Parliamentary and Health Service Ombudsman

A report by the Parliamentary Ombudsman on an investigation into a complaint about the Electoral Commission

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Presented to Parliament pursuant to Sections 10(3) and 10(4) of the Parliamentary Commissioner Act 1967

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Foreword

In line with the authority delegated to me by the Ombudsman, Dame Julie Mellor, DBE, I am laying before Parliament, under section 10(3) and section 10(4) of the *Parliamentary Commissioner Act 1967*, this report on an investigation into a complaint made by Mr P to the Parliamentary Ombudsman. The Ombudsman has taken no part in this investigation because of a potential perceived conflict of interest.

Mr P complained that the Electoral Commission was seriously at fault in the way it considered donations to the Liberal Democrat Party in 2005. He also complained that the Commission refused to allow him to pursue his complaint about that.

We have partly upheld Mr P's complaint. The Commission was responsible for monitoring political parties' compliance with the laws on receiving and accepting donations. We have found that the Commission, in the course of discharging that statutory responsibility, did not make adequate enquiries of the Party, and that its failure to do so was maladministration.

We also found that the Commission could have been more helpful to Mr P in its complaint handling responses. But we did not find that so serious that it was maladministration.

The Commission accepts two of the three recommendations we have made. It continues to disagree with our findings of maladministration.

We bring this to the attention of Parliament for it to consider taking whatever action it feels appropriate in this case.

Mick Martin
Managing Director
Parliamentary Ombudsman

July 2014

The complaint and summary of our decision

The complaint

1. Mr P complained that the Electoral Commission (the Commission) was seriously at fault:

    - in the way it considered and decided the issue of donations totalling £2.4 million made or ostensibly made by 5th Avenue Partners Limited (5th Avenue Ltd) to the Liberal Democrat Party (the Party) between February and May 2005; in particular that the Commission reached a perverse decision that the facts and law were incapable of supporting and which was in contravention of its statutory function to exercise its discretion reasonably in respect of donations to a political party; and

    - in refusing to allow him to pursue his complaint about this through its complaints procedure, on the basis that if he considered the Commission had acted unlawfully, he should take legal action, when what he was complaining about was maladministration.

2. Mr P said that he was outraged at the conduct of the Commission in the way it had reached its decision in the 5th Avenue Ltd case and the way in which it had arbitrarily rejected his complaint. Mr P wanted the Parliamentary Ombudsman (the Ombudsman) to recommend that the Commission respond to his complaint.

Our investigation and decision

3. In the course of this investigation we made enquiries of the Commission and considered its responses and relevant files. We considered the papers provided by Mr P and spoke to him in person. We considered comments from both the Commission and Mr P on drafts of this report. We also shared the factual parts of the report with the Party, who had no comment to make on the accuracy of those facts. While we have not included in this report all the information we considered during the course of the investigation, we are satisfied that nothing has been omitted that is of significance to our determination of the complaint made by Mr P.

4. For reasons that we will go on to explain, we partly uphold Mr P's complaint about the Commission. We have found maladministration in the way the Commission considered aspects of the donations made or ostensibly made by 5th Avenue Ltd to the Party. We have included in this report our recommendations, including recommendations to remedy the injustice to Mr P that we have concluded flows from maladministration by the Commission.

5. We have found that the Commission, in the course of discharging its statutory responsibility to monitor whether the rules on party and election finance had been followed, did not make adequate enquiries of the Party and that its failure to do so was maladministration. Instead of asking the Party to provide evidence that the Party had, within 30 days of receipt

of the donations, taken all reasonable steps to establish that 5th Avenue Ltd was a permissible donor in relation to each donation, the Commission relied on assurances from the Party that it had done so. This does not mean that the Party did not take all reasonable steps within 30 days. Nor does it mean that the donations 5th Avenue Ltd made to the Party were impermissible. But it does mean that the Commission was not able to reach an informed decision on whether or not the rules had been observed, including in relation to the donated flights. The Commission failed to seek relevant evidence at the outset, failed to give an informed view on the matter, and failed to review the position on receipt of relevant new information.

The Parliamentary Ombudsman's jurisdiction and role

The purpose of this chapter is to explain the extent of our powers in respect of the Commission and the matters about which Mr P complained.

6. The *Parliamentary Commissioner Act 1967* (the Act) empowers us to investigate action taken by or on behalf of organisations in the Ombudsman's jurisdiction in the exercise of their administrative functions. Section 5(2) of the Act prohibits us from beginning an investigation when the person making the complaint has, or had, available a remedy by way of proceedings in a court of law. That prohibition does not apply where, as in this case, we are satisfied that it is not reasonable to expect the complainant to have resorted to such proceedings. Complaints are referred to us by a Member of Parliament (an MP) on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action taken. The Commission is an organisation that falls under the Ombudsman's jurisdiction.

7. The Party is not an organisation that falls under the Ombudsman's jurisdiction. It is necessary for us to set out some of the actions of the Party in order to explain the events relevant to this complaint. However, we make reference to actions taken by the Party only to set in context the actions of the Commission. We do not make any finding or criticism about the actions of the Party and none should be inferred. Our findings relate only to the acts and omissions of the Commission.

8. Our approach when conducting an investigation is to consider whether maladministration has occurred that has led to an injustice that has yet to be remedied. If there is an unremedied injustice, we will recommend that the public organisation in question provide the complainant with an appropriate remedy. These recommendations may take a number of forms, such as asking the organisation to issue an apology or to consider making an award for any financial loss, inconvenience or worry caused. We may also make recommendations that the organisation review its practice to make sure that similar failings do not occur again.

How we look at complaints

9. In simple terms, when deciding whether to uphold complaints that injustice has been sustained in consequence of maladministration, we generally begin by comparing what happened with what should have happened. So, in addition to establishing the facts that are relevant to the complaint, we also need to understand the standards that applied at the relevant time. This allows us to decide what should have happened; we call this establishing the overall standard.

10. The overall standard has two components: the general standard, which is derived from general principles of good administration and, where applicable, of public law; and the specific standards, which are derived from the legal, policy and administrative framework and the professional standards relevant to the events in question.

11. Having established the overall standard, we then assess the facts in accordance with the standard. In particular, we assess whether or not an act or omission on the part of the organisation complained about is a departure from the applicable standard. If so, we then assess whether, in all the circumstances, that act or omission falls so far short of the applicable standard that it amounts to maladministration. The overall standard that we have applied to this investigation is set out overleaf.

The general standard (the Ombudsman's Principles)

The purpose of this chapter is to explain the general standard against which we have assessed the Commission's actions and which applies to the administrative actions of public organisations in general. We explain the specific standards that applied to the Commission's actions in the next chapter.

12. The Principles of Good Administration, Principles of Good Complaint Handling and Principles for Remedy are broad statements of what organisations should do to deliver good administration and customer service, and how they should respond when things go wrong.[1] The same six key principles apply to each of the three documents. These are:

    - getting it right
    - being customer focused
    - being open and accountable
    - acting fairly and proportionately
    - putting things right
    - seeking continuous improvement.

13. The Principle of Good Administration particularly relevant to this complaint is:

    - *Getting it right* – in their decision making, public organisations should have proper regard to the relevant legislation. Proper decision making should give weight to all relevant considerations, ignore irrelevant ones and balance the evidence appropriately.

14. The Principles of Good Complaint Handling particularly relevant to this complaint are:

    - *Being customer focused* – which means having clear and simple procedures. Also, listening to complainants to understand the complaint and the outcome they are seeking, and responding flexibly.
    - *Being open and accountable* – which means publishing clear, accurate and complete information about how to complain, and how and when to take complaints further. Also, providing honest, evidence-based explanations and giving reasons for decisions.
    - *Acting fairly and proportionately* – which means ensuring that complaints are investigated thoroughly and fairly and that decisions are proportionate, appropriate and fair.

15. The Principle for Remedy particularly relevant to this complaint is:

    - *Getting it right* – which involves quickly acknowledging and putting right cases of maladministration that have led to injustice.

1 The Principles can be found on our website at: www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples.

The specific standards (legal and administrative framework)

This chapter outlines the standards that were in place at the time of the events Mr P complained about and which, together with the standards in the previous chapter, are the basis on which we assessed the Commission's actions.

Establishment of the Commission

16. In 1998, following public concern about the sources of funding of individuals and organisations involved in political activity, the first report of the Committee on Standards in Public Life (chaired at the time by Lord Neill of Bladen QC) recommended a new system of statutory controls regulating the financial activities of political parties and other organisations and individuals engaging in the democratic process. The Committee recommended that an independent electoral commission be established to oversee the controls.

17. The *Political Parties, Elections and Referendums Act 2000* (the 2000 Act) subsequently established the Commission and introduced a series of controls governing political financing and the registration of parties and organisations involved in the political process. One of the Commission's key functions is to monitor compliance with the controls, which came into effect in February 2001.[2] The 2000 Act gives the Commission the power to issue guidance to, among others, political parties on a variety of matters, including what they need to do to comply with the 2000 Act.

18. The Commission's leaflet *Who we are and what we do*,[3] states:

> *'We are an independent body set up by the UK Parliament. We regulate party and election finance and set standards for well-run elections. We work to support a healthy democracy, where elections and referendums are based on our principles of trust, participation, and no undue influence.'*

19. In the leaflet, the Commission stated that it:

- *'registers political parties*
- *makes sure people understand and follow the rules on party and election finance*
- *publishes details of where parties and candidates get money from and how they spend it*
- *sets the standards for ... running elections and reports on how well this is done*
- *makes sure people understand it is important to register to vote, and know how to vote.'*

The Commission's complaints procedure

20. Mr P complained to the Commission on 10 July 2010. At that time the Commission's published complaints policy and procedure defined a complaint as:

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2 The *Electoral Administration Act 2006* and the *Political Parties and Elections Act 2009* made subsequent changes to electoral administration and granted the Commission new supervisory and investigatory powers. However, the 2000 Act was the applicable legislation at the time of the events that Mr P has complained about.

3 The Commission's leaflet is dated 2012-13.

'A comment about the way we acted in the exercise of our statutory duties. It expresses dissatisfaction with the service and suggests alternative actions or ideas on how we could provide a better service to our stakeholders. For example, a complaint might be made about: a failure or delay in dealing with a matter; bias or unfairness; discrimination or discourtesy; a failure to follow proper procedures; or a mistake made in carrying out our functions.'

21. The Commission asked that all written complaints be directed to the Secretary to the Commission Board, who would liaise with the director or head of the section or department that the complaint was about. The Secretary to the Commission Board would then co-ordinate any responses to the complaint and write to the complainant after the matter had been investigated.

22. In the first instance, the actual complaint would be investigated by the director or head of the relevant section or department. If a complainant was not satisfied with the response, they could ask for the complaint to go to the next stage, which was consideration by the Chief Executive of the Commission. If, after the second stage, they remained dissatisfied with the response, complainants could ask for the matter to be referred to the Chair of the Commission for a final decision.

23. The Commission revised its internal *Complaints Policy and Procedure* on 30 November 2012. This now says that:

    '... if there is a complaint about the administrative process in arriving at a decision, such as a failure to gather or properly consider certain information relating to the case or bias in arriving at a decision, then this may be dealt with under the complaints procedure.'

    The guidance goes on to say that a complainant must be explicit about the nature of their complaint and evidence this where possible, rather than making an assertion based on disagreement with the decision.

24. The Commission has also updated its website. As of December 2012, it said that disagreements with statutory decisions taken by the Commission are not suitable for consideration under its complaints procedures although it *'may still be possible to challenge* [a] *decision by legal process, such as statutory appeal rights or judicial review*'.

Funding of political parties in the UK – relevant reports and legislation

This chapter gives some of the wider context for our report, setting out a brief summary of the events that led to the creation of the Commission.

25. In October 1998 the Committee on Standards in Public Life, chaired by Lord Neill of Bladen QC, published *Standards in Public Life: The funding of political parties in the United Kingdom* (the Neill Report). Chapter 4 of the Neill Report was titled '*Donations: transparency and reporting*'. It recommended imposing on political parties a duty to report the sources of donations. Chapter 5 of the Neill Report was titled '*Foreign donations*'. After setting out arguments for and against a ban on foreign donations, the Neill Report reached the following conclusion:

    > *'5.16 ... at a time when the whole question of the funding of political parties is being re-examined, it is right to take the opportunity to lay down the principle that those who live, work and carry on business in the United Kingdom should be the persons exclusively entitled to support financially the operations of the political process here.'*

26. The Neill Report recommended that individuals should be permitted to donate if they were eligible for inclusion on an electoral register. It recommended that a company should be permitted to donate if it was registered in the EU, it carried on business in the UK, and its business in the UK generated enough income to support the donation. It also recommended that shareholder approval in a general meeting be made a precondition for a company making a donation.

27. *The Funding of Political Parties in the United Kingdom: The Government's proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life* (White Paper, Cm 4413, July 1999) tightened the criteria for permissibility of individual donors, requiring a donor to be on the electoral register at the time the donation was made, rather than simply eligible for registration. By contrast, the criteria for companies were relaxed slightly. The requirement that a company should generate enough income from its activities in the UK to support a donation was dropped.

28. Paragraphs 4.9 to 4.10 of the White Paper state:

    > *'The Neill Committee acknowledged that the ease with which a company, including a subsidiary of a foreign corporation, may be incorporated in the United Kingdom provides scope for the evasion of a ban on foreign donations to political parties. The draft Bill ...* [makes it] *necessary for a company to be carrying on business in the United Kingdom.* [...] *Where there is any doubt as to whether a corporate donor is genuinely carrying on business in the United Kingdom it will therefore be necessary for registered political parties to make some additional enquiries in order to establish that the donor qualifies as a permissible source. This is, however, a simple test, and in the great majority of cases a corporate donor's business activities in the United Kingdom should be well known to the political party in question.'*

29. As well as setting out the role of the Commission, the 2000 Act deals with the control of donations to registered political parties. The main objectives of Part IV of the 2000 Act were to prohibit the funding of political parties by persons who did not have a sufficient stake in the UK, and to ensure that those who made substantial donations could be identified.

30. Section 50 of the 2000 Act defines '*donations*'. The definition includes gifts, loans made other than on commercial terms, and the provision of services other than on commercial terms.

31. Section 54 sets out the criteria for permissible donations. Section 54(1) prohibits a party from accepting a donation from a person who is not a permissible donor or where the party is unable to ascertain the identity of the donor. Section 54(2) identifies permissible donors. They include:

    - an individual registered in an electoral register
    - a company registered under the *Companies Act 1985*[4] and incorporated in the EU that carries on business in the UK
    - any unincorporated association of two or more persons that carries on business or other activities wholly or mainly in the UK and whose main office is there.

    Section 160 states that '*business*' includes '*every trade, profession and occupation*'.

32. Section 54(6) provides that, where an agent causes a donation to be made to a party by another person, the agent must provide the party with all the details about the true donor, as required by Schedule 6 to the 2000 Act. Schedule 6 sets out the details that a party must provide when reporting donations.

33. Section 50(8)(a) provides that '*any reference to anything being given or transferred to a party or any person is a reference to its being so given or transferred either directly or indirectly through any third person*'.

34. The prohibition on foreign donations cannot be circumvented by:

    - the payment of money from a foreign source to an individual registered in the electoral register on terms that mean that the money is then held in trust by that individual, and
    - onwards payment by that individual to a political party.

35. Section 56(1) of the 2000 Act requires a party receiving a donation to take forthwith '*all reasonable steps*' to verify that it has been received from a permissible donor. Section 56(2) requires a party to return the donation within 30 days if that cannot be verified. If a donation is not returned within 30 days, it is deemed to have been accepted. It was the responsibility of the Commission to monitor compliance with that requirement. At the relevant time, by section 56(3) of the 2000 Act, the party and the treasurer of the party receiving a donation would be guilty of a criminal offence if it subsequently turned out that the donation was impermissible, even if the party had taken all such reasonable steps within the 30-day period.

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4 Now the *Companies Act 2006*.

36. Section 58 empowers the Commission to apply to the court for forfeiture of an equivalent sum where a donation from an impermissible donor has been accepted.

37. Section 62 of the 2000 Act required reports of donations in excess of £5,000[5] to be made to the Commission on a quarterly basis. The Schedule 6 details are to be provided for such donations – this will include the identification of the donor. Section 65(6) provides that the intentional misreporting of details relating to any donation can lead to the forfeiture of an amount equal to the value of that donation.

38. Section 71 of the 2000 Act refers to donations made to individual members of registered parties and to associations of such members. Such donations are governed by Schedule 7. In summary, the provisions relating to permissibility are extended to such donations, where they are made to individuals in connection with their political activities as a member of the party.

39. Sections 139 and 140 and Schedule 19 of the 2000 Act insert provisions into the *Companies Act 1985*, the effect of which is that donations to political parties must be approved by the company in a general meeting, and must be reported in the directors' annual report.

40. Section 145 of the 2000 Act is concerned with the general function of the Commission with respect to monitoring compliance with controls imposed by the 2000 Act. At the relevant time it provided:

> *'(1) The Commission shall have the general function of monitoring compliance with:*
>
> *(a) the restrictions and other requirements imposed by or by virtue of Parts III to VII;[6] and*
>
> *(b) the restrictions and other requirements imposed by other enactments in relation to:*
>
> *(i) election expenses incurred by or on behalf of candidates at elections, or*
>
> *(ii) donations to such candidates or their election agents.'*

41. Section 146 of the 2000 Act is concerned with the '*supervisory powers*' of the Commission. At the relevant time it provided:

> *'146 (1) The Commission may by notice require the relevant person in the case of any supervised organisation or individual (or former supervised organisation or individual):*
>
> *(a) to produce, for inspection by the Commission or a person authorised by the Commission, any such books, documents or other records relating to the income and expenditure of the organisation or individual as the Commission may reasonably require for the purposes of the carrying out by them of their functions, or*
>
> *(b) to furnish the Commission, or a person authorised by the Commission, with such information or explanation relating to the income and expenditure*

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5 This was increased to £7,500 in 2010.

6 *Part III – Accounting requirements for registered parties; Part IV – Control of donations to registered parties and their members etc.; Part V – Control of campaign expenditure; Part VI – Controls relating to third party national election campaigns; Part VII – Referendums.*

of the organisation or individual as the Commission may reasonably so require,

and to do so within such reasonable time as is specified in the notice.'

42. The Commission also has the power to enter the premises of supervised organisations in order to inspect books, documents or records, including computer records. Failure by a supervised organisation to comply with any requirement imposed by section 146 of the 2000 Act, without reasonable excuse, is an offence.

43. In response to a draft version of this report, the Commission referred us to the *Shorter Oxford English Dictionary* definition of 'to monitor': '*Observe, supervise, keep under review; measure or test at intervals*, [especially] *for the purpose of regulation or control*'.

Michael Brown and the donations by 5th Avenue Ltd

This chapter describes the history of the relevant donations.

44. 5th Avenue Ltd[7] was a company incorporated in the UK with a registered address in London. 5th Avenue Ltd was wholly owned by 5th Avenue Partners GmbH,[8] whose registered address was in Switzerland. The Director of 5th Avenue Ltd was Mr Michael Brown. He lived in Spain and there is no evidence or suggestion that he was on an electoral register in the UK. 5th Avenue Ltd was incorporated on 15 March 2004 and the first set of accounts was due to be filed with Companies House on 31 October 2005. Neither Michael Brown nor 5th Avenue Ltd were authorised to carry out regulated activities pursuant to the *Financial Services and Markets Act 2000*.

45. Between February and May 2005, 5th Avenue Ltd made four donations to the Party totalling £2,419,064.80. 5th Avenue Ltd or 5th Avenue Partners GmbH also provided the Party with the use of an aircraft to the value of £30,000.[9] These donations were:

    I. £100,000 on 10 February 2005. The monies were transferred from a 5th Avenue Ltd account with HSBC and were attributable to a payment from Univest Financial Group.

7 Previously known as Hexagon 303 Limited.

8 The acronym 'GmbH' stands for 'Gesellschaft mit beschränkter Haftung', and this is a type of legal entity common in European countries. The term is used to describe a company with limited liability, where the owners are not personally liable for the company's debts.

9 No charge had been made for the use of the aircraft, therefore the Party calculated an equivalent notional charge for the purpose of reporting its value to the Commission.

II. £151,000 on 25 February 2005. The monies were transferred from the same account above.

III. £1,536,064.80 on 22 March 2005. The monies were transferred from a second HSBC account held by 5th Avenue Ltd. The account was held in euros and had not previously been used. The monies were paid into the second account by electronic transfer of €2.225m from an account in the name of 5th Avenue Partners GmbH (a foreign company).

IV. £632,000 on 30 March 2005. The monies were transferred from a third HSBC account held by 5th Avenue Ltd. This was a dollar account and payment was funded by monies paid into this account by an individual investor.

V. £30,000 in May 2005. This was paid by 5th Avenue Partners GmbH in respect of flights taken during the 2005 election campaign. When the source of payment was raised by the Commission, the Party said that the cost had been '*re charged*' to 5th Avenue Ltd.

46. The Party declared receipt of each of these donations in its returns to the Commission (Annex A).

The Electoral Commission's monitoring of the Liberal Democrat Party's compliance with the 2000 Act

This chapter describes the action the Commission took after the Party reported receipt of the donations.

Public concern

47. The donations to the Party led to a number of press articles. Some of these speculated that Michael Brown had bought 5th Avenue Ltd in 2004 in order to be able to donate to the Party, and that the company was merely a shell that did not carry on business.

48. On 25 May 2005 Sir George Young MP wrote to the Commission after one of his constituents (not Mr P) raised concerns that the donations did not comply with the requirements of the 2000 Act. The constituent had asked Sir George to enquire about the steps the Party had taken to establish that at the relevant time 5th Avenue Ltd had been carrying on a business in the UK.[10]

The Commission begins its investigation

49. In June 2005 the Commission made enquiries of the Party about the donations. The Commission asked the Party how it had '*ensured that* [5th Avenue Ltd] *carries on business in the UK and satisfied itself that the company was a permissible donor*'.[11] In response, the Party said that

10 As required by section 54(2) of the 2000 Act.

11 At that time, the Commission did not have policy or guidance about what constituted carrying on a business or what steps a party should take to check the permissibility of a donation. Guidance for political parties has since been published and this can be found at Annex B.

it had '*discussed the rules for political donations with* [5th Avenue Ltd] *and was assured by the company*[12] *that they did business in the UK*'. The Party said it had subsequently confirmed with 5th Avenue Ltd that this was the case.

50. By the end of June 2005 the Commission had been unable to confirm whether 5th Avenue Ltd carried on business in the UK because:

    - The company's financial accounts would not be available until October 2005.
    - Neither Michael Brown nor the company were registered to carry out any controlled financial functions[13] that would indicate activity in the financial market.
    - No other companies registered to Michael Brown provided any further evidence of activity in the UK.
    - The company did not appear to have a place of business established in the UK, because its registered address appeared to be that of its solicitors.
    - The Party had not provided the Commission with any substantive evidence that the company had met the carrying on business criterion for permissibility.

51. On 29 June 2005 the Commission sought internal legal advice. The Commission told its advisers that it was unsure if the donations from 5th Avenue Ltd were permissible and that it was also unclear what the 2000 Act meant by '*carrying on a business in the UK*'. The Commission made reference to the Neill Report and to Lord Neill's comments (in the previous section). The Commission's internal legal advice triggered a general discussion within the Commission about what constituted carrying on a business in the UK.

52. The Commission met representatives of the Party on 4 August 2005 to explore with them the steps the Party had taken to satisfy itself that 5th Avenue Ltd carried on a business in the UK and was thus a permissible donor.

53. Following the meeting, the Party sent the Commission its note of the meeting.[14] In it, the Party noted that it had told the Commission the following:

    - 5th Avenue Ltd was incorporated in March 2004 under the name Hexagon 303 Limited. In August 2004 the company was acquired by 5th Avenue Partners GmbH of Zug, Switzerland, and changed its name to 5th Avenue Partners Limited.
    - The company's accounting reference date was shortened to 31 December,[15] meaning its first accounts would be drawn up to 31 December 2005 and filed by 31 October 2006. As the donations to the Party were made in the financial year ending 31 December 2005, they would be contained in the financial accounts to be filed by 31 October 2006.

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12 That is, by Michael Brown.

13 A controlled function relates to the carrying on of a regulated activity by a firm, which is specified under section 59 of the *Financial Services and Markets Act 2000*.

14 The Commission has told us that it is unable to locate any note of this meeting taken by the Party. It said it could not say whether or not the Party took such a note.

15 The Party's discussions with 5th Avenue Ltd's lawyers noted that the 31 December date was the year-end for its Swiss holding company, so the date had been brought forward into line for accounts consolidation purposes.

- The company's structure included a second UK company, 5th Avenue Ltd (UK) Limited, which was incorporated on 10 February 2005. The Secretary for this and 5th Avenue Ltd was Hexagon Registrars Limited.
- The registered address of Hexagon Registrars Limited was in London, the same address as the two 5th Avenue Ltd companies, and the principal practice office of [a firm of solicitors].[16]
- Both companies were categorised as financial service companies but required no external regulation. 5th Avenue Ltd Partners (UK) had applied for Financial Services Authority (FSA) regulation and the application was ongoing.

54. The Party said that on receipt of the donations, it had checked the Companies Register and was satisfied that 5th Avenue Ltd existed and was registered in the UK. It said no dormant company resolution had been filed, which would have been usual if the company was not trading.

55. The Party also said that as a result of the Commission's enquiries to it in June 2005, the Party had spoken to 5th Avenue Ltd's solicitors, who had informed the Party that the company:
    - was not dormant and had a lease on central London offices
    - had two employees, one of whom was its in-house accountant, and was registered with the tax authorities under the PAYE and NIC regulations
    - had appointed auditors,[17] whose intention was to file accounts in accordance with the *Companies Act 1985*, and
    - had leading London solicitors as its legal advisers.[18]

56. The Party said that, based on that information, it was satisfied that 5th Avenue Ltd was trading and, in accordance with the 2000 Act, was entitled to make donations. The Party said that it had presented all of the above evidence to the Commission's officers. The Party said that the Commission's officers had said '*subject to a final review of their papers, that they were satisfied with the information presented by* [the Party]'. The Party's covering letter to the meeting note said that it hoped the Commission agreed that the Party had been more than helpful with its enquiries which, '*whilst very proper* [were] *very embarrassing to our donor*'.

57. Sir George wrote to the Commission on 7 September 2005 enclosing another letter from his constituent. The constituent raised this series of questions for the Commission to answer:
    - Was there a commercial activity carried on by 5th Avenue Ltd at the time the donations were made?
    - Was this activity carried on with a view to making a profit?
    - Was this activity carried on continuously or intermittently by the company during the period before the donations were made?

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16 The firm of solicitors was 5th Avenue Ltd's legal advisers. 5th Avenue Ltd appears to have used the solicitors' address until permanent office space was leased in March 2005.

17 It is not usual for auditors to file accounts.

18 The solicitors were referring to themselves.

- If there was a business, what was the turnover of the business? What were the assets employed in the business?
- If the business was a regulated financial activity such as derivatives trading, what was the status of the FSA registrations of the company and its directors at the time that the donations were made?[19]
- What was the paid-in share capital of the company at the time of the donation?
- What were the assets of the company in the period immediately before the donations were made?
- If the assets of the company increased substantially in the period immediately before the donations were made, were those sums by way of capital, intragroup loan, or gift to the company? Were those additional assets used in the business?
- Did any money transferred to 5th Avenue Ltd by a connected company remain the property of that company?
- Were any board resolutions made by 5th Avenue Ltd in relation to the donation?
- Did 5th Avenue Ltd make the donation under the instructions of another person?
- Did the Party establish that 5th Avenue Ltd conducted business in the UK?
- If so, what was the turnover, and what were the assets of the business? Was it reasonably likely that a £2.4m donation could have been paid out of the assets of that company?
- What was the nature of the business? Was it an active business? Was it a type of business that required registration (for example, with the FSA)? Was there any such registration in place?

The Commission does not appear to have addressed the questions posed and did not send a substantive response to Sir George (paragraph 66).

58. On 23 September 2005 the Commission's Director of Regulatory Services sent an email to, among others, the Commission's Chair and Chief Executive, noting a press article that raised a number of questions about the 5th Avenue Ltd case. In particular, the Director of Regulatory Services noted that the article said that all the money for the donations had come from Michael Brown's Swiss company, which, for the Commission, raised the question of an agency relationship. (While the papers show that the Commission went on to consider what '*carrying on a business*' entailed, the Commission does not appear to have considered in 2005 the '*agency*' issue or the relevance of section 50(8) of the 2000 Act.)

59. In an internal email of the same day, the Commission's Chief Executive stated that he did not think that assurances the Party had received from Michael Brown and 5th Avenue Ltd's solicitors were sufficient because '*they don't in themselves indicate any more than, perhaps, an intention to make a profit*'. The Chief Executive said it would be helpful for the Party to provide the Commission with '*some evidence that they'd established the company was carrying out trading transactions, or even preparing to do so by way of purchasing stock, making investments etc*'.

19 The constituent added that there was substantial case law to the effect that the holding of bank deposits or similar investments did not constitute a business unless there was substantial continuous business activity in relation to those assets.

60. In September 2005 the Commission's regulatory service team prepared an internal note for the Commission's Chairman and Chief Executive. Among other things, the internal note said:

> *' ... The Regulatory Service Team can easily confirm the first*[20] *of the two criteria through checks on the company via the on-line service provided by Companies House ... The remaining criterion of carrying out a business in the UK was more difficult for the Commission to confirm ...*
>
> *'... This issue was highlighted in the Government's* [White Paper] *which said "a check against the register will not be sufficient to establish that a company incorporated in the UK is carrying on business here. Where there is any doubt as to whether a corporate donor is genuinely carrying on business in the UK it will therefore be necessary for registered political parties to make some additional enquiries in order to establish that the donor qualifies as a permissible source. This is, however, a simple test, and in the great majority of cases a corporate donor's business activities in the United Kingdom should be well known to the political party in question." ...*
>
> *' ... In the absence of the Commission issuing guidance or providing an interpretation of the definition of carrying on business, we have reviewed a number of reference documents and external organisations' definitions relating to this matter in order to assist the Commission in determining whether the company can reasonably be regarded as carrying out business in the UK ...*[21]
>
> *' ... The Team is of the view that* [the Party] *has taken reasonable steps to satisfy* [itself] *that the company is a permissible donor ...*
>
> *' ... In the absence of any further evidence or information in the public domain, it can reasonably be argued that, for the purposes of* [the 2000 Act], *the company is carrying out business in the UK and that therefore the donation is permissible ...*
>
> *' ... It can be further argued that after being pressed by the Commission to fully substantiate the permissibility of the donation, the party has provided sufficient evidence to justify this fact. However the initial checks that the party undertook in this case raise doubts as to the level of due care and diligence exercised by the party in establishing the permissibility of the donations ... .'*

The Commission provisionally concludes that the Party took all reasonable steps

61. In an email dated 30 September 2005 to the Party (Annex C), the Commission's Chief Executive said:

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20 That the company was registered under the *Companies Act 1985* and was incorporated in the European Union (EU).

21 These included reference to *Stroud's Judicial Dictionary of Words and Phrases* and HM Revenue & Customs practice directions. These did not appear to provide the Commission with any definitive guidance on the issue. The briefing note stated that the lack of clear guidance on the Commission's interpretation of what '*carrying on a business*' meant for the purposes of the 2000 Act had highlighted a gap in information that the Commission provided to stakeholders, which should be addressed urgently.

'You will see that we have noted some concerns on our part about the checking procedure you followed, and I can talk to you about those if you wish, but our overall conclusion is that based on the information currently available, [the Party] *took all reasonable steps and* [its] *conclusion that the donations were permissible is a reasonable one.'*

62. In a follow-up letter to the Party on 6 October 2005, the Commission's Chief Executive set out the steps that the Party had told the Commission the Party had taken to check permissibility (Annex D). The Chief Executive said that the Party had been assured verbally by 5th Avenue Ltd that the company did business, and that the Party had checked that no dormant company resolution had been filed. Later, the Party had been informed that 5th Avenue Ltd had a lease on London offices, had two employees and accountants, and intended to file accounts. The Chief Executive said:

    'The Commission has concerns about the extent and robustness of the initial permissibility checks carried out by the party into such significant donations within 30 days of their receipt. We shall want to follow this up with you with a view to ensuring that you have a robust checking process for all corporate donations. We shall be having similar discussions with all political parties.

    'However, the Commission's view is that, based on all the evidence which the party now has, and subject to any further information becoming available, it is reasonable for the party to regard the donations as having been permissible.'

63. The above letter dated 6 October 2005 was shared internally within the Commission. In response, one member of the Commission's legal team (in an internal email dated 9 October 2005) said:

    'I thought it might be worth repeating to colleagues my own understanding of the true position on a couple of points:

    '(i) it is only as things stand for the time being, subject to the emergence of any further information tending to the opposite conclusion, that it is now reasonable for the Party, on the basis of the information they now have, to regard the donations as having been permissible; and

    '(ii) we cannot yet know that the Party did not act unlawfully, both because the Party may not ("forthwith") have taken all reasonable steps to establish permissibility, and also because, if the donations turn out to have been impermissible, we cannot yet be certain that the [Party] *is not guilty of an offence for not returning them within 30 days.'*

64. In the meantime, HSBC had initiated civil proceedings against 5th Avenue Ltd, Michael Brown and six other defendants.[22] On 14 October 2005 the High Court issued a freezing order that prohibited Michael Brown and 5th Avenue Ltd from removing or disposing of any assets (up to a value of $45m).[23] Subsequently,

22 All of which appeared to be companies controlled and operated by Michael Brown.

23 It later emerged that several individuals who had given Michael Brown millions of pounds to invest, had been defrauded and their money had been 'invested' in a Ponzi scheme. It is not clear what amounts were recovered by HSBC, but it appears that a significant amount was subject to the injunction and repaid to defrauded investors in part satisfaction of their losses.

Michael Brown was arrested, interviewed and bailed by the City of London Police for offences of deception. In an affidavit sworn by Michael Brown, he stated that a sum of $10,000,000 (US) in his personal account had resulted from trades by a company called Refco Securities Ltd. While on bail, Michael Brown fled to Spain.

The Commission makes fresh enquiries

65. On 18 October 2005 Sir George wrote to the Commission with another letter from his constituent. The constituent said that the documents he enclosed showed that 5th Avenue Ltd had been capitalised at £1.00. He asked how it could make a donation of £2.4m. The constituent also asked if the Commission had seen a draft of the company's accounts, which were due for filing at Companies House by 31 October 2005.

66. The Commission's response to Sir George's letter of 7 September 2005 crossed with Sir George's letter of 18 October. In its response, the Commission did not address the specific points raised by Sir George and his constituent, but said:

> *'Having carefully considered the evidence presented to the Commission by the* [Party]*, the Commission considers it is reasonable, on the basis of the information currently available, for the Party to regard the donations as having been permissible. However, the Commission has made clear to the Party that, if further information became available, it could change our view. We have asked the Party to keep us informed of any such developments, and we shall be monitoring the situation ourselves.*
>
> *'The Commission has informed the* [Party] *that we have concerns about the extent and robustness of the initial checks which they carried out in this instance, and that we shall be following this up with them with a view to ensuring that they have a robust checking process in place for all corporate donations. We will be having similar discussions with all political parties.'*

67. On 27 October 2005 the Commission contacted Companies House, which confirmed that it had not received any accounts from 5th Avenue Ltd for the year ending 2004. Also on 27 October 2005, the Commission wrote to the Party about a newspaper article which reported that '*5th Avenue Ltd Partners ... leased offices in London on March 11* [2005], *more than a month after making its first donation*'. The Commission said in this letter that it had assumed that the company's London offices were established before the donations were made. The Commission said it considered '*it important to know the extent to which the party is able to verify the timing of the various points listed in the* [Chief Executive's letter of 6 October 2005] *in order to continue to be assured that the donations were permissible*'. The Commission asked the Party to confirm the information it had relating to these matters.

68. The Commission wrote to Sir George on 27 October 2005. It said that it did not have the power to require information from an individual or organisation that was not regulated under the 2000 Act. It said that it had not seen a copy of 5th Avenue Ltd's accounts. The Commission said that the 2004 accounts were due to be submitted by 31 October 2005, and the Commission would review them

as soon as they were publicly available. (Those accounts were never lodged.) The Commission said that if that review revealed '*any information which raises any questions regarding the permissibility of the donation, the Commission will be following up the issue with the* [Party] *and the company*'.

69. On 28 October 2005 a press article quoted Party sources as having said that:

> *'the party did make extensive further enquiries, including taking informal soundings in the City, to satisfy itself about Mr Brown before taking his company's money but had not notified the Electoral Commission of these.'*[24]

70. The Commission wrote to the Party the same day. It referred to the press article. The Commission asked if these additional enquiries had taken place and whether the company had provided further information that was relevant to the Party's view that the donation was permissible.

The Commission writes to all political parties

71. On 2 November 2005 the Commission sent a letter to all political parties that had reported having received a donation in the previous year. The Commission outlined the criteria for permissibility of corporate donations and the three tests that applied. (The text of that letter is at Annex E.)

The Party answers the Commission's questions

72. The Party replied to the Commission's letter of 27 October on 21 November 2005. It said:

> *'Our clear understanding was that the company was undertaking business at the time of our initial checks and we were aware that the company was actively seeking new premises by February 8th.*
>
> *'Our discussions with the company during February included the fact that they were operating from temporary premises, that they needed new premises, that there were minor problems with the new lease and some difficulties relating to the installation of a sophisticated computer network and that these were causing some problems for staff who were being paid. All of which demonstrated to us that they were carrying on a business.'*

73. The Party said that many of its additional checks were not relevant to the 2000 Act and were of a '*very confidential nature*'. The Party said it was prepared to discuss their relevance with the Commission's Chief Executive and Chairman.

The Commission continues to make enquiries

74. On 13 December 2005 the Commission contacted Companies House again about 5th Avenue Ltd's accounts. Companies House told the Commission it had not received them. Companies House said it had written to 5th Avenue Ltd on 11 November 2005 but had received no response.

75. On 27 December 2005 Sir George's constituent wrote directly to the Commission's Chief Executive. He enquired whether there had been

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24 Later, in November 2006, the Party told the Commission that senior staff from the Party had visited 5th Avenue Ltd at its former premises prior to any donations being made and at its new premises, which were leased from March 2005.

any further developments in the 5th Avenue Ltd investigation and provided new information to the Commission about 5th Avenue Ltd's activities. He said he might be able to make available a set of company accounts up to 31 December 2004. The constituent said that these showed £1.00 of paid-up share capital and around £3m of parent company borrowings. The company had slightly less than £3m in short-term cash or bank deposits, and some fixed assets in the form of computers and a car. The profit and loss account showed some accommodation expenses for the director, company secretarial expenses (in the form of rent at the solicitor's address), and depreciation charges for the car. The constituent said that these did not look like the accounts of a company that was actively engaged in a business and that the courts had long held that holding of cash deposits did not constitute a business unless the deposits were '*actively managed*'.

76. Sir George's constituent said that the accounts raised the question of how a company with a paid-in capital of £1.00 could make donations of £2.4m less than 40 days later. He said that the donation was made following a cash injection or with the support of the parent company to stop the donor company becoming insolvent. The constituent said that *'in either case it would appear that the donor company is simply acting as a front for an impermissible offshore donor*'. He said the company address given by the Party had a nameplate bearing the name '5th Avenue (UK) Limited' not the donor company. He also said that the office did not advertise the company's name and that the telephone number was ex-directory and never answered. He commented that this was not consistent with the usual behaviour of a company engaged in business. He said that although 5th Avenue Ltd was said to have paid National Insurance for its employees, the company had no salary costs in its 2004 accounts. The constituent ended the letter by repeating the questions he had asked before.

77. The Commission's Chief Executive replied on 30 January 2006, reiterating what he had said previously. (We have seen no evidence that the Commission gave consideration, between 27 December 2005 and its response on 30 January 2006, to the questions raised by Sir George's constituent.)

The Commission receives new evidence

78. Meanwhile, on 27 January 2006, the Commission received copies of the invoices for the donated flights.[25] These showed that the cost had been invoiced to and met by 5th Avenue Partners GmbH – 5th Avenue Ltd's parent company in Switzerland – which, in turn, had invoiced 5th Avenue Ltd for the flights. (This was evidence that 5th Avenue Partners GmbH had paid for the flights.) The Commission wrote to the Party on 3 February 2006. The Commission said that while it recognised that the Party had followed the requirement to report the value of the donations, this evidence raised questions about whether the donations should have been accepted. The Commission asked the Party to review the invoices and to confirm who had actually paid for the flights. The Commission said that if the flights were

25 This information was provided by a journalist.

provided by an impermissible source, it would expect the Party to surrender their reported value.

79. On 10 February 2006 the Party responded to the Commission. The Party said it had been arranged for 5th Avenue Partners GmbH to be invoiced for the flights, which were then recharged back to 5th Avenue Ltd. The Party enclosed a copy of a recharge invoice and a faxed copy of an undated note of confirmation on unheaded notepaper from Michael Brown (Annex F). The Party said that the recharge invoice included the March and April flights. The May flight was not included as the aeroplane was not used because it had broken down. The Party said that it believed the Commission would agree that its questions had been satisfactorily answered. The Party said it looked forward to receiving confirmation that the matter was closed.[26]

80. The Commission considered the donated flights further during February 2006. In an internal email, one of the Commission's staff said:

> *'As with all issues to deal with donations to the* [Party] *from this company, it is not a straightforward matter and* [a colleague] *is currently considering the legal implications regarding any potential agency relationships.*
>
> *'From a purely compliance perspective, the information provided is very basic and from my experience is not the quality of response that I would expect to be given if an organisation was trying to establish that it acted in good faith and exercised due diligence, for example, I would expect to see that invoice endorsed with some payment record and the date of the payment, which would then be cross referenced to the relevant company bank statement, together with official confirmation on headed company note paper.'*

81. On 13 April 2006 a meeting was held between the Commission and the Party. After the meeting, the Party wrote to the Commission. It said:

> *'We believe that we have satisfied all legal requirements in relation to permissibility – including the requirement for the company to be "carrying on a business in the UK". We have now been able to discuss with you in some detail our checking processes to confirm this. We noted that you would ideally like us to demonstrate more about the timing of Michael Brown's acquisition of the company and subsequent contact with* [the Party] *and also the scale of the company's trading.*
>
> *'The company was acquired by Michael Brown on 28 June 2004. His first contact with* [the Party] *was by email in December 2004, almost six months later, and was as a result of his looking at our website. The first contact did not suggest that he was offering any financial support but led to him being invited to a lunch on January 13th 2005. The possibility of making a donation to the party was first discussed at this time and resulted in a donation of £100,000 being received by us on 10th February.'*

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26 It appears that the Commission had been in touch with the Party in advance of this letter. In an internal email dated 10 February 2005, the Commission recorded that it had told the Party that once it received its letter with the invoice, the Commission would '*satisfactorily resolve this matter*'.

82. The Party said that it had discussed with the Commission '*how we undertook discreet but thorough checks on the donor*[27] *and which also provided information that the company was carrying on business in the UK, with substantial transactions*'. The Party said that 12 months after the donations were made, it would be helpful if the Commission could confirm that it was satisfied that the donations were permissible and that the issue was resolved. (We have seen no evidence that the Commission had asked the Party to provide evidence of the checks it said had been undertaken nor of the evidence those checks had elicited.)

83. On 19 April 2006 Michael Brown was arrested in Spain. Michael Brown was returned to the UK, and held in custody while awaiting trial.

84. Sir George's constituent wrote to the Commission's Chief Executive on 22 April 2006. He said that, given Michael Brown's recent arrest, a reasonable person must question the value of any assurance he had given about the legitimacy of his business. The constituent said that the permissibility question had become one of fact, rather than of opinion or assurances.

The Commission suspends its enquiries

85. At the instigation of the Commission's Chief Executive, the Commission contacted the City of London Police. The Commission agreed that it would await the outcome of the police investigation before continuing with its enquiries. On 24 May 2006 the Commission wrote to the Party to inform it of this and that the police investigation might reveal information relevant to the issue of whether the donations were permissible.

86. The Party responded, saying that it considered that the meeting held on 13 April 2006 should have satisfied the Commission that '*very robust checks*' were made. The Party said it regarded '*it as wholly unfair and improper for* [the Commission] *to appear to contradict* [its] *earlier statements*'. The Commission replied that it did not accept that its letter of 24 May 2006 contradicted its earlier statement, which had made clear that its view on permissibility of the donations was subject to further information becoming available. The Commission said it was still not satisfied that the question of whether 5th Avenue Ltd was a permissible donor was settled at the time the donations were made.

87. The Commission released a press statement on 25 May 2006. This said that it would await the outcome of the police investigation into the financial affairs of 5th Avenue Ltd and Michael Brown before considering further whether the donations to the Party were permissible.

88. On 25 September 2006 Southwark Crown Court sentenced Michael Brown to 18 months' imprisonment for perjury, and six months imprisonment for obtaining a passport by deceit. Michael Brown had pleaded guilty to both charges. The offence of perjury related to Michael Brown's sworn affidavit relating to profits from trades on behalf of Refco Securities Ltd.

89. On 11 October 2006 the High Court entered summary judgment against Michael Brown and 5th Avenue Ltd in the

27 The Party said these were security checks carried out by Special Branch officers.

proceedings brought by HSBC. The Court heard that Michael Brown had represented to four investors that their money would be used for trading in high-value, high-quality bonds. The Court found that these representations were false, that no trading took place, and that the scheme was fraudulent from its inception. Refco Securities Ltd (which Michael Brown said had carried out trading resulting in profit) confirmed under oath that it did no trading on behalf of Michael Brown or 5th Avenue Ltd. The Court found that the funds were moved around accounts in Europe and used for paying so-called profits to investors, or former investors, or for Michael Brown's own purposes. The Court found that the investors were entitled to damages in the sums equivalent to their entire investments (totalling over $45m).

The Commission announces it had been reasonable for the Party to treat the donations as permissible

90. On 27 October 2006 the Commission released a press statement about 5th Avenue Ltd and the donations. The statement said:

> *'it remains the Commission's view that the* [Party] *acted in good faith at that time, and the Commission is not re-opening the question of whether the Party or its officers failed to carry out sufficient checks into the permissibility of the donations.'*

91. The Commission reiterated that if any additional information that had a bearing on the permissibility of the donations came to light as a result of the ongoing police investigation or legal proceedings, it would consider the matter further.

The City of London Police investigation

92. In response to an enquiry from the Commission, the Crown Prosecution Service told the Commission that, as far as the Crown Prosecution Service was concerned, Michael Brown had set up 5th Avenue Ltd just to get money from investors; there were never any investments; and no legitimate trading ever took place. In February 2007 the City of London Police told the Commission that they would lay 18 charges, including theft and money laundering, against Michael Brown. The police said that the charges related to money fraudulently obtained from one investor, and that none of this money went to the Party. The money donated to the Party had been obtained from two other investors. The police said they had evidence that 5th Avenue Ltd was not carrying on any business and, while the company was purported to have been trading in bonds, this did not happen.

93. On 28 February 2007 the Commission wrote to the City of London Police. In the letter the Commission said:

> *' ...* [T]*he police have evidence that is likely to be relevant to the Commission's consideration of whether 5th Avenue Ltd Partners Limited was carrying on a business at the time the donations to the Liberal Democrats were made. We understand that this evidence indicates that the whole activity of 5th Avenue Ltd Partners Limited was fraudulent, which suggests to us that it could not be said to be carrying on a business. I understand that not all of this evidence necessarily relates directly to the particular charges likely to be brought against Mr Brown... .'*

94. On 17 April 2007 Michael Brown was charged with 18 further offences. While on bail, Michael Brown failed to report and fled the country. On 28 November 2008 Michael Brown was tried in his absence and found guilty of theft, furnishing false information and perverting the course of justice.

95. After the trial ended, the Commission resumed its enquiries into the permissibility of 5th Avenue Ltd's donations to the Party. Over several months, the Commission received documentary evidence that the police had gathered during their investigation.

96. The evidence the police gave the Commission contained what appears to be the Party's internal record of the donations from 5th Avenue Ltd. The Party had originally entered 5th Avenue Ltd's address as '*Alpenstrasse 11 CH6300 Zug Switzerland*' when recording the second donation. This was 5th Avenue Partners GmbH's address. This address was struck through and replaced with a London address, which at the time was the address of 5th Avenue Ltd's solicitors (Annex G).

The Commission's continuing contact with the Party

97. Meanwhile, the Party continued to give the Commission information. On 13 November 2006 the Party's solicitors wrote to the Commission and, among other information, provided the following:

    - senior staff from the Party had visited 5th Avenue Ltd at its former premises (at its solicitor's offices) before any donation was made. They had also visited its new premises (leased from March 2005) after the donations were made.
    - 5th Avenue Ltd and Michael Brown had been the subject of checks by Special Branch officers responsible for the security of party leaders during the election campaign. Special Branch officers had confirmed that police and Interpol records did not suggest that Michael Brown or 5th Avenue Ltd were involved in any illicit or fraudulent activity.
    - The Party had specifically discussed the rules applicable to donations with 5th Avenue Ltd, and had received assurances that the company did carry on a business within the UK.

98. On 29 January 2007 the Commission met representatives of the Party and its solicitors. At this meeting the solicitors produced a bundle of evidence, which they considered demonstrated that 5th Avenue Ltd was carrying on a business at the time of the donations. For example, they referred to 5th Avenue Ltd having rented property, having contracted staff, and having had significant cash transactions before the date of the first donation. Details and documents relating to these were provided, such as vehicle registration, contract of service for a chauffeur, bank transactions, and invoice and trading records.

99. The Commission's notes taken at this meeting indicate that the Commission's Chief Executive asked the Party and its solicitors: '*in layman's terms, what was the business of the company?*' and that the solicitors said that the Party had to be:

    'circumspect in its answers as we did not know for certain, whereas others including the police, the investors etc would know for certain. However it appeared to be an investment

management business managing other people's money to bring in high returns. The bank transactions appear to confirm this e.g. the references to commissions.'

100. After the meeting, the Commission's Chief Executive and two of his staff discussed the matter privately. A note following that discussion stated:

> *'All agreed that there was still no evidence to show that 5th Avenue Ltd was not carrying on business, but that* [the solicitors'] *evidence did suggest, not conclusively, that 5th Avenue Ltd may have been trading, in particular the transaction reports.'*

101. The Commission met the Party again on 4 November 2009. The Party provided its final submissions to the Commission the following day. (The executive summary of the Party's submissions can be found at Annex H.)

The Commission's legal advice

102. Between 2006 and 2009 the Commission sought Counsel's advice on six occasions. We have seen both the requests and the advice given. Advice was sought on many aspects of the case, including whether 5th Avenue Ltd was carrying on a business, whether fraudulent activity could constitute carrying on a business for the purposes of the 2000 Act, whether the donations were permissible under the 2000 Act and the prospects of success if forfeiture proceedings[28] were taken. The content of that advice is not relevant to our investigation. For information, we have summarised the issues considered in that advice in Annex L. Advice was not sought on the actions of the Commission in undertaking its monitoring role as set out in the 2000 Act. We are satisfied that advice was taken and properly considered by the Commission.

103. When Counsel was instructed in February 2007, the Commission informed Counsel that it had previously issued a press statement (dated 27 October 2006) in which the Commission had said:

> *'it remains the Commission's view that the* [Party] *acted in good faith at that time, and the Commission is not re-opening the question whether the party or its officers failed to carry out sufficient checks into the permissibility of the donations.'*

28 Section 58 of the 2000 Act states that if a party accepts a donation which, under section 54 of the 2000 Act, it is prohibited from accepting, a court may, on an application made by the Commission, order the forfeiture by the party of an amount equal to the value of the donation.

Conclusion of the Commission's investigation into donations to the Party

This chapter sets the Commission's actions in context. It summarises the Commission's conclusions about the permissibility of the donations and the prospects of a successful application to the court for forfeiture.

104. A Commission Board meeting was held on 10 November 2009.[29] The purpose of the meeting was to discuss the outcome of the Commission's investigation in the 5th Avenue Ltd case and reach conclusions. A report on the Commission's investigation was presented to the Board for consideration before the meeting.[30] Among other things, the Board was told the following:

    - The investigation had considered two issues: whether the reported donor, 5th Avenue Ltd, was a permissible donor, and whether 5th Avenue Ltd was the true donor.
    - The evidence indicated that some legitimate trades took place before the donations. There were also some legitimate activities in employing staff and leasing premises.
    - There was no evidence that 5th Avenue Ltd was set up purely for the purpose of making donations on behalf of Michael Brown. There were none of the factors necessary to justify lifting the corporate veil.[31]
    - The Commission had evidence of the source of three donations (of £100,000, £151,000 and £632,000) and concluded that funds had been invested with 5th Avenue Ltd for the purposes of bond trading. As the donations passed directly from investors to 5th Avenue Ltd and then to the Party, the issue of agency[32] did not apply.
    - The Commission considered that there '*was no legal basis for concluding that* [5th Avenue Ltd] *failed to satisfy the permissibility requirements under Section 54(2)(b) of* [the 2000 Act]'.

105. The report to the Board discussed in detail the donated flights. The report said that Michael Brown's note about recharging the cost of the flights to 5th Avenue Ltd was not supported by bank statements. The report went on to say that a recharge could take many forms, only some of which would be identifiable through bank statements or accounts. The report said that, given the nature of Michael Brown's activities, the passage of time, and the existence of his businesses both in Switzerland and Spain, it was difficult for the Commission to be thoroughly confident that all relevant records had been, or could be, obtained.

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29 The Board had been updated about the 5th Avenue Ltd case at various points throughout the investigation.

30 A bundle of papers was provided to the Board along with the report. The bundle included financial documents relating to 5th Avenue Ltd, internal communications and various correspondence from the Party. Also included was the advice the Commission had received from Counsel.

31 Piercing the corporate veil or lifting the corporate veil is a legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders.

32 Paragraph 32.

106. The report to the Board said that the reliability of Michael Brown's evidence was '*open to question*', and that *'the evidence in relation to the source of the donation is contradictory*'. The report further said that:

> *'in the absence of persuasive countervailing evidence to contradict Michael Brown's statement to the* [Party] *it would be difficult to establish that* [5th Avenue Partners] *GmbH was the donor. On balance it is considered that the evidence indicates that it is more likely than not that it was the intention*[33] *that the costs be met by* [5th Avenue Ltd] *and that* [5th Avenue Ltd] *be treated as the true donor.'* [34]

107. The Commission Board decided, *'on the evidence in this case*', that there was no legal basis for concluding that 5th Avenue Ltd failed to satisfy the permissibility requirements under section 54(2)(b) of the 2000 Act and that there was no legal basis to conclude that the donor was any individual or entity other than 5th Avenue Ltd. On 20 November 2009 the Commission issued a press release and case summary of the results of its investigation into the 5th Avenue Ltd case (Annex I).

Mr P's complaint to the Commission

This chapter describes Mr P's correspondence with the Commission about the complaint that led him to bring this matter to our attention.

108. On 10 July 2010 Mr P complained to the Commission, addressing his complaint to the Secretary to the Board (the Secretary). Mr P said that his principal grounds for complaint were that the Commission had failed in its statutory duty by reaching a perverse decision in the 5th Avenue Ltd case. Mr P made a secondary complaint that the service provided by the Commission in relation to two Freedom of Information requests he had made fell below an acceptable level for a public organisation. Mr P disputed the Commission's decision not to disclose information relating to the 5th Avenue Ltd case, and asked it to review this. Mr P said:

> *'where the ... Commission has erred in law or made a perverse decision or through negligence failed to carry out such investigations as were reasonable in the circumstances to fulfil its statutory duty, then it is in the public interest that information exposing those failings is made public.'*

(The full details of Mr P's complaints to the Commission can be found at Annex J.)

109. Mr P said that he thought he had made a compelling case for believing that the Commission made a perverse decision in relation to 5th Avenue Ltd, and consequently all the information relating

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33 The test in the 2000 Act is not *'the intention*' but who made the donation.

34 The Board minute states that the Commission acknowledged during the meeting that: '*there were questions about the reliability of Michael Brown's evidence*', but said that: '*the lack of any contradictory evidence would make it highly unlikely that we could prove* [5th Avenue] *was not the donor*'.

to the case should be made public. Mr P also asked the Commission to review its decision not to disclose to him legal precedents on which the Commission had relied.

110. On 17 July 2010 Mr P emailed the Secretary again. Mr P asked who would investigate his complaint and hear any appeal that may arise. Mr P said that the decision was one of the most important the Commission had made, so it was inconceivable that the Chief Executive or the Chairman had not been involved in the decision.

111. The Secretary responded to Mr P on 21 July 2010. The Secretary said that the Commission's complaints process was intended to address the way it acts in the exercise of its statutory duties or to address a failure or delay in dealing with a matter; bias or unfairness; discrimination or discourtesy; a failure to follow proper procedures; or a mistake made in carrying out its functions. The Secretary said the complaints process was not intended as a channel for detailed legal questions or to challenge decisions the Commission had made. The Secretary said that Mr P's primary complaint amounted to an allegation that the Commission had not acted lawfully, rather than an allegation of maladministration. The Secretary referred to the Commission's published case summary, which outlined its decision and reasons, and said that Mr P might wish to seek legal advice with regard to his allegations of a breach of statutory duty. The Secretary said that Freedom of Information requests were subject to a statutory regime and that issues of delay were grounds for review. The Secretary said that Mr P also had a right of appeal through the Information Commissioner.

112. Mr P responded to the Secretary on 27 July 2010. Mr P said that he was complaining about a perverse decision; perversity amounted to maladministration and where a public organisation was given reasonable grounds to believe it may have acted unlawfully, it had a duty to investigate.

113. The Secretary responded to Mr P on 5 August 2010. The Secretary said that the Commission had considered Mr P's case but did not see any additional facts that would make his disagreement with the Commission's decision on the 5th Avenue Ltd case a complaint rather than a difference of opinion. The Secretary said that the Commission did not feel that anything could be gained by holding a meeting, and referred Mr P to the Ombudsman's Office. When Mr P responded, he said he thought it improper for the Secretary to deal with his appeal. Mr P asked for his complaint to be referred to the Chief Executive of the Commission.

114. Internal legal counsel for the Commission responded to Mr P on 11 August 2010. Counsel said that the matter was being reviewed outside its complaints procedure. Counsel said that Mr P's correspondence made it clear that he disputed the Commission's decision in the 5th Avenue Ltd case and that it was not a complaint about process. Counsel said that this could not sensibly be revisited by way of a complaints process.

Mr P's comments on his complaint to the Ombudsman

The purpose of this chapter is to summarise Mr P's complaint to the Ombudsman. The full details of his complaints are at Annex K.[35]

115. Mr P commented primarily on the substance of the Commission's decisions, which he felt to be perverse, rather than the way in which the Commission arrived at its decisions. He asserted that:

- 5th Avenue Ltd was a sham company set up to further Michael Brown's fraud, and could not sensibly be regarded as having carried on business for the purposes of the 2000 Act.
- 5th Avenue Partners GmbH used 5th Avenue Ltd as a conduit for the transmission of the £1.5m donation and must be regarded as the true donor.
- When Michael Brown took investors' funds from 5th Avenue Ltd's bank accounts, he was stealing that money. Michael Brown could not say he was acting on behalf of 5th Avenue Ltd and that the theft was the company's act and not his. This was established by case law, and confirmed by Michael Brown's conviction. Where a thief steals money and then donates it to a political party, the donor is the thief, not the victim of the theft. It follows that Michael Brown was the true donor and the donations were impermissible.

116. Mr P said that he was outraged at the conduct of the Commission; not only in the way it reached its decision in the 5th Avenue Ltd case but also in the way it arbitrarily rejected his complaint on the most spurious and bureaucratic grounds.

35 Mr P asked us to treat this document as his complaint about the Commission. Some of Mr P's arguments relate to the complaints that he pursued with the Information Commissioner's Office and his subsequent appeals to the Information Rights Tribunal. We have not considered those complaints.

The Commission's comments on Mr P's complaint to the Ombudsman

This chapter summarises the Commission's response to Mr P's complaint to us; it sets out its position as it was before we began our investigation.

117. In its response to the complaint, the Commission said that it had reached its decisions in the 5th Avenue Ltd case after due consideration of all the evidence and the relevant legislation. The Commission said that as far as it was aware, the Party carried out the following checks within 30 days of receipt of the donations:

    - Michael Brown assured the Party that 5th Avenue Ltd was '*carrying on a business*' in the UK.
    - A Special Branch officer carried out discreet security checks on Michael Brown.
    - The Party also visited the company's premises prior to the donations being received and 5th Avenue Ltd was also found to have been registered with Companies House at the relevant time, meeting that requirement to be a permissible donor.

118. The Commission said that when it told the Party on 6 October 2005 that '*based on all the evidence which the party now has, and subject to any further information becoming available, it is reasonable for the party to regard the donations as having been permissible*', the Commission was bound by this statement unless further relevant information came to light. However, the Commission said that it did not take a decision, or at any stage express a view to the effect, that the Party had taken all reasonable steps to ascertain the permissibility of the donations within 30 days.

119. The Commission said that the fact that it considered that it was reasonable for the Party, based on the information it had at October 2005, to treat the donations as permissible did not equate to confirmation that the Commission considered that all reasonable steps had been taken within 30 days. The Commission said:

    > *'it is entirely possible for a party to obtain information outside of the 30 days period which enables it to form a view that the donations are permissible but still have failed to comply with s56(1)* [of the 2000 Act]. *Both on the facts, and on the law, it is clear that the Commission did not find that s56(1) had been complied with. In any event ... whatever the Commission stated on this issue had no bearing on their actual determinations in this case, which only concerned whether donations were permissible.'*

120. The November 2009 decision about the permissibility of the donations was taken by the Commission Board.

121. The Commission said that it did not think its administrative complaints process was an appropriate route for Mr P to challenge its investigation of 5th Avenue Ltd and its outcome. The Commission said Mr P raised detailed legal questions about an investigation into potential criminal and civil offences and the Commission's position on those was set out in its published case summary. The Commission said that, while its complaints procedure

did not expressly exclude '*points of law*', a complaints process could not be used to reopen consideration of a closed statutory investigation of possible civil and criminal offences.

Our findings

This chapter sets out our decision on the matters we have investigated and our rationale for our conclusions.

Introduction – the scope of our findings

122. As explained in the section on '*The complaint and summary of our decision*', the Commission is an organisation that falls under the Ombudsman's jurisdiction. The Party is not. The nature of Mr P's complaint is such that it has been necessary, in writing this report, to make reference to donations received, and action taken, by the Party. In making our findings, it will be necessary to make reference to the law about the donations that a political party in the UK may accept and to the enquiries that a political party should make in order to satisfy itself of the permissibility of any particular donation. For the avoidance of doubt, we should emphasise that we make no findings about the actions taken by the Party in respect of the donations made to it by 5th Avenue Ltd. Nor should any criticism of the Party be inferred. Our findings relate only to the acts and omissions of the Commission.

Maladministration

123. The Commission had to consider two matters that are of relevance to Mr P's complaint. These were whether the Party had, within 30 days of receiving the donations, taken *'all reasonable steps*' to determine that the donations were made by a permissible donor under the 2000 Act; and whether the donations themselves met the criteria for permissibility in accordance with the 2000 Act. Decisions on those matters were ones for the Commission, not us, to determine. As the

Commission said in response to a draft version of this report, it was for it to '*exercise* [its] *discretion in a proportionate manner*'. It was also appropriate for it to have due regard to making proper and effective use of public money. To provide some context, the Commission told us that the donations to the Party were made in the run up to the 2005 UK Parliamentary general election. The Commission told us that during the period January to June 2005, 2,874 donations were reported to the Commission by political parties with values from £5,000 to in excess of £200,000. However, given the high value of the donations in this case, the fact that little had been known about Michael Brown and 5th Avenue Ltd at the time of the donations, and the information that was gradually accumulated about his business activities, we would have expected the Commission to be able to demonstrate the factors it took into account when omitting to pursue this particular case any further. It has not done so.

124. The question that we have to decide is only whether the Commission acted with maladministration in considering whether the Party had '*taken all reasonable steps*' within the initial 30-day period and/or in considering the permissible donor question. We will deal with the Commission's handling of each of the questions in turn before addressing Mr P's complaint to the Ombudsman about the Commission's complaint handling.

Did the Commission act with maladministration when investigating the initial permissibility checks?

125. The 2000 Act does not specify what the Commission must do to satisfy itself that a political party has undertaken '*all reasonable steps*' to establish whether donations were made by a permissible donor. (Such reasonable steps should, however, be taken by a party within 30 days of receipt of a donation.) Nor does the 2000 Act specify the checks a political party must undertake. The 30-day period is an important factor in determining whether or not a party has complied with the requirements of section 56 of the 2000 Act.

126. At the time the donations in question were made, the Commission had not issued any guidance to parties about what the Commission expected in this area.

127. The White Paper indicated that in most cases, determining the permissibility of the donor would be a simple matter because the business activities of a donor would be well known. However, this was not the case in respect of 5th Avenue Ltd. Before it received the donations, the Party knew little of Michael Brown or his companies. The Party told the Commission that it had first met him only the month before 5th Avenue Ltd made a donation to party funds. The size of the donations, the lack of any historical connection between the Party and the donor, the apparent foreign resident status of Michael Brown and the fact that 5th Avenue Ltd was a start-up company, were all flags to the Commission that it should monitor carefully whether '*all reasonable steps*' had been taken

within the initial 30-day period to establish the permissibility of the donor.

128. When the Commission first asked the Party what checks it had carried out, the Party said it had:

- checked the Companies Register and was satisfied that the company existed and was registered in the UK; and
- been assured by the company that it did business in the UK.

129. The Commission appears to have been satisfied that 5th Avenue Ltd met the first two of the permissibility tests under the 2000 Act, namely that 5th Avenue Ltd was registered under the *Companies Act 1985* and incorporated in the EU. But the Commission did not have evidence that the checks the Party described later were carried out within 30 days of the receipt of the donations.

130. On 6 October 2005 the Commission told the Party that it had '*concerns about the extent and robustness of the initial permissibility checks*'. The Commission went on to say that, based on '*the information the Party now has, and subject to any further information becoming available, it is reasonable for the Party to regard the donations as having been permissible*'. The Commission did not say in that letter whether it was satisfied that the '*all reasonable steps*' test within the 30-day period had been met. That was an issue that the Commission was required to address, given its role in monitoring whether parties had followed the rules on party and election finance.

131. Between October 2005 and October 2006, the Commission obtained further information from the Party about its initial checks. But it appears that the Commission did not monitor whether all reasonable steps had been taken by the Party within 30 days of receipt of the donations, which the Commission should have done.

132. While the Commission's press statement of 27 October 2006 did not make reference to the 30-day period, it said that the Party had '*acted in good faith at the time*' and the Commission would not be *'re-opening the question of whether the Party or its officers failed to carry out sufficient checks*'. The Commission had had concerns in October 2005 about the extent and robustness of the checks, but by October 2006 had not obtained evidence to allay those concerns. Yet the Commission, in effect, decided to close the matter. The Commission did not monitor whether or not the Party had carried out sufficient checks within the 30-day period. The Commission should have done so. The 2000 Act does not specify the evidence that the Commission should have obtained in order to be satisfied that '*all reasonable steps*' had been taken by a party but the 2000 Act does say '*all*' reasonable steps, not just reasonable steps. The Commission should have asked, using its powers under section 146 of the 2000 Act if necessary, for evidence of the checks that had been done, rather than relying on assurances from the Party. In the circumstances, the Commission should reasonably have required full disclosure by the Party of the supporting evidence for the checks that were carried out within the initial 30-day period.

133. The 2000 Act was introduced following public concern about funding from individuals and organisations. The unusual circumstances of these particular donations immediately raised concerns on the part of both the public and the Commission about their source. Despite this, the Commission did not make

adequate enquiries of the Party or request that the Party supply documentary evidence of the checks the Party said it had carried out. The Commission did not do that in the first instance or as new information became available. Making appropriate enquiries of the Party would have enabled the Commission to assure the public that compliance with rules on donations was being effectively monitored.

134. The Commission has said that the carrying out of the 30-day checks had no bearing on whether the donations were in fact permissible. The carrying out of those checks does not determine whether an individual or company is, or is not, a permissible donor within the definition set out in section 54 of the 2000 Act. However, the 2000 Act requires the recipient of a donation to take all reasonable steps to verify whether the donor is a permissible donor and, if that cannot be done, to return the donation within 30 days of receipt of the donation. The requirement to carry out initial checks on the permissibility of the donor must be satisfied in order to achieve compliance with the 2000 Act. The Commission's function is to monitor compliance with the requirements of the 2000 Act and to consider taking forfeiture action if donations made by impermissible donors have been accepted.

135. We consider that '*monitoring*' compliance with the 2000 Act requires more than '*observing*' and, in many cases, more than the Commission accepting what it is told by a party about the donations it has received, the checks it has carried out and the timeframe for those checks. As in this case, it includes the Commission monitoring adequately whether political parties have taken all reasonable steps within the statutory timeframe to verify as far as possible that any donations are from permissible donors. It may, as in this case, require the Commission to engage in further questioning to check facts and documents, using its powers when necessary.

136. We consider that the Commission's enquiries about the Party's initial permissibility checks fell significantly short of what was required. This was a failure by the Commission to 'get it right'. It failed to ask for relevant information without good reason and so failed adequately to discharge its monitoring function under the 2000 Act. That was maladministration. The Commission did not follow up the concerns that it had about the robustness of the checks the Party had made, as it had said it would in its letter of 6 October 2005. That was maladministration.

Was there maladministration in the Commission's consideration of the permissibility of the donated flights?

137. When the Commission asked the Party in February 2006 to confirm who had paid for the flights, the Party said that it had been arranged for 5th Avenue Partners GmbH to be invoiced for the cost and that this was then recharged back to 5th Avenue Ltd. The Party supplied a copy of a recharge 'invoice' from 5th Avenue Partners GmbH to 5th Avenue Ltd and a faxed copy of a note on unheaded paper from Michael Brown. The note was signed, but undated, and said '*I confirm that the cost of the flights provided by me to the Liberal Democrat General Election Campaign were met by 5th Avenue Partners Limited*'.

138. No supporting evidence was sought or obtained by the Commission from the

Party. The Commission had no credible evidence that the cost of the flights was met by 5th Avenue Ltd. The Commission nevertheless proceeded on the basis that 5th Avenue Ltd was the donor, rather than 5th Avenue GmbH, which had met the cost of the flights.

139. The Commission said in its report to its Board that in the absence of any '*persuasive countervailing evidence to contradict Michael Brown's statement*' it would be difficult to establish that 5th Avenue Partners GmbH was the donor. However the only credible evidence that the Commission held (the invoice) showed that 5th Avenue Partners GmbH had paid for the flights. We do not accept that reliance could reasonably have been placed on Michael Brown's undated statement without supporting evidence that the costs had been met by 5th Avenue Ltd.

140. When, late in 2009, the Board considered the possibility of pursuing forfeiture proceedings, the report to the Board said that the reliability of Michael Brown's evidence was '*open to question*' but concluded that:

> *'on balance it is considered that the evidence indicates that it is more likely than not that it was the intention that the costs be met by 5th Avenue Ltd and that 5th Avenue Ltd be treated as the true donor. On the evidence available it is not possible to prove that 5th Avenue Partners GmbH was the donor rather than 5th Avenue Ltd.'*

It was, however, clear that the flights had initially been paid for by 5th Avenue Partners GmbH. The question the Commission had to address was not the '*intention'* but who had paid for the flights. It did not address this question or make further enquiries of the Party.

141. By the time of the Board meeting, the Commission was aware that Michael Brown was a fraudster, a convicted forger and a convicted perjurer. The Commission had evidence that the flights had initially been paid for by a foreign company and had no credible evidence to the contrary. The Commission could, and should, have pursued with the Party the question of what checks it had undertaken within 30 days of receipt of the donations. For the Commission not to do so in the face of the evidence it held, and in light of its responsibility to monitor compliance with the 2000 Act, was unreasonable. The failure by the Commission to pursue the question by seeking further evidence from the Party was so far short of reasonable as to be maladministration.

142. In his correspondence with the Commission, Mr P raised many more issues. The thrust of Mr P's argument was that the Commission did not act reasonably. We agree with him to the extent indicated in this report. We have not found it necessary to examine every issue that he raised in order to reach that conclusion. We have determined that it was maladministration for the Commission not to have made further enquiries about the checks that the Party undertook within 30 days of receipt of the donations or to request that the Party supply documentary evidence of the checks it had carried out within that period. We have also found that it was maladministration for the Commission not to make adequate enquiries about who met the cost of the donated flights.

Complaint handling

143. When Mr P submitted his complaint to the Commission, he assumed it would respond to his complaint through its complaints procedure. This belief was reinforced by

the Commission's own description of a complaint as:

> *'...a comment about the way we acted in the exercise of our statutory duties ...* [expressing] *dissatisfaction with the service and suggests alternative actions or ideas on how we could provide a better service to our stakeholders.'*

The description continued: '*a complaint might be made about bias or unfairness; a failure to follow proper procedures; or a mistake made in carrying out our functions*'.

144. Mr P assumed that the Commission would, in due course, provide him with a rationale for its decisions about the donations, taking into account the many points he had made. The Commission did not do that. Instead, it decided that his complaint concerned its decisions rather than process and that his complaint could not *'sensibly or practicably be re-visited by way of the complaints process*'. The Commission suggested that Mr P either consider taking legal action or lodge a complaint with the Ombudsman, which he did.

145. Was that maladministration? We do not think that it was. The Commission's guidance gave Mr P reason to think that his complaint alleging perversity could be addressed through the Commission's complaints process. But Mr P's interpretation was not the only interpretation that it was possible to put on that guidance, and the Commission was not obliged to accept his interpretation. While the Commission could have been more helpful in its responses to Mr P, we do not think that its failures were so serious as to amount to maladministration.

146. Mr P argued that the Commission had taken perverse decisions and that perversity in decision making can amount to maladministration. That is correct. But perversity in decision making can also amount to unlawfulness and it was not unreasonable for the Commission to see his complaint as a claim of unlawfulness, rather than a complaint to be handled through its complaints process. We think that in Mr P's case, it was not unreasonable for the Commission to conclude that his complaint was essentially a challenge about lawfulness. It was appropriate for the Commission to signpost Mr P to the Ombudsman as well as to the courts. (It is for the Ombudsman to make her own decision about whether a remedy might be available through court proceedings and whether it is reasonable to expect a complainant to pursue such proceedings.)

147. We think that the Commission might reasonably have been expected to explain its position more clearly and sympathetically, given that Mr P's expectations had been raised by its own definition of a complaint. The Commission should have made its position clear in its guidance but its omission to do so does not in our view amount to maladministration. We do not, therefore, uphold this element of Mr P's complaint.

Injustice

148. Mr P, as a member of the public, had a right to expect that the Commission would take appropriate steps to monitor compliance with the 2000 Act. Mr P said that the Commission's failure to do that in this case has caused him outrage. As a result of our contact with Mr P during the course of our investigation, we are persuaded of the strength of his feelings and his strong sense of outrage resulting from the Commission's maladministration. That sense of outrage is demonstrated in part by Mr P's persistence in pursuit of his

complaint despite the personal cost to him in doing so and, in part, by his demeanour when we have spoken to him. The sense of outrage felt by Mr P results at least in part from the maladministration we have found and represents an injustice suffered by Mr P.

Recommendations

149. Mr P wanted the Commission to revisit its decision in the 5th Avenue Ltd case and he wanted an answer from the Commission to his complaint. We do not think that it is appropriate to recommend that now. Michael Brown's activities have been subject to extensive legal proceedings and it seems unlikely that there is anything more that the Commission could do. We see no value in asking the Commission to answer Mr P's complaint. While we have not answered every point that Mr P raised, our investigation has provided a more comprehensive answer than Mr P received from the Commission. Nonetheless, Mr P has suffered an unremedied injustice which we consider should be put right by the Commission. We therefore recommend that, within four weeks of the issue of the final report, the Commission apologise to Mr P for the unremedied injustice he has suffered in consequence of maladministration on the part of the Commission.

150. We also recommend that the Commission should reflect on the lessons to be drawn from the case, both about its handling of the substantive issue and about handling complaints of this kind, including the information it makes available to the public about its complaints procedure. Once it has done so, the Commission should write to Mr P, his MP and to us, setting out what those lessons are, the actions it will take, and by when, to seek to ensure that the failings in this case are not repeated.

151. At the start of 2005 the Commission had not published guidance about what constituted carrying on a business or what checks a party must take to ascertain the permissibility of a donor under the 2000 Act. Guidance has since been developed (see Annex B) and the latest version is available on the Commission's website. We recommend that the Commission review the adequacy of that guidance in light of the findings we have reached.

Conclusion

152. We have found maladministration by the Commission in the way that it considered aspects of the donations in question to the Party. We have also found that Mr P suffered injustice in consequence of that maladministration.

153. The Commission accepts two of the three recommendations we have made but has refused to apologise to Mr P for the maladministration. The Commission continues to disagree with our findings of maladministration. We bring this to the attention of Parliament for it to consider taking whatever action it feels appropriate in this case.

Annex A: Quarterly report of donations made to the Party

Party Name: LIBERAL DEMOCRATS

Quarter / Year: APRIL – JUNE 2005

B2 Non-Cash Bequests and Non-Cash Donations

Number of entries made in this section:

	Full name	Donor status	Company Reg. No.	Bequest (Y / N)	Value £.pp
1.	CB/1425	[redacted]	[redacted]	[redacted]	[redacted]
	Address	**Nature of non-cash bequest or donation**			
	[redacted]	[redacted]			
	Received by	**Date received**	**Date accepted**		
	[redacted]	[redacted]	[redacted]		

	Full name	Donor status	Company Reg. No.	Bequest (Y / N)	Value £.pp
2.	5TH AVENUE PARTNERS LTD.	COMPANY	05073942	N	£30,000.00
	Address	**Nature of non-cash bequest or donation**			
	10, DOMINION STREET, LONDON, EC2M 2EE.	USE OF AIRCRAFT FOR 6 DAYS AT £5,000 PER DAY.			
	Received by	**Date received**	**Date accepted**		
	FEDERAL PARTY	6/5/05	6/5/05		

	Full name	Donor status	Company Reg. No.	Bequest (Y / N)	Value £.pp
3.	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
	Address	**Nature of non-cash bequest or donation**			
	[redacted]	[redacted]			
	Received by	**Date received**	**Date accepted**		
	[redacted]	[redacted]	[redacted]		

Party Name: LIBERAL DEMOCRATS

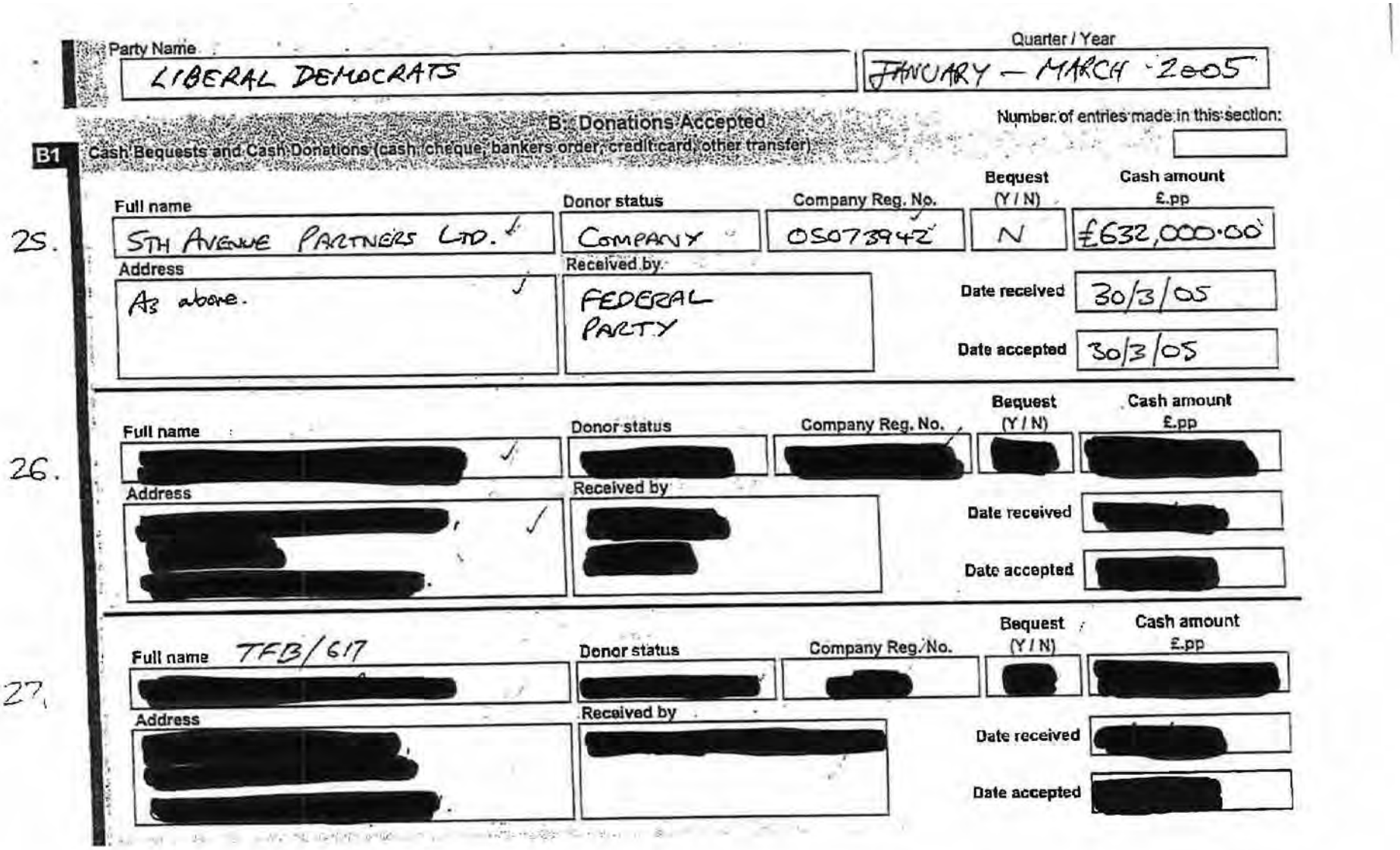
Quarter / Year: JANUARY – MARCH 2005

Number of entries made in this section:

B: Donations Accepted

B1 Cash Bequests and Cash Donations (cash, cheque, bankers order, credit card, other transfer)

	Full name	Donor status	Company Reg. No.	Bequest (Y / N)	Cash amount £.pp	Address	Received by	Date received	Date accepted
22.	5TH AVENUE PARTNERS LTD. ✓	COMPANY	05073942 ✓	N	£100,000.00	TEN DOMINION STREET, LONDON, EC2M 2EE. ✓	FEDERAL PARTY	10/2/05	10/2/05
23.	5TH AVENUE PARTNERS LTD. ✓	COMPANY	05073942 ✓	N	£151,000.00	As above. ✓	FEDERAL PARTY	25/2/05	25/2/05
24.	5TH AVENUE PARTNERS LTD. ✓	COMPANY	05073942 ✓	N	£1,536,064.80	As above. ✓	FEDERAL PARTY	22/3/05	22/3/05



Party Name: LIBERAL DEMOCRATS

Quarter / Year: JANUARY – MARCH 2005

B: Donations Accepted

Number of entries made in this section:

B1 Cash Bequests and Cash Donations (cash, cheque, bankers order, credit card, other transfer)

	Full name	Donor status	Company Reg. No.	Bequest (Y / N)	Cash amount £.pp	Address	Received by	Date received	Date accepted
25.	5TH AVENUE PARTNERS LTD.	COMPANY	05073942	N	£632,000.00	As above.	FEDERAL PARTY	30/3/05	30/3/05
26.	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
27.	TFB/617 [redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Form RP10 Quarterly Report of Donations Made to a Political Party on the GB Register Page 2 of 10

Annex B: Guidance on donations for political parties

1

Managing donations to political parties

Who this document is for:

Party officers in Great Britain who have a good understanding of donations and want to know more about how to deal with them.

This covers:

- Permissibility of donations
- Valuing donations
- Recording donations
- Reporting donations

Related documents:

- Overview of donations to political parties
- Situations and procedures – Permissibility checks for political parties

Forms and explanations for donations and loans

- Quarterly donations returns – RP10 and RP10QN
- Quarterly loan returns – RP10B and RP10QNB

Expert papers

- Donations from trusts
- Valuing auction prizes

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

2

Summary

Donations to political parties are regulated by the Political Parties, Elections and Referendums Act 2000 (PPERA).

This means that when you receive a donation, you must check that you can accept it, record it and in certain cases, report it to us.

This guidance gives you information about how to deal with donations.

3

What is a donation?

A donation is money, goods or services given to a party without charge or non-commercial terms, with a value of over £500.

Some examples of donations include:

- A gift of money or property.
- Sponsorship of an event or publication.
- Subscription or affiliation payments.
- Free or specially discounted use of an office.

For more information on sponsorship as a donation see this document:

- Expert paper: Sponsorship

Under the Political Parties, Elections and Referendums Act 2000 (PPERA), only items with a value of **more than £500** are classed as donations.

Checks on donations

Before your party accepts any donation of more than £500, you must immediately make sure that you know who the donor is **and** that the donation is from a permissible source.

If you are given a donation on behalf of someone else, the person giving you the donation (the agent) must tell you:

- that the donation is on behalf of someone else; and
- the actual donor's details

If you think that someone might be acting as an agent, you must find out the facts so that you can make the right checks.

An example of someone acting as an agent is where an event organiser is handing over the proceeds from a dinner held specifically to raise funds for your party.

If you are not sure who you should treat as the donor (the person paying over the donation or someone else), please call or email us for advice. Important

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

4

What is a permissible source?

A permissible source is:

- An individual registered on a UK electoral register, including overseas electors and those leaving bequests.
- Most UK-registered companies.
- A Great Britain registered political party.
- A UK-registered trade union.
- A UK-registered building society.
- A UK-registered limited liability partnership (LLP) that carries on business in the UK.
- A UK-registered friendly society.
- A UK-based unincorporated association that carries on business or other activities in the UK.

You can also accept donations from some types of trust, and from certain public funds. For more information, see Expert paper: Donations from trusts.

The reasonable costs of overseas visits are deemed to be from a permissible donor.

For more information, see this document:

- Situations and procedures: Permissibility checks for political parties

How long have you got to check permissibility?

You must start checking the permissibility of the donation as soon as you receive it.

You have 30 days to decide whether to accept or refuse the donation.

If you keep the donation beyond 30 days, you are deemed to have accepted it.

5

When do you 'receive' a donation?

You usually 'receive' a donation on the day you take ownership of it.

For example:

- If you are given free leaflets, you receive the donation when the leaflets are handed over to you.
- If you are given a cheque, you receive the donation on the date that the cheque clears.
- If a donation is transferred directly into your bank account, you receive the donation on the date that you check your online bank record or are notified of its receipt by the bank.

What happens if you receive a donation that isn't permissible?

If a donation is received and it isn't permissible, you must return it within 30 days. If your party keeps the impermissible donation after the 30 days, you are deemed to have accepted it.

If your party accepts an impermissible donation, your party may be subject to civil enforcement action. The party and the treasurer may also have committed criminal offences.
If you've accepted an impermissible donation, you should tell us as soon as possible.

Donations of £500 or less

Donations of £500 or less are outside the scope of PPERA and you do not need to record or report them.

However, be alert to situations where it appears that a donor is attempting to evade PPERA by making a series of small donations, for example, if a number of donations of £400 are made from the same source in similar circumstances.

If you think this may be happening, call or email us for advice.

Important
It is an offence to attempt to evade the controls on donations.

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

6

How do you value a donation?

The value of a donation is the difference between the value of what you receive and the amount (if any) you pay for it.

If you are given property, goods or services free of charge, or at a non-commercial discount, you must value it at the market rate.

For example:

Market rate for goods	-	Price you pay	=	Value of donation
£1,000	-	£400	=	£600

Or:

Market rate for services	-	Price you pay	=	Value of donation
£1,000	-	£0	=	£1,000

If the donor is a commercial provider, you should use the rates they charge other similar customers. If this information isn't available, you should find out what similar providers charge for the same property, goods or services and use this as the market rate.

If you are still not sure how to value a particular donation, please call or email us for advice.

You should keep a record of how you reached your valuation.

Commercial discounts are those available to other similar customers, such as discounts for bulk orders or seasonal reductions.

Non-commercial discounts are special discounts that your party, specifically, is given by suppliers.

7

Valuing donations where your party hosts an event or provides goods or services

If your party hosts an event, or provides goods or services, any profit from the event (or the goods or services) constitutes a donation.

The value of any donation is the profit made by the party from each donor.

You should work out how much it costs the party for each person attending the event, or for each person receiving goods or services. Then, deduct this amount from what each person paid you to find the value of the donation.

If the event includes an auction, for more information see this document:

- Expert paper: Valuing auction prizes

For example:

Cost of event	÷	People at event	=	Cost per person
£25,000	÷	100	=	£250

So:

Amount person paid	-	Cost per person	=	Value of donation
£1,000	-	£250	=	£750

Valuing a donation by sponsorship

If someone sponsors a publication or event on the party's behalf, the value of the donation is the full amount that they pay.

You must not make any deduction for any benefit that they receive from the sponsorship.

For more information see this document:

- Expert paper: Sponsorship

Valuing other types of donation

You can find more information on valuing office space and seconded staff in Expert paper: Splitting expenses.

If you are still not sure how to value a donation, please call or email us for advice.

Need help? Just call us...

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Wales: 029 2034 6800

8

How to record and report donations

Accepting donations – a summary

If you accept a donation over £500, you must record these details:

- The donor's name and address.
- If the donor is a company, their registered company number.
- The amount or nature and the value of the donation.
- The date on which the donation was received.
- The date on which the donation was accepted.

You must record the donor's address as it is shown on the relevant statutory register. If the donor is an overseas elector, you must record their home address. This is because no address will appear on the electoral register.

If the donor is an unincorporated association, you must record the main office address. This is because there is no register of unincorporated associations to refer to.

You must include and report permissible donations (over certain thresholds) in your quarterly return.

The thresholds are different for central parties and accounting units.

- A central party's reporting threshold is **over £7,500.**
- An accounting unit's reporting threshold is **over £1,500.**

For more information on which registers you need to check, see this document:

- Permissibility checks for political parties

RP10

9

Returning donations – a summary

If you receive a donation from an impermissible source you must return it and record these details:

- The amount or nature of the donation and its value.
- The manner in which the donation was made.
- The date you received the donation.
- The date you returned the donation.
- The action you took to return the donation (for example, the person or institution you returned it to).

You must include all impermissible donations on your quarterly return.

Donations from uncertain sources

If you are unable to confirm who a donation is from, or that it is from a permissible source, you should record it and return it.

If any interest has been gained on the donation your party can keep it, as it is not treated as a donation.

Need help? Just call us...

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10

Aggregating donations and loans

You must add together and report permissible donations and loans that you receive from the same source in the same calendar year (whether they're made to the central party, an accounting unit or a combination of both). You should report these aggregated amounts to us in the quarter they exceed the reporting threshold.

There are different thresholds for reporting depending on whether your source has already made a reportable donation or loan in the calendar year.

- If you **have** already reported the source in the calendar year, the threshold is **over £1,500.**
- If you **have not** already reported the source in the calendar year, the threshold is **over £7,500**.

Different thresholds apply for reporting of donations and loans to accounting units. If your party has accounting units, you should read Reporting donations and loans: Parties with accounting units.

You will need to report your aggregated donations and loans in your quarterly return.

If your party has accounting units, for more information see this document:

- Situations and procedures – Reporting donations and loans: Parties with accounting units

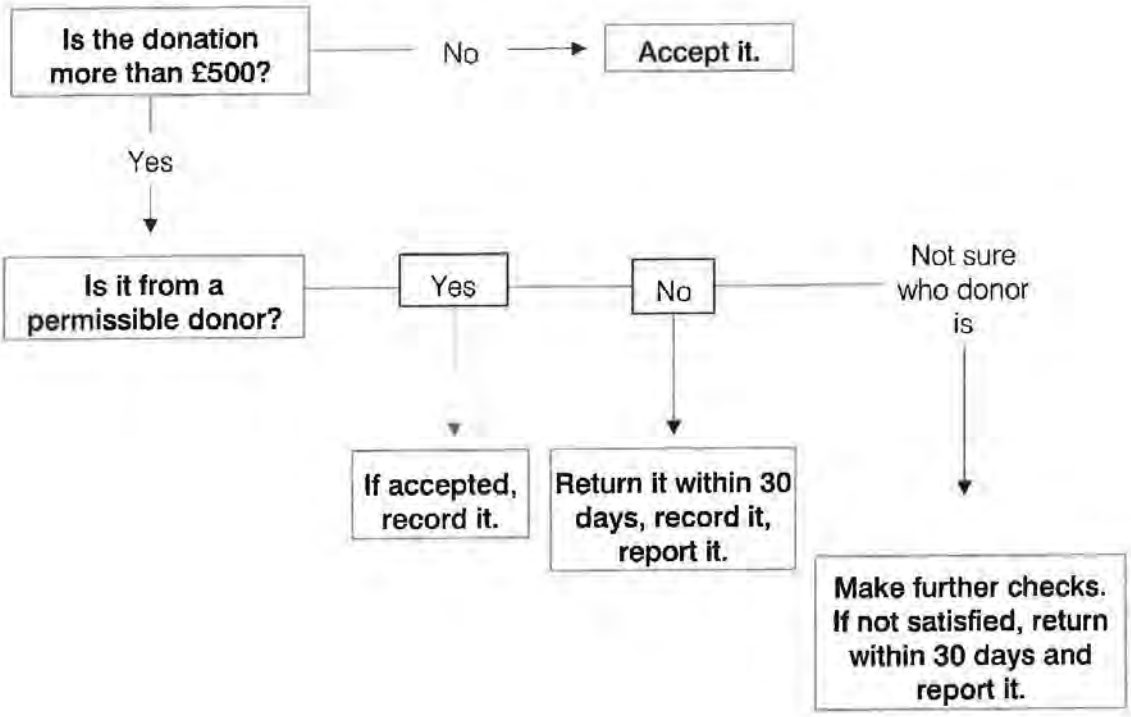
Important

RP10

11

What to do with donations

Donations from a new donor



Need help? Just call us...
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Wales: 029 2034 6800

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Reporting donations

Your party must submit quarterly returns showing donations you have accepted in that quarter. These are the deadlines for submitting quarterly returns:


RP10

Important

There are penalties for late submission of your returns.

Quarter	Date return is due
One (January–March)	30 April
Two (April–June)	30 July
Three (July–September)	30 October
Four (October–December)	30 January

When a UK general election is called you must report donations you have received to us each week, unless you have made a declaration to us that you will not be standing any candidates at the election.

Important

You can make this declaration on Form RP6 at any time up until seven days after the election is called. You can also withdraw the declaration if your party decides to stand candidates


RP6

When a general election is called, we will write to you to let you know how to report to us and put details on our website.

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Reporting requirements summary

Donation	Requirement
Single donation of £500 or less	No recording or reporting requirements
Single donation of over £500	Record
Single or aggregate donations/loans of more than £7,500	Record and report on quarterly return
Donations/loans totalling more than £1,500 where a party has previously reported donations/loans from the same source that year	Record and report in quarterly return

You can find reporting forms and instructions on how to complete them here:

- RP10
- RP10QN

If your party has accounting units, for more information on relevant thresholds see this document:

- Situations and procedures – Reporting donations and loans: Parties with accounting units

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

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Exemptions from quarterly returns

Even if you do not receive any donations, you still need to submit a quarterly return report – this is called a '**nil return**'. You can find the form here.

RP10QN

If you submit four successive quarterly nil returns you are exempt from submitting further reports until you receive another donation.

We will write to you to let you know if you become exempt from quarterly returns. You must still submit your annual accounts.

Important

How we can help

You can find more information in the guidance documents we have suggested in this document, or you can view our full range of guidance and up-to-date resources on our website.

If it's easier, you can also contact us on one of the phone numbers or email addresses below. We are here to help, so please get in touch.

Call us on:

- **England**: 020 7271 0616
  pef@electoralcommission.org.uk
- **Scotland**: 0131 225 0200
  infoscotland@electoralcommission.org.uk
- **Wales**: 029 2034 6800
  infowales@electoralcommission.org.uk

Visit us at www.electoralcommission.org.uk

We welcome feedback on our guidance – just email us at:
pef@electoralcommission.org.uk

1

Permissibility checks for political parties

Who this document is for:

Party officers in Great Britain who want to know more about how to check if a donor or lender is permissible.

This covers:

- Who is a permissible donor or lender
- How to make checks on permissibility
- What you need to record

Related documents:

- Overview of donations to political parties
- Overview of loans to political parties
- Situations and procedures – Managing donations to political parties
- Situations and procedures – Reporting donations and loans: Parties with accounting units

Expert papers

- Donations from trusts

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

2

Summary

Donations and loans to political parties are regulated by the Political Parties, Elections and Referendums Act 2000 (PPERA).

They can only be accepted from certain sources, mainly UK-based.

This guidance explains how to check if you can accept a donation or loan from a particular source, and tells you the information you need to record.

The information you record will help you complete your quarterly returns to us.

Checking permissibility

Before a party accepts any donation or loan of more than £500, it must take all reasonable steps to:

- make sure it knows the identity of the true source
- check that the source is permissible

Who is responsible for checking permissibility?

Parties must appoint and register a treasurer with us. The registered treasurer is legally responsible for making sure that the party complies with the rules.

This includes maintaining suitable systems within the party to ensure that donations and loans are dealt with correctly.

Other party officers must give relevant information to the treasurer if reasonably required to do so.

How long do I have to check permissibility?

As soon as you receive a donation, you must make sure you know who the donor is, and start checking their permissibility. You have 30 days to decide whether to accept or refuse the donation.

You must complete permissibility checks on lenders before entering into a loan.

Even if you have made a check in connection with an earlier donation or loan from the same source, you must make a fresh check in each new case to make sure nothing has changed.

You should keep a record of all your permissibility checks to show that you have followed the rules.

For more information, see these documents:

- Introduction to being a party treasurer
- Overview of loans to political parties
- Overview of donations to political parties
- Managing donations to political parties

Important

If it is not completely clear who you should treat as the donor, you should check the facts to make sure.

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

4

What is a permissible source?

A permissible source is:

- An individual registered on a UK electoral register, including overseas electors and those leaving bequests.
- A UK-registered company which is incorporated within the European Union (EU) and carries on business in the UK.
- A Great Britain registered political party.
- A UK-registered trade union.
- A UK-registered building society.
- A UK-registered limited liability partnership (LLP) that carries on business in the UK.
- A UK-registered friendly society.
- A UK-based unincorporated association that is based in and carries on business or other activities in the UK.

You can also accept donations, but not loans, from certain types of trust, certain public funds and anyone who is paying for the reasonable costs of an overseas visit.

Charities are not allowed to make political donations under charity law, even if they fall into one of the categories of permissible donor.

If you know that a donor is a charity, you should make sure that they get advice from the Charity Commission before giving a donation.

For more information, see this document:

- Expert paper: Donations from trusts

5

How to check if an individual is permissible

What makes an individual permissible?

Individuals must be on a UK electoral register at the time of the donation or loan. This includes overseas electors.

If you are left a bequest, and the individual was on the electoral register at anytime five years before their death, you can accept the donation.

How do you check permissibility?

You can use the electoral register to check if an individual is permissible. Parties are entitled to a free copy of the full electoral register.

A new version of the electoral register is usually published on 1 December every year, and it is updated regularly.

You should contact the Electoral Registration Officer at the relevant local council for your copy, explaining that you are asking for it as a registered political party. You should also ask them to send you all the updates.

Important

You must check the register and updates carefully to make sure that the person is on the register on the date you enter into the loan, or on which you received the donation.

In special circumstances, people have an anonymous registration. If a donor or lender is anonymously registered, please contact us for advice on how to confirm permissibility.

You must only use the register for checking if a donor or lender is permissible, or for electoral purposes. You must not pass it on to anyone else.

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

6

What do you need to record?

You must record:

- The full name of the donor or lender.
- The address as it is shown on the electoral register, or if the person is an overseas elector, their home address

You may find it helpful to note the person's electoral number, as a record of your check.

How to check if a company is permissible

What makes a company a permissible donor?

A company is permissible if it is:

- registered as a company at Companies House
- incorporated in a Member State of the EU, and
- carrying on business in the UK

You must be sure that the company meets all three criteria.

How do I check company registration and EU incorporation?

You should check the register at Companies House, using the free Webcheck service at www.companieshouse.gov.uk.

You should look at the full register entry for the company.

To check that the company is permissible, you need to look at its registered number. Some companies will have a number only. Other companies have a letter as a prefix to the number.

The table below shows you if a company with a particular prefix is permissible, as long as it is also carrying on business in the UK.

Use Companies House free Webcheck service at: www.companieshouse.gov.uk

Prefix letter	Is it permissible?
None	Yes
NI, SC	Yes
FC, NF, SF	Yes, if 'country of origin' on the register entry is an EU Member State
OC3, SO3	Yes, as a limited liability partnership – see separate section below
IP, SP, NP	Maybe – see industrial and provident societies in the 'Other types of donor' section on page 10
Any other prefix	No

How do you check if the company is carrying on business in the UK?

You must be satisfied that the company is carrying on business in the UK. The business can be non-profit-making.

Even if you have direct personal knowledge of the company, you should check the Companies House register to see if:

- The company is in liquidation, dormant, or about to be struck off.
- The company's accounts and annual return are overdue.

A company may still be carrying on business if it is in liquidation, dormant or late in filing documents, but you should make extra checks to satisfy yourself that this is the case.

For any company, you should consider looking at:

- The company's website.
- Relevant trade, telephone directories or reputable websites.
- The latest accounts filed at Companies House.

If you are still not sure if the company is carrying on business in the UK, you should ask for written confirmation of its business activities from the company's directors.

If you're still uncertain that a company is permissible, please call or email us for advice.

8

What do you need to record?

You must record:

- The name as it is shown on the register
- The company's registered office address
- The registered company number

Limited liability partnerships

What makes a limited liability partnership a permissible donor?

A limited liability partnership (LLP) is a permissible donor if it is:

- Registered as an LLP at Companies House.
- Carrying on business in the UK.

How do you check permissibility?

You should check the register at Companies House, using the free Webcheck service at www.companieshouse.gov.uk.

You need to look at the LLP's registered number. Only numbers beginning with OC3 or SO3 are permissible LLPs.

You can find more information in the previous section 'How do you check if the company is carrying on business in the UK?' on the previous page.

Use Companies House free Webcheck service at: www.companieshouse.gov.uk

What do you need to record?

You must record:

- The name as it is shown on the register
- The LLP's registered office address

9

Unincorporated associations

What makes an unincorporated association a permissible donor?

An unincorporated association is a permissible donor if:

- It has more than one member.
- The main office is in the UK.
- It is carrying on business or other activities in the UK.

How do you check permissibility?

There is no register of unincorporated associations. Permissibility is a matter of fact in each case.

In general, an unincorporated association should have:

- An identifiable membership, and
- Rules or a constitution, and
- A separate existence from its members.

For example, members' clubs are sometimes unincorporated associations.

If you are not sure that an association meets the criteria, you should consider whether the donation is actually from individuals within it (rather than the association) or if someone within the association is acting as an agent for others.

If you think this is the case, you must check the permissibility of all individuals who have contributed more than £500 and treat them as the donors.

You can find more information on carrying on business in the previous section 'How do you check if the company is carrying on business in the UK?' on page 7.

If you would like more guidance on permissibility and unincorporated associations, please call or email us.

If an unincorporated association makes political donations amounting to more than £25,000 in a calendar year, you should make them aware that they have to report this to us.

See our website or call us for more information.

What do you need to record?

You will need to record:

- The name of the unincorporated association.
- The company's main office address.

10

Other types of donor

The table below shows how you check permissibility for other types of donor or lender.

Type of donor	Requirement	Where to check
Trade union	Listed as a trade union by the Certification Officer	The Certification Officer www.certoffice.org
Building society	A building society within the meaning of the Building Societies Act 1986	The Financial Services Authority http://mutuals.fsa.gov.uk
Friendly/ industrial provident society	Registered under the Friendly Societies Act 1974 or the Industrial and Provident Societies Act 1965	The Financial Services Authority http://mutuals.fsa.gov.uk

What do you need to record?

You will need to record:

- The name of the donor.
- The address, as shown on the relevant register.

11

How we can help

You can find more information in the guidance documents we have suggested in this document, or you can view our full range of guidance and up-to-date resources on our website.

If it's easier, you can also contact us on one of the phone numbers or email addresses below. We are here to help, so please get in touch.

Call us on:

- **England**: 020 7271 0616
  pef@electoralcommission.org.uk
- **Scotland**: 0131 225 0200
  infoscotland@electoralcommission.org.uk
- **Wales**: 029 2034 6800
  infowales@electoralcommission.org.uk

Visit us at www.electoralcommission.org.uk

We welcome feedback on our guidance – just email us at:
pef@electoralcommission.org.uk

Need help? Just call us...

England: 020 7271 0616 Scotland: 0131 225 0200
Wales: 029 2034 6800

Annex C: The Commission's email to the Party 30 September 2005

FW: Company donations

[redacted]

From: [redacted]
Sent: 30 September 2005 16:30
To: [redacted]
Subject: FW: Company donations

info

From: [redacted] ELECTORAL COMMISSION
Sent: 30 September 2005 16:29
To: [redacted] LIBERAL DEMOCRAT PARTY
Subject: RE: Company donations

Thanks [redacted] Will amend address and to take your point about responding to your early August letter. Can you please suggest a revised form of words on the question of when the checks took place? Look forward to speaking to you early next week.

[redacted]

From: [redacted] LIBERAL DEMOCRAT PARTY
Sent: 30 September 2005 16:27
To: [redacted] THE ELECTORAL COMMISSION
Subject: RE: Company donations

Thank you for this. Were almost there - in particular the specific items you print were not obtained during the 30 day period but as a result of my additional checks made prior to my meeting with [redacted] I also think you might consider clarifying that this letter is in reply to my early August letter.

I'll ring you on Monday or Tuesday as you propose. As long as we publish the letter next week say Thursday then the time lag is just about OK.

[redacted]

[redacted]

-----Original Message-----
From: [redacted] THE ELECTORAL COMMISSION
Sent: 30 September 2005 15:18
To: [redacted] LIBERAL DEMOCRAT PARTY
Subject: FW: Company donations

[redacted]

Thanks for coming in yesterday evening. Here is a further draft letter which seeks to reflect the points you put to me and also focuses in a bit more detail on the particular case at issue here. You will see that we have noted some concerns on our part about the checking procedure you followed, and I can talk to you about those if you wish, but our overall conclusion is that based on the information currently available, you took all reasonable steps and your conclusion that the donations were permissible is a reasonable one.

21/10/2005

Again, please let me have any comments [redacted]

All the best

[redacted]

The information contained in this email, and any attachments with it, is intended only for the individual or organisation to whom it is addressed. Such information may be confidential and privileged, and no mistake in transmission is intended to waive or compromise such privilege. If you have received the email in error, please notify the sender of this email or contact info@electoralcommission.org.uk.
This mail and any attachments have been checked for the presence of a computer virus.

21/10/2005

Annex D: The Commission's letter to the Party 6 October 2005

4 2 david griffiths

The Electoral Commission

David Griffiths
Registered Treasurer
Liberal Democrats
4 Cowley Street
London
SW1P 3NB

Your reference: DBG/AL

6 October 2005

Dear David,

5th Avenue Partners Limited

1. I am writing in response to your letter of 17 August 2005 to Chris Welford, the Electoral Commission's Director of Regulatory Services, following your meeting at our offices on 4 August.

2. Section 56 of the Political Parties, Elections and Referendums Act 2000 requires that all reasonable steps should be taken by or on behalf of a political party to verify whether a donor is a permissible donor.

3. Section 54 (2) (b) of the Act lays down three requirements, each of which must be met in order for a company to be a "permissible donor" to a political party. These are that the company:

- is registered under the Companies Act 1985 or the Companies (Northern Ireland) Order 1986
- is incorporated within the United Kingdom or another Member State
- carries on business in the United Kingdom.

4. The Commission considers that it is worth bearing in mind what the Government said in relation to "carrying on business" in its July 1999 paper *The Funding of Political Parties in the United Kingdom*, in response to the recommendations in the 5th Report of the Committee on Standards in Public Life:

The Electoral Commission
Trevelyan House
Great Peter Street
London SW1P 2HW

Tel 020 7271 0500
Fax 020 7271 0505
info@electoralcommission.org.uk
www.electoralcommission.org.uk

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.....a check against the [Companies House] register will not be sufficient to establish that a company incorporated in the United Kingdom is carrying on business here. Where there is any doubt as to whether a corporate donor is genuinely carrying on business in the United Kingdom it will therefore be necessary for registered political parties to make some additional enquiries in order to establish that the donor qualifies as a permissible source. This is, however, a simple test, and in the great majority of cases a corporate donor's business activities in the United Kingdom should be well known to the political party in question (paragraph 4.10)

5. The Commission's view is that in order to discharge its responsibilities under Section 56 of the Act, as mentioned in the first paragraph of this letter, a political party should, in relation to the "carries on business" test, take all reasonable steps to establish that a company which has made a donation was, at the time the donation was made, both in a position to carry on business, and in fact carrying on business, in the United Kingdom.

6. You have explained to the Commission that [redacted] (the party's nominating and campaigns officer) had assured [redacted] (the party's compliance officer) that at the time the donations were made, [redacted] (chair of the party's general election campaign) had been assured verbally by the company that they did business in the United Kingdom. You added that [redacted] subsequently confirmed this verbally with the company. You also explained that at the time the donations were made, you checked that no dormant company resolution had been filed in relation to 5th Avenue Partners Limited. I understand that the party took the view on the basis of this information that the company was a permissible donor as prescribed in the Act, and you did not need to make any further enquiries about the permissibility of the donations at that stage.

7. You have also explained that, after the Commission asked for further explanations of the steps which the party had taken to verify that the donations were permissible, 5th Avenue Partners Limited's solicitors informed you that the company was not dormant at the time the donations were made, and specifically that:

- the company had a lease of central London offices
- the company had two employees, one its in-house accountant, and was registered with the tax authorities for PAYE and NICs

The Electoral Commission

- it had appointed a leading firm of London accountants - as its auditors, and a firm of London solicitors as its legal advisers
- the company intended to file accounts in accordance with the Companies Acts and the group's status

8. Your view was that this further evidence supported the party's view that the company was a permissible donor as prescribed in the Act.

9. The Commission has concerns about the extent and robustness of the initial permissibility checks carried out by the party into such significant donations within 30 days of their receipt. We shall want to follow this up with you with you with a view to ensuring that you have a robust checking process for all corporate donations. We shall be having similar discussions with all political parties.

10. However, the Commission's view is that, based on all the evidence which the party now has, and subject to any further information becoming available, it is reasonable for the party to regard the donations as having been permissible.

11. I would, however, be grateful if you would keep us informed of any further developments, particularly if any further information comes into the public domain which would lead to you to change your position.

Yours sincerely,
Peter Wardle

Peter Wardle
Chief Executive

An independent body established by Act of Parliament

Annex E: Letter to all political parties regarding donation criteria

The Electoral Commission

Letter sent to political parties that had reported having recieved a donation in the previous year.

Copy

2 November 2005

Permissibility of Corporate Donations

1. There has, as you will be aware, been some recent interest in the steps taken by political parties to establish the permissibility of donations from companies, and the Commission considers it appropriate to provide registered party treasurers with an indication of the tests we consider a party should consider undertaking before accepting a corporate donation. We will be developing more general guidance on permissibility, incorporating the issues set out in this letter. As your party has received corporate donations in the past and/or is likely to do so in the future, we would particularly welcome your comments on the advice set out below.

2. Section 54 (2) (b) of the Political Parties, Elections and Referendums Act 2000 lays down three requirements, each of which must be met in order for a company to be a "permissible donor" to a political party. These are that the company:

- is registered under the Companies Act 1985 or the Companies (Northern Ireland) Order 1986;
- is incorporated within the United Kingdom or another Member State; and
- carries on business in the United Kingdom.

3. Section 56 of the Act requires that "all reasonable steps must be taken forthwith by or on behalf of a political party" to verify whether a donor is a permissible donor, within 30 days of receipt of the donation.

Test 1: Registration

4. This requirement can be easily checked through the Companies House website (http://www.companieshouse.gov.uk) by entering the company name or registration number, if provided.

The Electoral Commission
Trevelyan House
Great Peter Street
London SW1P 2HW

Tel 020 7271 0500
Fax 020 7271 0505
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Test 2: Incorporation

5. A company comes into existence when the Registrar of Companies issues a certificate of incorporation. The date that a company was issued with a certificate of incorporation can also be found by searching the Companies House website. If of course, the company is not registered in the United Kingdom, a party would need to conduct an equivalent search for evidence of incorporation within another Member State.

Test 3: Carrying on business

6. The Commission's view is that in order to discharge its responsibilities under Section 56 of the Act, a political party should, in relation to the "carries on business" test, take all reasonable steps to establish that at the time a donation is made, the company is in a position to and was in fact carrying on business in the United Kingdom.

7. It is worth bearing in mind what the Government said in relation to "carrying on business" in its July 1999 paper *The Funding of Political Parties in the United Kingdom*, in response to the recommendations in the 5th Report of the Committee on Standards in Public Life:

> *.....a check against the [Companies House] register will not be sufficient to establish that a company incorporated in the United Kingdom is carrying on business here. Where there is any doubt as to whether a corporate donor is genuinely carrying on business in the United Kingdom it will therefore be necessary for registered political parties to make some additional enquiries in order to establish that the donor qualifies as a permissible source. This is, however, a simple test, and in the great majority of cases a corporate donor's business activities in the United Kingdom should be well known to the political party in question* (paragraph 4.10)

8. The phrase "carrying on business" has been considered by the courts on a number of occasions particularly in relation to the test of company residency, and the Commission seeks to interpret and apply it in accordance with those decisions. Some helpful guidance as to the sort of questions the Commission considers parties should 9. ask about a company can be found in the HM Revenue & Customs *Statements of Practice* and *Business Information Manual* which comment on "carrying on business" and the "badges of trade" (http://www.hmrc.gov.uk).

10. It is important that parties document that process they undertake to establish permissibility. In the event of queries about a particular donation, parties should be able to provide evidence of the robustness of their donations checking systems.

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Democracy matters

An independent body established by Act of the UK Parliament

INVESTOR IN PEOPLE

The Electoral Commission

11. I hope that you find this letter helpful in assessing the permissibility of corporate donations. FOR PPP attendees: If necessary the Commission would be happy to place this subject on the agenda for the next parliamentary parties panel meeting in November. In the interim, please do not hesitate to contact me if you have any urgent queries. FOR OTHERS: If you have any queries about the approach set out in this letter, please do not hesitate to contact me.

Yours sincerely

Christopher Welford
Director of Regulatory Services
020 7271 0517
cwelford@electoralcommission.org.uk

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Democracy matters

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INVESTOR IN PEOPLE

Annex F: Donated flights invoice and note

5th Avenue Partners GmbH

INVOICE

5th Avenue Partners Limited
26 Upper Brook Street
London
W1K 7QE

Invoice date: 30 June 2005
Invoice no: 05001
Ref: SAVE01

Detail	Amount
Recharging Jet Club invoices	
002423 (£12,840.00 @ 0.705219)	€18,207.11 ✓
002438	€46,000.00 ✓
002451	€8,315.00 ✓
	€75,522.11

ALPENSTRASSE 11, CH-6300, ZUG, SWITZERLAND
TEL: +41 41 763 2930 FAX: +41 1 355 3226

I confirm that the cost of the flights provided by me to Liberal Democrat General Election Campaign were met by 5th Avenue Partners Limited

Michael Brown

TOTAL P.003

Annex G: The Party's donations report

1430

LIBERAL DEMOCRATS

DONATIONS REPORT RECORD – INCOMING PAYMENTS

The recipient of any recordable donation under the PPERA 2000 should attach the cheque/supporting voucher/accompanying letter to this form and having completed the details at the top of the form, ensure the procedure below is strictly followed. The legislation comes into force for anything received from 16th February 2001. Therefore we must comply with this protocol for all donations of more than £200 with immediate effect.

8187460

Name of Donor 5th Avenue Partners Ltd TEN DOMINION STREET

Address of Donor ~~Alpenstrasse 11 CH6300 Zug Switzerland~~ LONDON EC2M 2EE

Membership Number (if applicable)

Name of Account on which cheque is drawn

1/3 **Date Received** 25.2.05 **Amount** £150,000.00 ✓

Type of Donation

Donation	✓	Gift in Kind	
Membership Subscription		Bequest	

Type of Donor
INDIVIDUAL/REGISTERED POLITICAL PARTY/COMPANY/TRADE UNION/ BUILDING SOCIETY/LIMITED LIABILITY PARTNERSHIP/FRIENDLY OR OTHER REGISTERED SOCIETY/UNINCORPORATED ASSOCIATION/PUBLIC BODY/OVERSEAS VISIT

Accounting Unit receiving donation FEDERAL/ENGLAND/WALES

The following section is for Membership Department use only (to be completed by [redacted]

[redacted]

Permissibility Information (electoral number, registered company number, trust details)

05073942 COMPANY REG

LIBERAL DEMOCRATS

DONATIONS REPORT RECORD – INCOMING PAYMENTS

The recipient of any recordable donation under the PPERA 2000 should attach the cheque/supporting voucher/accompanying letter to this form and having completed the details at the top of the form, ensure the procedure below is strictly followed. The legislation comes into force for anything received from 16th February 2001. Therefore we must comply with this protocol for all donations of more than £200 with immediate effect.

Name of Donor 5th Avenue Partners Limited

Address of Donor TEN DOMINION STREET

LONDON EC2M 6E

Membership Number (if applicable)

Name of Account on which cheque is drawn 8187460

Date Received 10/11/05 9/2/05 **Amount** £100,000.00

Type of Donation

Donation	.....	Gift in Kind	.....
Membership Subscription	.....	Bequest	.....

Type of Donor
INDIVIDUAL/REGISTERED POLITICAL PARTY/COMPANY/TRADE UNION/ BUILDING SOCIETY/LIMITED LIABILITY PARTNERSHIP/FRIENDLY OR OTHER REGISTERED SOCIETY/UNINCORPORATED ASSOCIATION/PUBLIC BODY/OVERSEAS VISIT

Accounting Unit receiving donation FEDERAL/ENGLAND/WALES

The following section is for Membership Department use only (to be completed by [redacted]

[redacted]

Permissibility Information (electoral number, registered company number, trust details)

05073942 COMPANY REF.

LIBERAL DEMOCRATS

DONATIONS REPORT RECORD – INCOMING PAYMENTS

The recipient of any recordable donation under the PPERA 2000 should attach the cheque/supporting voucher/accompanying letter to this form and having completed the details at the top of the form, ensure the procedure below is strictly followed. The legislation comes into force for anything received from 16th February 2001. Therefore we must comply with this protocol for all donations of more than £200 with immediate effect.

Name of Donor 5th Avenue Partners

Address of Donor 70N Dominion Street
London EC2M 2EE

Membership Number (if applicable) 8/87460

Name of Account on which cheque is drawn

11/4th **Date Received** 30/3/5 **Amount** £32,000

Type of Donation

Donation	✓	Gift in Kind	
Membership Subscription		Bequest	

Type of Donor
INDIVIDUAL/REGISTERED POLITICAL PARTY/COMPANY/TRADE UNION/ BUILDING SOCIETY/LIMITED LIABILITY PARTNERSHIP/FRIENDLY OR OTHER REGISTERED SOCIETY/UNINCORPORATED ASSOCIATION/PUBLIC BODY/OVERSEAS VISIT

Accounting Unit receiving donation FEDERAL/ENGLAND/WALES CS

The following section is for Membership Department use only (to be completed by [redacted]

[redacted]

Permissibility Information (electoral number, registered company number, trust details)

Book 21
124-203 (113)

LIBERAL DEMOCRATS

DONATIONS REPORT RECORD – INCOMING PAYMENTS

The recipient of any recordable donation under the PPERA 2000 should attach the cheque/supporting voucher/accompanying letter to this form and having completed the details at the top of the form, ensure the procedure below is strictly followed. The legislation comes into force for anything received from 16th February 2001. Therefore we must comply with this protocol for all donations of more than £200 with immediate effect.

Name of Donor 5th Avenue PARTNERS LIMITED.

Address of Donor TEN DOMINION STREET

LONDON EC2M 2EE

Membership Number (if applicable)

Name of Account on which cheque is drawn

Date Received 22/3/5 **Amount** £1,536,064.80

Type of Donation

Donation ✓ Gift in Kind

Membership Subscription Bequest

Type of Donor
INDIVIDUAL/REGISTERED POLITICAL PARTY/COMPANY/TRADE UNION/ BUILDING SOCIETY/LIMITED LIABILITY PARTNERSHIP/FRIENDLY OR OTHER REGISTERED SOCIETY/UNINCORPORATED ASSOCIATION/PUBLIC BODY/OVERSEAS VISIT

Accounting Unit receiving donation FEDERAL/ENGLAND/WALES

The following section is for Membership Department use only (to be completed by [redacted]

[redacted]

Permissibility information (electoral number, registered company number, trust details)

Annex H: The Party's Executive Summary to the Commission

Private and confidential

NOTE FOR MEETING WITH ELECTORAL COMMISSION IN RESPONSE TO THE EC'S LETTER OF 30 OCTOBER 2009

ARGUMENTS TO BE PRESENTED ON BEHALF OF THE LIBERAL DEMOCRATS PARTY CONCERNING DONATIONS OF £2.4M BY 5TH AVENUE PARTNERS LIMITED IN SPRING 2005

Executive Summary

- The primary question is whether 5th Avenue Partners Limited, the relevant donor, was carrying on business in the UK at the time of the donations. That is the test set out in s 54 PPERA and the Court of Appeal in the recent UKIP case has confirmed that if that question is answered in the affirmative then there can be no case for forfeiture.
- There is an overwhelming body of evidence that 5th Avenue Partners Limited was indeed carrying on business in the UK at the time of the donations. The Electoral Commission therefore has no jurisdiction to consider whether to make an application for forfeiture.
- The Liberal Democrats took all reasonable steps at the time of the donations to establish that 5th Avenue Partners Limited was carrying on business in the UK. In particular, given the size of the donations Special Branch were asked to investigate and gave the company and Michael Brown a clean bill of health.
- The Electoral Commission has previously expressly stated (in October 2005 and May 2006 and again in January 2007) that it was reasonable for the Party to regard the donations as permissible (the test under s56 PPERA). There has been no new evidence which changes that conclusion.
- The Court of Appeal in the UKIP case clearly stated that *"no party... need ever put itself in jeopardy of an order under s58 (2)* [forfeiture] *if it proceeds as envisaged by s.56"*.
- Accordingly there are no grounds upon which the Electoral Commission could decide to apply for a forfeiture order.
- Indeed it would be contrary to the Electoral Commission's own criteria of reasonableness, proportionality and natural justice for the Commission to consider applying for a forfeiture order. Donors would be deterred from making donations to any political party (if such donations could be under threat 4 ½ years after they have been made in circumstances where the Commission has accepted that the relevant Party took the appropriate steps required under s56).
- Worse still for the Liberal Democrats, if the Electoral Commission decided to seek a forfeiture order now, on the eve of a General Election, then notwithstanding that the Party would be confident of defeating such an order, the fact of the application itself would kill donations to the Party (since donors would be worried about the threat of forfeiture) and that would cripple the Party's prospects in the General Election.
- 4 ½ years after the donations were made, for the last General Election, the Liberal Democrats have a legitimate expectation that this matter will now be closed.

Annex I: 5th Avenue Ltd case summary

The Electoral Commission

Investigation into donations to the Liberal Democrats reported as being from 5th Avenue Partners Limited

1. Case Summary

1. The Electoral Commission has investigated donations made to the Liberal Democrats and reported as being from 5th Avenue Partners Limited, to determine whether those donations were within the rules for political donations under the Political Parties, Elections and Referendums Act 2000 (PPERA).

1.1. Enquiries concerning the donations began in May 2005 but were suspended in March 2007 at the request of the City of London Police. The Commission was only able to resume its investigation at the conclusion of the criminal proceedings in November 2008, at which time Michael Brown, the sole director of 5th Avenue Partners Limited, was convicted of theft, furnishing false information and perverting the course of justice.

1.2. During its investigation the Commission has made a number of enquiries and obtained and considered a large volume of documents, including evidence used in the criminal proceedings against Michael Brown. Those documents became available to the Commission in May 2009, some time after the investigation was resumed.

1.3. Having carefully examined the evidence and the applicable law, the Commission has concluded that 5th Avenue Partners Limited met the permissibility requirements under PPERA, and therefore was a permissible donor. The Commission also considers that there is no reasonable basis, on the facts of this case and taking into account the relevant law, to conclude that the true donor was someone other than 5th Avenue Partners Limited.

1.4. No evidence emerged during the investigation to change the Commission's previously expressed view that it was reasonable for the Liberal Democrats, based on the information available to them at the time, to have regarded the donations as permissible.

The donations

The donations reported as being from 5th Avenue Partners Limited are as follows:

i 10 Feb 2005, £100,000

ii 25 Feb 2005, £151,000

iii 22 Mar 2005, £1,536,064.80

iv 30 Mar 2005, £632,000

v 06 May 2005, £30,000 for use of aircraft for 5 days

2. Requirements in relation to political donations

2.1. There are a number of rules under PPERA in relation to what donations can be accepted by political parties.

2.2. Parties can only accept donations from 'permissible' donors. A permissible donor is, in the case of an individual, someone who is registered on the electoral register. In the case of a company, a permissible donor must be registered under the Companies Act 1985; incorporated within the United Kingdom or another member State; and carrying on business in the United Kingdom at the time of the donation.

2.3. If a party receives a donation from an impermissible source it should return the donation within 30 days. Where a party has accepted a donation which it was prohibited from accepting, or accepted a donation despite being unable to establish the permissibility of the donor, the Commission may seek a court order that an amount equal to the impermissible donation be forfeited.

3. Key issues in this case

The investigation focused on the two key issues of the case, set out below:

1) Was 5th Avenue Partners Limited a permissible donor?

3.1. 5th Avenue Partners Limited was registered under the Companies Act 2005 and was incorporated within the UK, as required by PPERA. The issue to be determined was whether it was carrying on business in the UK at the time of the donations.

3.2. The evidence indicates that 5th Avenue Partners Limited undertook a number of actions consistent with carrying on business, including;

opening business bank accounts with a major high street bank, opening trading accounts with a financial services broker, contracting for staff/services and passing company resolutions. In February 2005 it deposited a substantial sum of money into one of its trading accounts, which was then used for options trading and in March 2005 the company entered into a lease for offices. During February and March 2005 it also spent substantial sums on office furniture and equipment. Some of these activities occurred shortly after the initial donations were made; a number of others were undertaken in advance of the donations.

3.3. Based on the evidence, the Commission has concluded that 5th Avenue Partners Limited met the permissibility requirements under PPERA and was, therefore, a permissible donor..

2) Was 5th Avenue Partners Limited the true donor?

3.4. The Commission considered whether there was a basis for concluding that either Michael Brown, as an individual, or 5th Avenue Partners GmbH, a company incorporated in Switzerland and which was the parent company of 5th Avenue Partners Limited, was in fact the true donor. Neither Michael Brown nor the parent company would have qualified as permissible donors under PPERA.

3.5. The Commission considers that there is no reasonable basis taking into account the facts of this case and the relevant law to conclude that the true donor was anyone other than 5th Avenue Partners Limited. The Commission looked at the relevant evidence and considered that there was no reasonable likelihood that a court would find that 5th Avenue Partners Limited acted as an agent on behalf of either Michael Brown or 5th Avenue Partners GmbH when making the donations. The Commission also considered whether company law allowed the actions of 5th Avenue Partners Limited to be treated as the actions of Michael Brown or 5th Avenue Partners GmbH. The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.

3.6. There is no credible evidence that any of the donations came from Michael Brown's own money rather than from one of his companies.

3.7. For three of the donations (the donations of £100,000, £151,000 and £632,000), the evidence indicates that money in relation to these came from money transferred into 5th Avenue Partners Limited by investors.

3.8. For the other two donations (the cash donation of approximately £1.54m and the non-cash donation of £30,000) the movement of funds was different, in that the parent company was involved.

3.9. The source of funds for the donation of approximately £1.54m can be traced as having originated with investments into the parent company. Funds were transferred from the parent company bank account to the UK company bank account. E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party. The sum of €2,250,000 was transferred to 5th Avenue Partners Limited. Shortly thereafter €2,225,000 was transferred from 5th Avenue Partners Limited bank account to the Liberal Democrats. The money arrived in one of the Party's accounts on 22 March 2005 having already been converted into sterling in the sum of £1,536,064.80.

3.10. The Commission considered whether the transfers amounted to an agency arrangement. An agency arrangement is a form of agreement that one person acts on behalf of another. An agency arrangement would not arise purely because a holding company made funds available to its subsidiary. It is commonplace for holding companies to transfer funds to subsidiaries.

3.11. The Commission considered whether the transfer amounted to agency, whereby 5th Avenue Partners GmbH arranged for 5th Avenue Partners Limited to act on its behalf. The facts do not support such a conclusion. There is no evidence of an express agency agreement. Additionally, there is no evidence of a motive for the parent company to use the UK company to make the donation on its behalf. Any benefit from making the donations appeared to relate primarily to the UK company rather than its parent, which did not support a conclusion that the UK company was merely acting as a conduit for its parent. There is also no evidence that the manner of transfer of funds was intended to conceal the true source of the donation or to evade the requirements of PPERA.

3.12. The cost of the non-cash donation of £30,000 in relation to flights was originally met by 5th Avenue Partners GmbH. The Liberal Democrats provided documents to indicate that the cost of the donations was ultimately met by 5th Avenue Partners Limited. This evidence included an inter-company recharge invoice from 5th Avenue Partners GmbH to 5th Avenue Partners Limited and a statement from Michael Brown confirming that the cost of the flights was met by 5th Avenue Partners Limited. Whilst there was concern about the reliability of these documents there was insufficient evidence to contradict the information provided by Michael Brown and 5th Avenue Partners Limited. On the facts of this case the Commission was of the view, in relation to this non-cash donation that there was no reasonable

likelihood that a court would find that that 5th Avenue Partners GmbH was the true donor rather than 5th Avenue Partners Limited.

Annex J: Mr P's complaints to the Commission

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Subj: **COMPLAINT AGAINST CHIEF EXECUTIVE AND CHAIR OF ELECTORAL COMMISSION**
Date: 10/07/2010
To: [redacted]@electoralcommission.org.uk

[redacted]

Please treat the following as a complaint against the Electoral Commission. I have sent copies to N [redacted] who are dealing with the FOI aspects.

[redacted]

[redacted]

10th July 2010

Your ref': FOI 48/10

I refer to your late response to my request under the Freedom of Information Act, received on 5th July 2010. In light of your late response to my related request, your reference FOI 35/10, it is clear that the Electoral Commission are serial offenders when it comes to complying with guidance from the Information Commissioner. It took a complaint to the Information Commissioner to get a response from you, relating to 35/10, and I have also had to make a complainant of delay in relation to 48/10.

I set out below e-mails relating to FOI 48/10:

Your reference: FOI 48/10- dated 22/6/10

By your own reckoning you ought to have responded to the above request on or before 21st June 2010 and once again you have gratuitously ignored the law. You failed to respond to my related request, FOI 35/10, within the statutory period, until I was forced to make a complaint to the Information Commissioner (IC), and it seems that I will have to make a complaint in this case.

If I do not hear from you by 12 noon on Thursday 24th June 2010, indicating you will respond within a reasonable time, I will make a complaint to the IC without further warning. Casually ignoring the law for a second time, once again without any attempt to contact me, indicates contempt for the law and a gross discourtesy to me. Further apologies are insufficient because it now appears that it is policy, on the part of the Electoral Commission, to deliberately delay answering my questions.

FOI 48/10- dated 23/6/10

I would like to apologise for the delay in responding to your request. We are carefully considering your request and aim to respond by the end of next week at the very latest. We aim to reply to all FOI requests within 20 working days and regret that we have not been able to meet this deadline.

I am extremely sorry for the inconvenience caused.

FOI 48/10- dated 23/6/10

I am prepared to give you until 4.0pm on 2nd July to respond to my request, but if you do not do so I will make a complaint to the Information Commissioner. If it is your intention to simply copy the same response as you gave in FOI 35/10, I will require an explanation on why this extension was necessary.

In relation to FOI 48/10, you did not have the courtesy to contact me to say you could not respond within twenty working days and I had to chase the matter up by e-mail. You

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[redacted]

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responded, stating that you would respond *"by the end of next week at the very latest"*, which would have been no later than Friday 2nd July 2010. When you failed to respond or otherwise contact me by 2nd July 2010, I reported the Electoral Commission to the Information Commissioner because I felt it was unreasonable that you had not responded, by that date.

I now turn to your response to 48/10 and request that you review the decision not to disclose [redacted] relevant information. Before giving my reasons why the information should be disclosed, I make the general point that where the Electoral Commission has erred in law or made a perverse decision or through negligence failed to carry out such investigations as were reasonable in the circumstances to fulfil its statutory duty, then it is in the public interest that information exposing those failings is made public.

To help make relevant points under 48/10, I believe it will be helpful if I firstly mention the related request under 35/10, which is currently under review:

4. Does the EC hold any information, in any form whatsoever, indicating that during its deliberations it understood that as an incorporated company, 5th Avenue Partners Ltd had a legal identity of its own and that investors money was under the control of the company?

You confirmed that you held information *relating* to the structure of the company and the provenance of the donations, but go on to say that the requested correspondence is exempt from disclosure. You are reviewing this decision and hopefully you will answer the specific questions posed, but bearing in mind I sent in my original request for this information on 24/03/2010 and the matter is still unresolved, this is a very poor performance on the part of the Electoral Commission

In response to the above question, under 35/10, you concede that you hold information relating to the formation and structure of 5th Avenue Partners Ltd and the provenance of the donations, so it is reasonable for me to believe that you understood that an incorporated company has a legal identity of its own. Additionally, in the case summary, you detail the direct or indirect movement of investors' money into the accounts of 5th Avenue Partners Ltd, so I think it is fair to say that you understood that this money was in the possession or control of the company.

In the response to 35/10 you state:

The scope of the Commission's investigation was such as to establish the identity of the donor and whether that donor was a permissible donor. The terms under which money was held by the company was not something it was necessary for the Commission to directly determine.

There is no dispute that Mr Brown was convicted, under the Theft Act 1968, of stealing investors' money from the company's accounts and donating part of the proceeds to a political party. Your contention seems to be that because the money was in the possession and control of the company and the donation was in its name, there was no requirement to investigate further, for the purposes of establishing if the donations were valid under the PPERA. I say this is perverse and you neglected your duty by not investigating further

Section 5(1), Theft Act 1968, states that property shall be regarded as belonging to *any person* having possession or control of it. For the purposes of *this* section of the Act, *any person* includes a corporate body.

From the case summary, you believe that 5th Avenue Partners Ltd met the requirements of Section 54(2) PPERA and if that is the case, on your own reasoning, the investors' money was in the possession or control of the company. Therefore, when Brown stole the money and used it for a political donation he stole the money from the possession or control of the company, as per

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Section 5(1) Theft Act 1968.

It is a physical and legal impossibility for the separate legal entity of 5th Avenue Partners Ltd to donate money that has been put beyond its possession and control by an act of theft. A donation is a gift and this explicitly means that the donor must consent to the donation. 5th Avenue Partners Ltd could not possibly consent to a donation beyond its physical and legal control.

If a person's wallet is stolen, containing a credit card, and the thief uses the card to make a donation to a political party, in the name of the card holder, that cannot be a donation from the owner of the wallet, even though it is in his name. The same principle applies if a company credit card was stolen and used in the same way; it is not a donation from the company. By your reasoning, the donation is from the card holder and that is simply perverse.

I believe that the above represents a compelling case for believing that the Electoral Commission made a perverse decision in relation to 5th Avenue Partners Ltd and consequently all the information relating to the case should be made public. There can be no public interest in concealing anything, which could indicate a public body has failed in its statutory duty.

The above arguments are based on the assumption that the company met the requirements of Section 54(2) PPERA and the purpose of my request, under 48/10, is to demonstrate that in the alternative 5th Avenue Partners Ltd did not meet those requirements.

I now turn specifically to 48/10. In doing so I will demonstrate that the corporate veil was lifted and you erred in law by finding to the contrary. Firstly, I will deal with question 1 of my request, which states:

1. In reaching its decision that the corporate veil could not be lifted, did the Electoral Commission refer to any specific legal precedents on the circumstances in which the corporate veil could or could not be lifted and if so please name the cases?

You claim legal professional privilege for not disclosing this information. I am not seeking the legal advice received or interpretation of any particular legal precedents. I am merely seeking the names of the legal precedents referred to. You admit cases were referred to and as it is my case that you erred in law, there is a public interest in disclosing the law upon which decisions were made, statute or common law.

In paragraph 3.5 of the case summary you state

"..... there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation" and consequently there was no likelihood that the donation could be proven to be other than a permissible donation from 5th Avenue Partners Ltd.

I reasonably believe that this is a gross misinterpretation of the common law relating to 'lifting the corporate veil.' The Electoral Commission has made a public statement, but when it is challenged hides behind legal privilege and refuses to give the legal basis for the statement.

In the paragraph 3.1 of the case summary, you state that 5th Avenue Partners Ltd was registered under the Companies Act 2005. There is no such legislation. Possibly, you are referring to the

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11 August 2010 [redacted]

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Companies Act 2006, which replaced the Companies Act 1985. In any case, 5th Avenue Partners Ltd was incorporated on 15/03/2004 so it could not have been registered under the Companies Act 2006 because the Act did not receive the Royal assent until November 2006. If you make a simple mistake like this, you could have made mistakes on more fundamental points of law.

You know perfectly well that I am not asking for the legal advice or any interpretation of the cases referred to. I simply want the names of the cases so I can judge for myself whether they bear the interpretation you claim or you have referred to the correct cases. You refer to the PPERA and Companies Act, in the case summary, and no doubt both these statutes were mentioned in legal advice, but you do not seek to keep the names of the statutes secret. It would be ridiculous if you did, yet the names of the case law referred to, which forms part of our common law, are perversely kept secret. If you disclose the names of statutes mentioned in legal advice there is no justification for withholding the common law referred to. You have the right to waive the legal privilege you believe you have, which I dispute, so exercise your discretion and name the cases. It cannot be in the public interest to conceal evidence, which will show whether the correct common law was referred.

Please review your decision not to disclose the legal precedents you referred to.

I now set out the remainder of my request under 48/10, to which you seem to admit holding the information or some of the information:

2. Does the Electoral Commission hold any information whatsoever, indicating that at the time of incorporation or subsequent to incorporation, 5th Avenue Partners was *used* as a vehicle for impropriety: namely facilitating theft or fraud or otherwise acquiring, retaining or controlling money obtained through dishonesty?

3. Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd was corporately a party to theft or fraud?

4. Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was the sole director of 5th Avenue Partners Ltd.?

5. Does the Electoral Commission hold any information whatsoever indicating that Michael Brown had ultimate control of 5th Avenue Partners Ltd; through his control of the parent company, 5th Avenue Partners GmbH, or was otherwise the controlling mind behind 5th Avenue Partners Ltd?

6.Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was personally involved in stealing or fraudulently obtaining money controlled by 5th Avenue Partners Ltd.

7. Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was personally involved in directly stealing from or directly defrauding any named private individual(s) as opposed to 5th Avenue Partners Ltd or any other corporate body?

9. Detective Sergeant [redacted] of the City of London Police's Economic Crime Unit told the Times newspaper of 29/11/2008 that 5th Avenue Partners Ltd was *"just a sham"*. In paragraph 3.2 of its judgment, the Electoral Commission gives examples to allegedly demonstrate that 5th Avenue Partners Ltd was carrying on a business. Does

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11 August 201[redacted]

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the Electoral Commission hold any information whatsoever indicating that while 5th Avenue Partners Ltd may have had the appearance or even the processes to operate as a genuine business, office, bank account etc, it fundamentally failed to operate as a legitimate business because its *raison d'etre* was to facilitate theft or fraud?

10. Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd received any substantial income, which was not later stolen or was in the course of being stolen or obtained fraudulently when it came under the control of the company?

11. Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd made its donations to the Liberal Democratic Party from monies it generated lawfully and not from criminal activity?

12. Does the Electoral Commission hold any information whatsoever indicating that under the PPERA, a company used primarily to facilitate theft or fraud can be described as carrying on a business?

For convenience I have retained the original numeration.

Please forgive me if I am misunderstanding your position on disclosing the above information. You seem to be saying that while you hold some or all the information, it is exempt from disclosure on grounds of public interest. I made it very clear in my request that a yes or no answer would sufficient to satisfy my request. By saying that you do hold all or some of the information and then claiming a public interest exemption, you seem to be confirming what I want to know because you can only claim an exemption if you possess the information. It may be my misunderstanding, but to make progress I will assume you are claiming exemption and proceed accordingly. You can always clarify the position when responding to my request for a review.

I do not think it is necessary to go through each request, because they are all interrelated and my general points will cover each.

As a result of statements made by the Crown at Mr Brown's trial and public statements by police after the trial; it is in the public domain that 5th Avenue Partners was controlled exclusively by Mr Brown; that 5th Avenue Partners Ltd was "*just a sham*" – a direct quote from the police- and simply a vehicle to facilitate theft of investors money; that Mr Brown was convicted of stealing a large sum of cash from a *named* investor- not the company- and that all the money donated to the Liberal Democratic party, in the name of 5th Avenue Partners, Ltd was part of the proceeds of the money he was personally convicted of stealing.

The brief summary of what is in the public domain encapsulates the information mentioned in my request, so the only question is: does the Electoral Commission hold the information referred to? The answer is apparently yes, for the reasons set out above.

There may be parts of the police report that are confidential, because that information is not in the public domain, but my request is based on information, which is most certainly in the public domain. As you are aware, I know what information is in the public domain and what I seek is confirmation that you possessed the information at the time you made the decision on the 5th Avenue Partners Ltd.

There can be no public interest exemption for information in the public domain and if required, I will call witnesses from the City of London Police on what was made public at the trial and in

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public statements they made to the media following Mr Brown's conviction.

Your general point seems to be that origins of the money donated to the political party were not relevant to your investigation because in your response you state:

The scope of the Commission's investigation was whether there was compliance with the party funding controls in the Political Parties Elections and Referendums Act 2000 (PPERA) and in particular the permissibility of donations under section 54 of that Act. It was not a matter for the Commission to determine whether a company was used as a vehicle for facilitating theft or fraud; this would generally be a matter for the police.

Frankly, I find this statement perverse. The police say the company was a sham to facilitate theft, but you seem to regard this as carrying on a business for the purposes of the PPERA or just as bad, not relevant to your investigation,. In the Bearwood Corporate Services Ltd case you state:

There is no definition in PPERA of "carrying on business". However, in other areas of the law, the term has been interpreted broadly. It is not necessary for a company to generate profit. A company need not be actively trading, provided that the company continues to engage in business transactions, such as employing staff or paying for business facilities. Additionally, even if a company has not yet traded, provided that it is preparing to do so, it is likely to be within the scope of "carrying on business".

In paragraph 3.2 of the case summary, in the 5th Avenue Partners Ltd case, you describe the activities the company engaged in. On the face of it these activities seem to meet the requirements you refer to in the Bearwood case. However, in a public statement, the police refer to 5th Avenue Partners Ltd as a company with a blue-chip name that formed part of a lavish facade, erected by Brown to fool rich investors into trusting him. The police statement continued: *"It's part and parcel of the offence. It's part of the thing about him having a chauffeur and being a member of the Caledonian Club and working from fancy offices in Mayfair. It's part of the persona. 5th Avenue sounds very prestigious.....but was just a sham."* In court it was said that the political donations were another status symbol because it made him seem important and well connected, so the donation itself was part and parcel of the deceit by which he gained the trust of rich investors in order to cheat them.

The company was resource by crime and all or most of its income was stolen money or money in the course of being stolen. It was nothing more than a lavish facade erected by Brown to fool investors into trusting him so he could steal their money, which he did on a huge scale. Its *raison d'etre* was to facilitate theft or fraud by Brown, so it was Brown who was stealing the money and the company was the mere instrument he created to facilitate his crimes. This is not just my opinion, but the police, the Crown Prosecution Service and the court that convicted Brown.

The final question of my request under 48/10 states:

> **12. Does the Electoral Commission hold any information whatsoever indicating that under the PPERA, a company used primarily to facilitate theft or fraud can be described as carrying on a business?**

You responded:

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11 August 2010 [redacted]

1156

We do hold information in relation to whether or not 'a company used primarily to facilitate theft or fraud can be described as carrying on a business'.

You continue by stating that the Commission considers *"this information"* to be exempt under the FOI. Surely your response is an admission you possess the information and based on the nature of my request, under question 12 above, any reference to exemptions is superfluous and confusing.

Quite obviously you knew that 5th Avenue Partners Ltd was used primarily to facilitate theft or fraud and concluded that for the purposes of Section 54(2) PPERA, theft and fraud was classed as carrying on a business, *or* this knowledge was not relevant to your findings. It is my understanding, from your response, that the latter was the case, but in either case this is a perverse position.

For the purposes of lifting the corporate veil, it is immaterial if a company has all the appearances of a normal company, if those appearances are part of a deceit to facilitate theft or fraud. The deception that 5th Avenue Partners Ltd was a prestigious company was just that: a deception. As a matter of law and common sense, where a company is the instrument used to facilitate theft or fraud the corporate veil is always lifted. A court will look beyond the deceit to the reality of the situation, but you ignored reality and consequently acted unlawfully.

A director cannot use a company to facilitate theft or fraud and then turn to his victims and say: "It wasn't me guv, it was the company?" Well, this is exactly what you are saying in relation to Brown and 5th Avenue Partners Ltd and you are wrong in law.

It seems to me that you have looked at the case of *Salomon v Salomon* [1897], but not taken into account modern exceptions.

The House of Lords has made it clear in *Standard Chartered Bank v Pakistan National Shipping Corporation {[2002] UKHL 43}*, that a director purporting to be acting on behalf of an incorporated body is personally liable if deceit is involved. As Lord Hoffmann put it in the Standard Chartered Bank case: *"No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and am not to be personally liable'"*. The "*someone else*", in the context of the case was, of course, a limited company.

The deceit in the 5th Avenue case was total. Everything was done with a dishonest intent to cheat investors out of their money. Personal liability for deceit is so self evident that once the elements of the fraud or theft are made out the corporate veil is lifted.

Mr Brown was personally convicted of stealing investors money, through the instrument of a sham company, so this is absolute proof that deceit is proven and the corporate veil pierced. It is self evident that the court, in convicting Brown of theft, had lifted the corporate veil, otherwise he could not have been convicted. In spite of this you stated in the case summary that a court was unlikely to lift the corporate veil, when you *knew* or *ought* to have known that a court had already lifted it.

Major drug dealers set up seemingly legitimate businesses to launder money and they have all the usual trappings of an office, accounts, staff, etc, but nevertheless they would not be classed as carrying on a business if they financed a political party with drug money. In principle, there is no difference between a company set up to launder drug money and one set up to facilitate theft or fraud. Both are fronts for criminal activity and the courts would automatically lift the corporate veil. In this case your interpretation of Section 54(2) PPERA was so narrow it resulted in a

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perverse decision.

If Brown was personally liable for the actions he perpetrated in the name of a company, then the donations he made to the political party must be personal donations and therefore impermissible because he was not eligible to make personal donations under the PPERA.

Section 1 Theft Act 1968 states:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief"and "steal" shall be construed accordingly.

Section 3(1) Theft Act 1968 states:

(1)Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

Section 5(3) Theft Act 1968 states:

Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

Brown was convicted of theft under the Theft Act 1968.Theft is always a personal liability under the Act. The victim can be an incorporated body; the perpetrator is always a human being. The above extracts from the Theft Act 1968 are relevant to this case because they strengthen my arguments that the donation was personal.

Brown, undoubtedly dishonestly appropriated investors money- the conviction proves this- and he did so by assuming right of ownership over the money and treating it as his own by donating it to a political party, albeit deceitfully through a sham company. The personal assumption of the rights of ownership over the money, as per Section 3(1) Theft Act 1968, proves decisively that the donation was personal and therefore unlawful under PPERA - he could not have been convicted of theft if he had not assumed personal rights of ownership. Additionally, Section 5(3) Theft Act 1968 makes it clear that the original owners, the investors, still retained *true* ownership of the money, so he acted *deceitfully* by concealing from the political party that the money was stolen- it cannot be described as anything else and according to the Crown was part of the overall deceit used by Brown to cheat rich investors. It is part of the course of conduct used by Brown and contributes to the reasons justifying the lifting of the corporate veil.

The investors may have retained true ownership of the money, but of course, they could not and did not make the donations because the money had been stolen from them by Brown.

In the case summary you give a great deal of financial detail about the donations and this could only have come from documentation provided by the police. You have therefore disclosed key information from a source you claim insists on strict confidentiality, so it is nonsense that you now purport that rules of strict confidentiality apply. If you can supply very detailed financial information from the allegedly confidential source, you can answer my questions about information already put in the public domain.

For all the reasons set out above, I request that you review your decision not to release the information and/or clarify, unequivocally, whether you hold the information or not.

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11 August 2010 [redacted]

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I also want the Electoral Commission to treat this letter as a complaint under the complaints procedure. A copy has been sent to [redacted] Committee Services Manager at the Electoral Commission.

My principal grounds for complaint are that the Electoral Commission failed in its statutory duty by reaching a perverse decision in the 5th Avenue Partners Ltd case. I consider this to be a complaint against the chief executive and chair of the Commission because they are ultimately responsible for the decision made in the 5th Avenue case. Unless I receive a prompt acknowledgment that the correspondence has been received, followed by satisfactory answer to my complaint within a reasonable time, I will make a complaint to the Parliamentary and Health Service Ombudsman through a Member of Parliament about this particular matter

My lesser complaint is that the service provided by the Commission in relation to FOI 35/10 and FOI 48/10 fell below acceptable levels for a public body. I do not want this to be considered as a complaint against any individuals I have had dealing with because my sole purpose in making this particular is to help you identify any failings and put them right.

I have already offered to meet with the Electoral Commission to discuss this case and I stand by that offer.

I do not regard this or related correspondence as confidential and will only regard future correspondence as confidential if specifically requested to do so and the request is reasonable. I do not object to my correspondence being passed to third parties the Commission may need to consult with, but I do not consent to my personal details being made *public* unless I expressly give my consent.

Yours sincerely

[redacted]

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11 August 2010 [redacted]

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Subj: [redacted]
Date: 27/07/2010 21:22:07 GMT Daylight Time
From: [redacted]
To: [redacted]

[redacted]

[redacted]

Secretary to the Commission Board
The Electoral Commission
Trevelyan House
30 Great Peter Street
London SW1P 2HW

27th July 2010

Dear Sir

COMPLAINT

1. I refer to your letter, received by e-mail on 21st July 2010, in which you decline to investigate my complaint that the Electoral Commission made a perverse decision in the 5th Avenue Partners Ltd case.

2. You state that the complaints process is not intended to raise detailed legal questions or challenge decisions with which I disagree. You continue:

Your primary complaint amounts to an allegation that the Commission has not acted lawfully in deciding not to take enforcement action following an investigation, rather than to referring to possible maladministration

3. You appear to concede that if my complaint related to maladministration, it would be investigated under the Electoral Commission's complaints procedure.

4. The Cabinet Office has issued a leaflet entitled *The Ombudsman in Your Files*. In Annex A, the Cabinet Office lists examples of maladministration given to the House of Commons by Richard Crossman, the minister responsible for taking the Ombudsman law through Parliament in 1967. Presumably, Mr Crossman knew what Parliament intended to be treated as maladministration.

5. ANNEX A

WHAT IS MALADMINISTRATION?

The "Crossman Catalogue"

Bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so

#339

31 August 2010 [redacted]

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6. I am complaining about perversity, something Mr Crossman told Parliament was an example of maladministration. A perverse decision is one that cannot be supported by the facts or law, so it would be entirely wrong for the Electoral Commission not to investigate evidence of perversity in relation to the 5th Avenue Partners Ltd case. I presented detailed reasons why the decision was perverse- unlawful- but the Electoral Commission refuses to investigate my detailed evidence on grounds that my reasons do not meet the Commissions definition of a complaint.

7. This is not a case where the Electoral Commission has considered my arguments and decided they have no merit. You have decided it is *"not appropriate for me to seek to consider.....the matters you raise under the Commissions complaints procedure."*

8. The Electoral Commission cannot possibly know whether they have made a perverse decision, unless they consider the matters I raise. Simply to summarily dismiss my arguments is to say: *"We stand by our decision regardless of whether you are right or wrong because your evidence does not fit neatly into our complaints procedure."*

9. It seems that the minutiae of the complaints procedure are more important than the possibility that the Electoral Commission may have acted unlawfully. I contend that a perverse decision amounts to maladministration *per se.* Even if the Electoral Commission contests this, the overriding point I am making is that regardless of circumstances, where a public body is given reasonable grounds to believe it may have acted unlawfully, it has a *duty* to investigate to ensure that no illegality has taken place. The alternative is to turn a blind eye and carry on regardless. I believe that I have given the Electoral Commission reasonable grounds to investigate; even if the Commission regards this as being outside the normal limits of the complaints procedure.

11. Without prejudice to the above, I am prepared to accept that generally, reasoned legal opinion is outside what is *normally* regarded as maladministration. In the leaflet, *The Ombudsman in Your Files*, there is a section on the relationship between judicial review and the Ombudsman procedure, which states that the Ombudsman *"...does not seek to interpret law but seeks to establish whether a public body acted correctly and fairly in carrying out its interpretation of the law."*

12. This tends to support your view that the *"complaints process is not intended as a channel by which to raise detailed legal questions, or to challenge decisions with which you disagree."* However, while opinion, including legal opinion, is not *normally* challenged as maladministration, I will now outline why, in addition to the above, in the exceptional circumstances of this case, my complaint does fall within the jurisdiction of your complaints procedure.

13. It is the duty of the Electoral Commission to administer and interpret the PPERA and you state your objectives to be:

We are an independent body set up by the UK Parliament. Our aim is to instill integrity and public confidence in the democratic process. Our key objectives are to ensure:

Transparency and integrity in party and election finance

Well-run elections, referendums and electoral registration

14. I think it relevant, when considering whether my complaint should be investigated, to consider if, in the case of 5th Avenue Partners Ltd, the Electoral Commission instilled integrity and public confidence in the democratic process by ensuring transparency and *integrity* in relation to the £2.4m of stolen money donated to the Liberal Democratic Party.

15. I can save a great deal of time by agreeing there was *prima facie* evidence that 5th Avenue Partners Ltd met all the requirements of Section 54(2b) PPERA. I include in this that the activities described in paragraph 3.2 of the case summary would, normally, amount to *prima facie* evidence

of *" carrying on a business."* Although the *prima facie* requirements of Section 54(2b) were met, I can also agree that in the wholly exceptional circumstances of this case, the Electoral Commission was correct by going to a second stage and considering whether, under company law, the actions of the company could be treated as the actions of its sole director, Michael Brown, which would make the donations impermissible because Brown was not personally entitled to make donations under the PPERA. This second stage is mentioned in paragraph 3.5 of the case summary, but having considered whether Brown could be made personally liable for the donations, in the next sentence, the Electoral Commission continues:

The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.

16. It is this single sentence that forms the principal basis of my complaint because I consider it to be a negligent misrepresentation of a material fact and therefore maladministration. I am sure the Electoral Commission will agree that if it has made a negligent misrepresentation of a material fact, in its case summary, this amounts to maladministration and ought to be investigated.

17. I will now go into detail about why I say this is a misrepresentation of a fact and not simply a disagreement over opinion.

18. From my Freedom of Information Act request and other investigations, I am satisfied that the Electoral Commission *knew* that 5th Avenue Partners Ltd was controlled by its sole director, Michael Brown; that the company was a facade, used by Brown, to facilitate theft or fraud of investors money; that all or most of its activities, including the activities described in paragraph 3.2 of the case summary, were part of the fraudulent facade; that all the money donated in the name of 5th Avenue Partners Ltd was stolen or fraudulently obtained from the victims of Brown's crimes and that Brown had been personally indicted on numerous counts of dishonesty relating to the fraudulent facade of his company.

19. Also, from my FOI investigation, it is very clear that the Electoral Commission believes that in the circumstances of the 5th Avenue Partnership Ltd case; provided the *prima facie* requirements of Section 54(2b) were met, then the donations were permissible *per se* and it was irrelevant that the company was a vehicle to facilitate crimes of dishonesty and the donated money was the proceeds of those crimes. This means that although the Electoral Commission went to the second stage, referred to above, in fact it decided that the second stage was unnecessary and all that was required for the donations to be permissible was *prima facie* evidence that the three elements of Section 54 (2b) were met.

20. I think the following response to FOI 48/10 is an excellent example of the Electoral Commissions position:

The scope of the Commission's investigation was whether there was compliance with the party funding controls in the Political Parties Elections and Referendums Act 2000 (PPERA) and in particular the permissibility of donations under section 54 of that Act. It was not a matter for the Commission to determine whether a company was used as a vehicle for facilitating theft or fraud; this would generally be a matter for the police.

21. In other words, a criminal can set up a company to facilitate theft or fraud or even launder drug money, but provided it is registered, incorporated and has the facilities to operate as a normal business, even if those facilities are used wholly or mainly to facilitate crime, it can finance a political party without breaching the PPERA.

22. Curiously, throughout the case summary, the Electoral Commission explains the law relating to

the PPERA in detail, but when it comes to explaining why the corporate veil was unlikely to be lifted, no supporting reasons or evidence is given other that the simple assertion that company law had been considered. The public does not know what company law was referred to or how it was applied and interpreted in relation to this case. It was a question of *"we are the experts, we know all that is required to make the right decision, so that is all you, the public, needs to know."* The assertion was so one sided and authoritive, it became a statement of material fact rather than the expression of a reasoned opinion.

23. Lord Bowen stated in *Smith -v- Land & Home Property Corporation [1884]:*

'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion..... But if the facts are not equally
known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.'

24. Although this was a contract case, the principle applies to this case. Only the Electoral Commission knows or purports to know the company law referred to, so the public has to take the Electoral Commissions assertion, relating to the corporate veil, on trust. This turns the assertion into a statement of material fact and not an expression of opinion. If that statement of material fact is false or misleading, it is a misrepresentation and therefore maladministration and not a mere disagreement over opinion. I believe there was a misrepresentation and it was a negligent misrepresentation. I note at this stage that under FOI 48/10, the Electoral Commission is refusing to disclose the legal precedents referred to, in deciding that the corporate veil was unlikely to be lifted, so it is impossible for the public to know the reasoning behind the decision. It really is a case of *"we know best."*

25. At the time the Electoral Commission made its statement of fact about the corporate veil, it knew that Brown- not his company- had faced an Indictment of eight criminal counts, at a *Crown Court*, relating to theft, criminal deception, money laundering and furnishing a false statement with intent to deceive. The Electoral Commission also knew that the role of 5th Avenue Partners Ltd was to facilitate Brown's personal criminal conduct. It is irrelevant that he was not convicted on all counts. What matters is that a Crown Court allowed the Indictment to proceed to a trial. Therefore, without doubt, at the time the Electoral Commission made its assertion, relating to the corporate veil, it knew that a *Crown Court* had already lifted it; otherwise the trial could not have proceeded. The fact that Brown was convicted, on some of the dishonesty counts, is absolute proof that the corporate veil was lifted; otherwise Brown could not have been convicted at all. Consequently, the statement of fact, that it was unlikely a court would lift the corporate veil, was a negligent misrepresentation and most certainly maladministration. I should add that the Indictment does not cover all crimes committed by Brown, just those that the Crown decided to prosecute. Additionally, the standard of proof in criminal proceedings is beyond a reasonable doubt, but the standard of proof for forfeiture of donations, under the PPERA, is just the balance of probability. Consequently, it would have been easier to prove that the donations ought to be forfeited than it was for the Crown to prove that Brown was personally liable for his crimes.

26. The House of Lords has made it clear in *Standard Chartered Bank v Pakistan National Shipping Corporation {[2002] UKHL 43}*, that a director purporting to be acting on behalf of an incorporated body is personally liable if deceit is involved. As Lord Hoffmann put it in the Standard Chartered Bank case: *"No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and am not to be personally liable'"*. The "*someone else*", in the context of the case was, of course, a limited company.

27. A director cannot commit theft or fraud in the name of his company and then evade personal

liability by saying it was the company and not him that was liable. In the 5th Avenue Partners Ltd case, the Electoral Commission turned the law on its head and allowed Brown, in effect, to say: *"It wasn't me that stole the money, defrauded investors and donated the proceeds of my crimes to a political party; it was my company!"* This is not company law and yet in paragraph 3.5 of the case summary, the Electoral Commission claims to have considered company law. It is self evident that *relevant* company law was not considered. Unless *relevant* company law was considered, like the Standard Chartered Bank case, the statement in 3.5 is a negligent misrepresentation and therefore maladministration.

28. To emphasise that the donations were from Brown and not his company, I will, as an example, analyse one of the counts Brown was convicted of:

Count 4

STATEMENT OF OFFENCE

THEFT, contrary to section 1(1) of the Theft Act 1968

PARTICULARS OF OFFENCE

MICHAEL BROWN on a day unknown between the 9th day of February 2005 and the 27th day of May 2005 stole a chose in action, namely a credit of $7,200,000 belonging to [redacted] and due from 5th Avenue Partners Limited to the said [redacted]

29. The accused was Michael Brown, not his company. The property belonged to [redacted] not 5th Avenue Partners Ltd. The property was a *chose in action*, a credit valued at $7.2m *due* to [redacted] from 5th Avenue Partners Ltd. Although the *chose in action* was *due* from the company, by its nature it belonged to [redacted] not the company. A bank account is an example of a *chose in action*. When the account is in credit, no actual money is in the account, but the sum credited to the account is *due* to the account holder because he is the absolute owner, not the bank The account holder can draw out some or all the money *due* to him at any time and use it for any purpose he wants. If some other person steals money from the account, it is exactly the same as stealing money physically in the possession of the account holder.

30. The same principle applies to the bank accounts of corporate bodies. Therefore, by way of a hypothetical example, if Brown had stolen a chequebook belonging to AB Ltd and used it to make a large donation to the Liberal Democrats, the donation would be in the name of AB Ltd, but by no stretch of the imagination could this be classed as a donation from AB Ltd, even if the company met the requirements of the PPERA. It was a donation from the thief.

31. I doubt if the Electoral Commission would argue that in the hypothetical case of AB Ltd, the donation was from the company, yet this is exactly what the Commission is arguing in the case of 5th Avenue Partners Ltd. The *chose in action*, the credit, was in the possession of 5th Avenue Partners Ltd and was *due* to [redacted] because he was the absolute owner, in the same way that a bank account holder is the absolute owner of money credited to the account. There was no stolen chequebook, but Brown used his control of 5th Avenue Partners Ltd to steal the *chose in action* by transferring it, wholly or in part, directly from the company account to the Liberal Democratic Party, in the name of 5th Avenue Partners Ltd. The company was the instrument by which he committed the theft, in the same way the chequebook was the instrument in the case of the hypothetical AB Ltd. Therefore, on transfer of the money, from the company to the political party, the donation was in the name of the 5th Avenue Partners Ltd, but it was not a donation from the company anymore than the donation in the hypothetical case was a donation from the company. It was a donation from the thief, Brown, who deceived the political party into believing that it was a lawful donation from a company, when in fact it was money stolen from [redacted].

32. I do not want to labour the point, but a further example may be helpful. If a person is murdered

in the course of a robbery and his credit card stolen and used to make a donation to a political party, in the name of the murdered card holder, the Electoral Commission's position, based on its reasoning in the 5th Avenue Partners Ltd case, is that this would be a permissible personal donation ,under the PPERA, from the victim, provided he was on the electoral register. The thief is the donor, not the victim.

33. A donation is a gift given freely and where money is stolen from [redacted], who I use merely as an example, or any other of Brown's victims, then the money is beyond the possession and control of the true owner(s) and whatever the thief does with the money is the actions of the thief and not the victims. Staying on this theme, the Electoral Commission has taken the view that the donations were from 5th Avenue Partners Ltd, but the Standard Chartered Bank case makes it clear that Brown was personally liable for the theft or fraud so it was he that made the donation. However, if the Electoral Commission, for what ever reason, believes the donation was from 5th Avenue Partners Ltd the question of whether the company consented to the donations becomes an issue.

34. Under the *Attorney General's Reference (No. 2 1982) CA* it was held that a person in total control of a limited liability company (by reason of his shareholding and directorship) is capable of stealing the property of the company.

35. Brown was in total control of 5th Avenue Partners Ltd so he was capable of stealing from the company. Under Section 5(1) Theft Act 1968, property will be regarded as being owned by any person, which includes a corporate body, having possession or control of it. If I take the *alternative* view that the donated money was in the *'owned'* of the company, as per Section 5 (1) Theft Act 1968, rather than [redacted] or other victims of Brown's crimes, then Brown stole the money from the company by transferring it to the political party. A company cannot commit theft any more than it commits an offence if an employee, while on company business, drives a company vehicle through a red traffic light. It follows, from *Attorney General's Reference (No. 2 1982) CA,* that Brown stole the money from the possession or control of the company so it could not consent to the donations.

36. The stated aims of the Electoral Commission include, ensuring *integrity* in party finances. Where is the integrity in accepting a situation in which a political party benefits directly from the proceeds of crime? Either the law is wrong or the Electoral Commission has made a serious error. If the law is wrong, I am not aware that the Electoral Commission has sought to have it amended; so on its own reasoning it is prepared to allow a situation to continue in which, provided a company meets all the requirements of the PPERA, it does not matter if the company is a front for organised crime. This is not what Parliament intended. Of course, the law is not wrong and through negligence the Electoral Commission had not carried out a thorough investigation and this has resulted in negligent misrepresentations in the case summary and a perverse judgment in the 5th Avenue Partners Ltd case.

37. I have narrowed and clarified the issues and regardless of which way the facts or law are interpreted, the donations were impermissible. For the reasons given above, I appeal against the decision not to treat my correspondence as a complaint. I am satisfied that my complaint relates to maladministration and not a mere disagreement over an opinion. I hope that the Electoral Commission now agrees that they should review the 5th Avenue Partners Ltd case under the complaints procedure, but if not I give notice that having exhausted the complaints procedure I will either take the matter to judicial review or to the Parliamentary Ombudsman via my MP.

38. Regardless of the indifference shown by the Electoral Commission, as to whether I am right or wrong, I am still prepared to attend a meeting to help resolve this matter. Although my complaint was directed at the chief executive and chair of the Electoral Commission, I do understand that they will be involved in the appeal so I will amend my complaint and direct it to the Electoral

44/48

31 August 2010 [redacted]

1/67

Commission generally.

Yours sincerely

[redacted]

31 August 2010 [redacted]

4945

1/74

Subj: **Re: Complaint**
Date: 09/08/2010 21:17:28 GMT Daylight Time
From: [redacted]
To: [redacted]

[redacted]
Secretary to the Commission Board
The Electoral Commission
Trevelyan House
30 Great Peter Street
London SW1P 2HW

9th August 2010

Dear Sir

Your ref: ECCP 69
APPEAL TO THE CHIEF EXECUTIVE

1. I refer to my previous correspondence relating to my complaint against Electoral Commission in connection with the 5th Avenue Partners Ltd case.

2. I would like you to consider the following. If, before the donations were received or accepted, Michael Brown said to the Liberal Democrats, *"5th Avenue Partners Ltd is nothing more than a vehicle to facilitate theft or fraud and all the money to be donated, in the name of the company, is the proceeds of crimes committed through the company"* they could not have accepted the donations because to do so would have been a criminal offence under the Section 22, Theft Act 1968 and the Sections 328 and 329, Proceeds of Crime Act 2002. However, Brown dishonestly concealed the truth so the party was deceived into receiving and accepting donations they could not, by the criminal law, have accepted had they had known the truth.

3. The legal maxim, *fraud vitiates consent*, means that where consent is obtained by deceit, there is no consent at all *if* the act consented to is not the act done. For example, if a woman consents to an intimate examination, by a man falsely posing as a doctor, she is the victim of indecent assault because the act she consented to was a medical examination, but the act done was indecent assault and she did not consent to this. There was consent to the nature of the act, but not to its quality.

4. In the case of the Liberal Democratic Party, the act consented to was accepting a donation under Section 54(2b) PPERA, but the act done, through deceit, was to accept the proceeds of crime. Had the party known this, they would not and could not have accepted the donations because the Theft Act and Proceeds of Crime Act prohibit this. There was certainly deceit

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because Brown concealed the truth and had he not done so the party would have committed criminal offences by accepting the donations.

5. If the party could not *consent* to accepting the donations, had they known the truth from the outset, it follows there was no *consent* at all when they were deceived into accepting something they could not accept, had they known the truth. The provisions of the Theft Act and Proceeds of Crime Act prohibited the party from *consenting* to the acceptance of the proceeds of crime and the same statutes criminalise the kind of activity I paraphrased in paragraph 1, but the real question is whether the donations were impermissible under Section 54(2b) PPERA.

6. For a donation to be permissible under 54(2b), the company must be one *"which carries on business in the United Kingdom."* If 5th Avenue Partners Ltd did not meet this requirement the donations were impermissible *per se*.

7. It is undisputable that (1) 5th Avenue Partners Ltd was a sham; a facade to facilitate the commission of theft or fraud and (2) the donations, in the name of the company, were themselves the proceeds of crime. Its *raison d'etre* was theft and fraud so the *business* carried on by the company was theft and fraud. Theft and fraud are unlawful per *se*; therefore the business carried on by the company was unlawful *per se*. This goes beyond theft and fraud because the very act of transferring the proceeds of crime to the party, disguised as lawful donations, is prohibited by Section 327 Proceeds of Crime Act 2002. Theft, fraud and money laundering are unlawful per *se* and as matter of fact and law such activities cannot be deemed lawful by reason of the PPERA so the donations are impermissible.

8. In a response to my Freedom of Information Act request the Electoral Commission stated:

The scope of the Commission's investigation was whether there was compliance with the party funding controls in the Political Parties Elections and Referendums Act 2000 (PPERA) and in particular the permissibility of donations under section 54 of that Act. It was not a matter for the Commission to determine whether a company was used as a vehicle for facilitating theft or fraud; this would generally be a matter for the police.

9. From the above FOI response, it appears to be immaterial that 5th Avenue Partners Ltd was a total facade to deceive and cheat investors and launder the proceeds of crime. According to the case summary all that is relevant is that the company had the resources to operate as a business or operated as a business. It therefore seems the nature of the business is irrelevant and even if the company had all the usual resources to operate as a normal business, it did not matter if those resources were a sham to suck in and cheat wealthy people. Presumably the Electoral Commission would rule that if the police presented evidence that a photographic company, properly registered and incorporated, was using its studio and photographic equipment and computers to exclusively produce and sell child pornography, for the sole purpose of financing a political party, the donations would be permissible under the PPERA.

10. I accept that in all but the most exceptional of cases, *prima facie* evidence that a company was carrying on a business of some kind will be sufficient because it would be very difficult to know any different. However, in the 5th Avenue Partners Ltd case, the police made a determination that the company was a front for cheating investors and the donations were the proceeds of crime and passed this information on to the Electoral Commission. The Commission were not required to make a determination on this issue because the police and court convictions had already done this.

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11. However, through gross negligence the Electoral Commission dismissed the evidence provided by the police as being irrelevant and in doing so failed in its statutory duty to thoroughly investigate this case. Had the Commission carried out a thorough investigation, it would have been very obvious that a course of criminal conduct cannot, as a matter of fact and law, be regarded as carrying on a business for the purposes of the PPERA- one Act of Parliament cannot make unlawful conduct under another Act lawful and an unlawful business is just that: unlawful.

12. The fact that the business of the company was known to be crime combined with the lesser issue that the party could not consent to accepting the donations, had it known the truth, ought to have raised questions and caused the Electoral Commission to consider that on the balance of probability the donations were impermissible.

13. The party took reasonable steps, under Section 56(1b), to establish that 5th Avenue Partners Ltd appeared to be a permissible donor, but only within the limits that deception and concealment allowed. However, taking reasonable steps is irrelevant if the donations were impermissible *per se*. Without deception and concealment the party would have declined the donations and used the procedure under Section 56(2a) or 56(2b), depending whether they declined on grounds that they could not knowingly accept stolen money or the donations were impermissible *per se*.

14. The above complements what I have said in previous correspondence and I ask that it be taken into account in relation to my complaint, to the chief executive, that [redacted] refuses to treat my correspondence as a complaint against the Electoral Commission.

15. My complaints are that the Electoral Commission made such a perverse decision in the 5th Avenue Partners case that the findings were incapable of being supported by the facts or the law; that the Electoral Commission failed in its statutory duty by neglecting to carry out such investigation as circumstances demanded, in relation to the meaning of carrying on a business, and made negligent misrepresentations, in the case summary, that company law had been considered, when it is self evident that if company law had been considered the donations would have been deemed impermissible. All these matters come under the heading of maladministration and should be treated as such.

Yours sincerely

[redacted]

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Annex K: Mr P's document submitted as his complaint to the Ombudsman

IN THE MATTER OF AN APPEAL TO THE SECOND-TIER TRIBUNAL (INFORMATION RIGHTS)[36]

Case No.
Mr P (Appellant)
v
The Electoral Commission and Information Commission
(Respondents)

1. These are the Appellant's grounds for appeal against a decision of the First-Tier Information Rights Tribunal in the above mentioned case. The Appellant is not legally represented. However, all his arguments were based on a sound factual basis and points of law, the interpretation of which required nothing more than common sense. This was not a case of the law being an ass; the law is perfectly straightforward and all the issues and complexities have arisen through lawyers not applying the correct law to the correct facts.

2. In paragraph 10, page 300, of her witness statement, [Name], the Electoral Commission's witness, states:

The investigation raised legal issues for which there was no precedent within the PPERA (Political Parties, Elections and Referendums Act 2000).

3. The PPERA 2000 is relatively new, but all the legal issues, arising from the PPERA 2000, are interpreted in well established legal precedent at Common Law and in other statutes, as will be shown below. The cause of all the problems appears to be lawyers interpreting the PPERA 2000 in isolation instead of in the context of the wider body of established law- the normal way of interpreting legislation. As a result, decisions have been made unlawfully. The purpose of this FOI Act case is to obtain information, which will show that the Electoral Commission acted unlawfully.

4. The Appellant's grounds for appeal are lengthy, not because of the complexities of the case but to correct the wholesale misunderstanding on what the relevant law and facts ought to have been. However, the length of the grounds is proportionate to the issues and their importance.

5. The general grounds for appeal are:

The tribunal did not apply the correct law or wrongly interpreted the law.

The tribunal had no evidence, or not enough evidence, to support its decision.

The tribunal did not give adequate reasons for its decision in its written judgment.

6. The reasons for the appeal are set out in full below. Where a reference is made to a page number, this is a reference to the open bundle prepared for the original case.

7. In 2005 donations, totaling £2.4m, were made to the Liberal Democratic Party in the name of a company called 5th Avenue Partners Ltd. In November 2009, following an investigation, the Electoral Commission ruled that the donations were permissible under the Political Parties, Elections and Referendums Act 2000 (PPERA 2000).

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36 This document is reproduced without corrections but we have redacted names.

8. The Electoral Commission issued a case summary setting out its reasons why the donations were permissible (pages 55-59).

9. There were several key issues including whether 5th Avenue Partners Ltd met the permissibility requirements of the PPERA 2000 by carrying on a business in the UK and whether the company's sole director, Michael Brown, or its Swiss parent company, 5th Avenue Partners GmbH, were the true donors- both were impermissible donors, so the donations would have been unlawful if they were from either. The Electoral Commission decided there was no evidence anyone other than 5th Avenue Partners Ltd was the true donor.

10. It is important to note that Brown had absolute ultimate control of 5th Avenue Partners Ltd, through his shareholding in its Swiss parent company, 5th Avenue Partners GmbH, so this was a case where the director had ultimate control of the company.

11. In paragraph 1.3 of the case summary, the Electoral Commission state:

The Commission also considers that there is no reasonable basis, on the facts of this case and taking into account the relevant law, to conclude that the true donor was someone other than 5th Avenue Partners Limited.

12. In paragraph 3.5 of the case summary, the Electoral Commission made the following assertion:

The Commission also considered whether company law allowed the actions of 5" Avenue Partners Limited to be treated as the actions of Michael Brown or 5th Avenue Partners GmbH. The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.

13. It was clearly the Electoral Commissions view that 5th Avenue Partners Ltd was the true donor. For the true donor to be other than 5th Avenue Partners Ltd, the corporate veil would have to be removed from 5th Avenue Partners Ltd to make the actions of that company the actions of Michael Brown or 5th Avenue Partners GmbH or some other unknown person or entity. The Electoral Commission self-evidently believed that having considered the facts of the case and relevant law, there was no reasonable basis for a court to remove the corporate veil from 5th Avenue Partners Ltd.

14. The Appellant made several Freedom of Information Act 2000 request to the Electoral Commission, including the following:

In relation to the alleged donations by 5th Avenue Partners Ltd to the Liberal Democratic Party, the Electoral Commission in paragraph 3.5 of its judgment states:

"*..... there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation*" and consequently there was no likelihood that the donation could be proven to be other than a permissible donation from 5th Avenue Partners Ltd.

1) **In reaching its decision that the corporate veil could not be lifted, did the Electoral Commission refer to any specific legal precedents on the circumstances in which the corporate veil could or could not be lifted and if so please name the cases?**

15. The Electoral Commission agreed that they held the requested information, but claimed a public interest exemption on grounds that the names of the legal precedents were referred to in legal advice. There was no dispute that the Appellant was only requesting the names of the cases referred to and not any interpretation or further information. Nevertheless, the Appellant conceded that the names of the cases were in legal advice obtained by the Electoral Commission and to that limited extent formed part of the legal advice- the Appellant will address the limited nature of his request further in his conclusions to these grounds for appeal.

16. It is important to note, from the FOI Act 2000 request and response (page151), that the Electoral Commission admit holding case law on "*the circumstances in which the corporate veil could or could not be lifted*." The request was specific to the 5th Avenue case, so there is no dispute that the information relates to the circumstances of the 5th Avenue case. Furthermore, in paragraph 8 (page 217) of a letter from the Electoral Commission to the Information Commissioner, dated 8th February 2011, they state:

The cases were referred to by counsel in the course of analysing whether the corporate veil could be pierced in the circumstances of the 5th Avenue case. The principles set out in these cases were in the content of the legal advice.

17. The requested information was referred to in the legal advice and related to *whether the corporate veil could be pierced in the circumstances of the 5th Avenue case*."

18. Establishing the relevant "*circumstances of the 5th Avenue case*" was an important issue before the lower-tribunal otherwise it would be impossible to know whether the legal precedents justified the removal of the corporate veil in the circumstances of the case. The Appellant, will address this issue later in these grounds.

19. The Appellant relied principally on the following guidance, from the Information Commissioner, which he set out in paragraph 8 of his skeleton arguments prepared for the lower tribunal, to justify disclosure of the requested information:

A suspicion of misrepresentation or unlawful behaviour. Where there is sound evidence that the public authority is misleading the public about advice it has received, ignoring advice or acting unlawfully, this may be a significant factor in favour of disclosure. This factor was discussed by the Tribunal in FCO v Information Commissioner and Boddy v Information Commissioner and North Norfolk DC (EA/2007/0074; 23 June 2008). The ICO considers that the more evidence that can be provided, the more weight will attach to this factor.

A lack of transparency in the rationale for the public authority's actions. There is some general public interest in the promotion of transparency, accountability and public understanding and involvement in public processes. A significant lack of transparency will therefore favour disclosure, although this must amount to more than mere curiosity over the content of advice and will carry less weight than arguments of misrepresentation backed up by evidence.

20. In paragraph 34 of its judgment, the Tribunal states:

The legal advice according to the Appellant was either wrong, ignored, or "*more likely it was not based on the full facts and this resulted in a perverse and therefore unlawful decision*".

21. The Appellant's overall view was that had the well established legal precedent 's, on piercing the corporate veil, been applied to the relevant circumstances of the 5th Avenue case, the Electoral Commission could not lawfully have reached a conclusion that a court was unlikely to remove the corporate veil. The issue was not whether the conclusion was correct, but whether it had been lawfully reached by investigating matters the Electoral Commission had a duty to investigate. The Appellant's evidence, before the lower-tribunal, was that the Electoral Commission failed to investigate relevant matters and thereby acted unlawfully in reaching its conclusion and misled the public, in the case summary, by claiming to have considered relevant evidence when they clearly did not- if relevant evidence was omitted there was also a lack of transparency in the rationale for the actions of the Electoral Commission. In short, the above guidance from the Information Commissioner was relevant to the case; there was suspicion of misrepresentation, unlawful behaviour and a lack of transparency.

22. In paragraph's 5 and 5a of the Appellant's skeleton arguments, before the lower tribunal, he states:

5. In paragraph 33 of the Decision Notice, page 10, the Commissioner states:

Where a public authority has issued misleading information or there is evidence of impropriety, as the complainant suggest, the Commissioner's view is that there is a strong public interest disclosure to ensure greater transparency of its actions.

5a. The Appellant has presented evidence that the Electoral Commission acted unlawfully in the manner in which they investigated the 5th Avenue case and that they made misrepresentations and through a lack of transparency concealed evidence. Clearly, based on the Information Commissioner's opinion, these are issues the Appellant can properly argue and the Tribunal can take into account. The Tribunal is not required to decide if the donations were permissible under the PPERA 2000, but whether the Electoral Commission acted lawfully in the way in which they investigated the case and whether they misrepresented the evidence in the case summary etc. There is no public interest in concealing evidence that only serves the purpose of covering up unlawful conduct or misconduct.

23. The Appellant went to the trouble of setting out, in his skeleton arguments, the ruling in the famous *Wednesbury case* in which Lord Greene stated:

If , in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.....

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said,

and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

24. From all this, the lower tribunal knew it was not been asked to determine if the Electoral Commission was wrong to state the donations were permissible, under the PPERA 2000, but whether the Electoral Commission neglected to consider matters it had a duty to consider. If they did not, the Electoral Commission acted unlawfully and this and the consequences of this unlawful behaviour- misrepresentation and a lack of transparency- were matters the Tribunal ought to have taken into account in determining the public interest

25. In paragraph 92 of its judgment, the Tribunal states:

92. Taking account of the evidence of [the Commission's witness] and the closed material (which included the legal advice; the list of legal precedents referred to and the report of the investigation presented to the EC Board), the Tribunal finds that it has found no indication of any evidence that the public has been misled. From what it has seen the Tribunal is satisfied that nothing in the closed materials as a whole lends any support to the suggestion that the advice the EC received was anything less than thorough and that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted. Nothing in the closed materials would indicate that the investigation was carried out in anything approximating a perverse or unlawful manner and therefore adding particular extra weight to the public interest justifying disclosure of the list of case precedents requested by Mr P.

26. This is a finding of fact and as such it must be capable of being supported by the evidence before the Tribunal otherwise it is perverse- unlawful. The finding is unambiguous and comprehensively rejects any suspicion of unlawful behaviour or misrepresentation, so there was no "*strong public interest*" in disclosing the requested information on those grounds- the principal grounds. However, the Appellant believes the findings in paragraph 92 are perverse because they were not supported by the facts and law known to the First-Tier Tribunal. If the lower tribunal based its decision, not to disclose the information, on perverse findings then the decision not to disclose the information did not take account of matters the Tribunal had a duty to take account of.

27. In paragraph 87 of the judgment, the Tribunal states:

87. Nevertheless it is very clear to the Tribunal that it is not its role to determine whether the EC's decisions set out in the Case Summary were right. The Tribunal's decision relates only to whether the ICO was right in upholding the decision that it was in the public interest to withhold the disputed information – namely the list of case precedents relating to the lifting of the veil of incorporation. The Tribunal's statutory remit under FOIA, which is principally enshrined in Part V of FOIA, in particular section 58, does not allow it to reinvestigate these matters. Although section 58(2) refers to reviewing findings of fact, that does not authorise the Tribunal to query, let alone re-examine, a finding of fact in turn made on the basis of legal advice taken by a third party, in particular, a separate regulatory body which the Tribunal in this case had no basis, let alone any jurisdiction to question. To reinvestigate matters which were looked at in the way described by the EC would in effect cause the Tribunal to act in breach of statutory duty by trespassing upon the function and role of the EC in a way not contemplated by statute, in particular, the PPERA.

28. The Tribunals view on its statutory duty is that Section 58 FOI Act 2000 does not authorise it to "*determine whether the EC's decisions set out in the Case Summary were right.*" As demonstrated above, the Tribunal was not required to determine if the decisions of the Electoral Commission were correct, but whether they had been arrived at lawfully- there is a difference, so if the Tribunal thought it was being required to rule on whether the decisions of the Electoral Commission were correct, then it did so perversely and contrary to the clear written submissions of the Appellant. However paragraph 87 continues with the Tribunal stating that although Section 58(2) refers to reviewing findings of fact, this did not authorise the Tribunal to "*query* "or "*re-examine*" findings of fact "*made on the basis of legal advice*" obtained by the Electoral Commission and to "*reinvestigate matters which were looked at in the way described by the EC would in effect cause the Tribunal to act in breach of statutory duty*." The "*matters which were looked at in the way described*" by the Electoral Commission were the matters described in the case summary.

29. Section 58(2) FOI Act 2000 states:

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

30. The finding of fact, in the Information Commissioner's decision notice, only contains two paragraphs (pages 5-6, paragraphs 13-14). These are, helpfully, under the heading, **Finding of Fact**. The two paragraphs refer exclusively to the investigation conducted by the Electoral Commission and the presentation of "*the findings of its investigation*" in the case summary published on 20th November 2009. According to the finding of fact, the investigation, by the Electoral Commission, considered whether 5th Avenue Partners Ltd was a permissible donor, under the PPERA 2000, and whether it was the true donor and concluded that 5th Avenue Partners Ltd was a permissible donor and the true donor. The finding of fact continues by stating that in investigating whether the company was the true donor, the Electoral Commission considered whether company law allowed the actions of 5th Avenue Partners Ltd to be treated as the actions of Michael Brown or 5th Avenue Partners GmbH and having considered this found there was no reasonable likelihood a court would remove the corporate veil. The finding of fact concludes by stating that the case summary can be found on the Electoral Commission's web site and gives a link to the site. The decision notice was therefore based on the case summary.

31. The findings of fact, on which the decision notice is based relate exclusively to the investigation carried out by the Electoral Commission and the conclusions or findings of that investigation. For the reasons stated above, the issue was not whether the decisions of the Electoral Commission were correct, so the Appellant agrees that the conclusions were not a finding of fact for the purpose of Section 58(2) FOI Act 2000.However, the investigation on which the conclusions were based was most certainly a finding of fact, which Sections 58(2) authorised the Tribunal to review. If that were not the case, the above legal guidance, from the Information Commissioner, would be meaningless because public authorities could act unlawfully, on the basis of perverse legal advice, with impunity. Findings of fact based on that wrong legal advice would be inviolate and evidence proving decisions had been arrived at unlawfully could never be disclosed under the FOI Act 2000. Public authorities could simply say they were only obeying legal advice and no matter how perverse that advice, it could never be disclosed. This would be something akin to the perverted *Nuremburg* defence.

32. Clearly from paragraph 87, the Tribunal did not "*query* "or "*re-examine*" findings of fact "*made on the basis of legal advice*." On its own admission, the Tribunal decided that the investigation, on

which the decisions of the Electoral Commission were based, could not be reviewed because they were findings of fact "*made on the basis of legal advice*" or put another way, the investigation was inviolate and the Tribunal and public must blindly accept it was the lawful basis for the decisions of the Electoral Commission, regardless of circumstances. In short, the Tribunal decided that "*the investigation which the EC carried out, as set out in the Case Summary, was..... thorough and properly conducted*" and did so, not on the basis of a review of the investigation, but on the basis that a finding of fact, based on legal advice, cannot be reviewed under Section 58(2). The effect of the Tribunal's interpretation of Section 58(2) is that there is an irrebuttable presumption that that a finding of fact based on legal advice must be blindly accepted as correct by the courts and public. This is a dangerous presumption because 50% of cases, before the courts, that are based on legal advice fail because the legal advice of one party is wrong. As a matter of law, the Tribunal's interpretation of Sections 58(2), insofar as it relates to findings of fact based on legal advice, is wrong.

33. The Tribunal is also inconsistent in its interpretation of Section 58(2). Having firmly stated that it was not "*its role to determine whether the EC's decisions set out in the Case Summary were right*" and that it was not authorised to "*query* "or "*re-examine*" findings of fact "*made on the basis of legal advice*" this is precisely what the Tribunal did otherwise it could not have found, in paragraph 92, that there was "*no indication of any evidence that the public has been misled*" and was satisfied that "*the advice the EC received was anything less than thorough and that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" and nothing indicated that the "*the investigation was carried out in anything approximating a perverse or unlawful manner*."

34. In paragraph 87 the Tribunal state that "*it is very clear to the Tribunal that it is not its role to determine whether the EC's decisions set out in the Case Summary were right*," and it could not lawfully "*query*" or "*re-examine*" or otherwise "*reinvestigate*" the decisions of the Electoral Commission, published in the case summary. If it did not do any of these things, it could not reasonably state in paragraph 92 that there is "*no indication of any evidence that the public has been misled*" and was satisfied that "*the advice the EC received was anything less than thorough*" and that the investigation" *which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" and that the investigation was not carried out in a "*perverse or unlawful manner*." For example, to state that the investigation, set out in the case summary, was "*thorough and properly conducted*" required the Tribunal to "*query*" or "*re-examine*" or otherwise "*reinvestigate*" the findings in the case summary otherwise it could not possibly know whether the investigation, set out in the case summary, was "*thorough and properly conducted*."

35. The findings in paragraph 92 were clearly based on the unlawful presumption that the Tribunal could not review the investigation carried out by the Electoral Commission. Section 2(b) FOI Act 2000 required the Tribunal to decide whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*." The Tribunal did not decide the issue on "*all the circumstances of the case*," but on the very narrow and unlawful presumption that findings of fact, based on legal advice, cannot be challenged and had to be accepted. Inevitably, this excluded relevant evidence and led to the conclusion that it was not in the public interest to disclose the requested information. Through not taking account of the Appellant's evidence that the Electoral Commission acted unlawfully, by not investigating matters it had a duty to investigate, the Tribunal itself acted unlawfully by neglecting to take account of matters it had a duty to investigate.

36. In paragraph 92, the Tribunal does state that it took account of the evidence of [Name], the Electoral Commissions witness, and the closed material, including the legal advice and found no indication of anything unlawful or improper on the part of the Electoral Commission. This is not surprising. In her witness statement (paragraphs 10 and 13, pages 300-301) [the Commission's witness] makes it clear that the Electoral Commission "*sought and had regard to legal advice*" when considering whether a court was likely to remove the corporate veil and the decisions of the Electoral Commission were "*consistent with legal advice*." The investigation was based on legal advice and unsurprisingly the closed evidence and case summary reflected the legal advice and in turn [the Commission's witness'] witness statement reflected the case summary. If the legal advice was wrong or not based on the relevant facts, as the Appellant claims, then there is a chain of consistent evidence, all of which is perverse because it is not based on the material circumstances of the case, as discussed above. Just because evidence is consistent does not make it right; the Appellant's evidence was equally consistent, but that was ignored. The correct role of the Tribunal was to test the evidence of both parties and make a decision based on all the circumstances of the case, not just the evidence of one party.

37. The Tribunal stated in paragraph 91 that "*were there any basis for inferring that the EC ignored the legal advice it received or has misled the public, then there would be a genuine degree of public interest in ensuring that the EC reached a proper decision.*" Not reviewing findings of fact based on legal advice made it impossible for the Tribunal to know whether the legal advice was appropriate to the circumstances of the case or was otherwise wrong. Legal advice has to be relevant to the circumstances of a case and this can only be determined by reviewing the findings of fact on which the legal advice is based.

38. Had the Tribunal not misinterpreted Section 58(2) FOI Act 2000 and reviewed the investigation carried out by the Electoral Commission, it would have known that "*in all the circumstances of the case*," the legal advice was incapable of supporting a conclusion that a court was unlikely to remove the corporate veil. This would have been particularly so had the Tribunal listened to what [the Commission's witness] admitted, under oath, during cross examination. As will be shown below, her admissions ought to have compelled the Tribunal to a conclusion that the Appellant's factual basis for his case was essentially correct and the Electoral Commission did act unlawfully and mislead the public. It is noteworthy that the Tribunal did not mention any of [the Commission's witness'] admissions in its judgment and this gave a false impression.

39. It is irrelevant if the Electoral Commission was acting on legal advice if that advice was wrong or not appropriate to the relevant circumstances of the case.

39. The Appellant gives another general example of the perversity of the findings in paragraph 92.

40. It has been the Appellant's consistent case that the Electoral Commission acted unlawfully in the manner in which it carried out its statutory duties under the PPERA 2000 and disclosure of the requested information would show this. A key issue before the Tribunal was whether Parliament, through the PPERA 2000, intended that political parties in the UK could be financed with the proceeds of crime.

41. The Information Commissioner stated, in his response to the Appellant's Tribunal proceedings (page 89, paragraph 24c) that:

The Commissioner accepts that the implication of the ECs conclusion appears to be that political parties in the UK can be funded by the proceeds of crime, and that there is an interest in the public being reassured that the reasoning behind that decision is sound. However, that consideration does not outweigh the factors favouring withholding the information. Public authorities regularly rely on legal advice to interpret the scope of statutory provisions, and the fact that their advice identifies (what members of the public may consider to be) a lacuna in the statute cannot be sufficient reason to require disclosure of the advice.

42. This was the Information Commissioner's independent view, based on evidence presented by the Appellant, so there is agreement with the Information Commissioner that "*the implication of the ECs conclusion appears to be that political parties in the UK can be funded by the proceeds of crime, and that there is an interest in the public being reassured that the reasoning behind that decision is sound*." However, regardless of this the Information Commissioner decided it was not in the public interest to disclose the requested information.

43. In paragraph 83 of its judgement, the Tribunal states:

The Tribunal accepts that there is a general public interest in allowing public access to information. In this case it is clear that there is a strong public interest in the issues raised by the Appellant. On the face of it, it would seem, as he claims, inconceivable that Parliament envisaged that political parties could be funded by the proceeds of crime, as acknowledged by the ICO: "The Commissioner accepts that the implication of the EC's conclusion appears to be that political parties in the UK can be funded by the proceeds of crime." (para 24c of ICO response (page 89).

44. The Tribunal found that "*it is clear that there is a strong public interest in the issues raised by the Appellant*" and "*on the face of it, it would seem, as he claims, inconceivable that Parliament envisaged that political parties could be funded with the proceeds of crime, as acknowledged by the ICO*." If it seemed to the Tribunal that it was inconceivable that Parliaments intended that political parties could be financed with the proceeds of crime, it follows that the Appellant was correct and the PPERA 2000 did not allow this and therefore "*the implication*" referred to by the Information Commissioner is evidence that the Electoral Commission did act unlawfully. It cannot be inconceivable that it was Parliaments intention to allow political parties to be funded with the proceeds of crime and at the same time be lawful for the Electoral Commission to reach conclusions, the implications of which appear to be that political parties can be funded with the proceeds of crime. This is a legal nonsense.

45. The above entirely supports the Appellant's case that the Electoral Commission acted unlawfully and therefore it is in the public interest to disclose the case law, which the Electoral Commission seem to think allows a clearly unlawful situation to be lawful. However, perversely, in paragraph 92 of its judgment the Tribunal found there was no evidence that the Electoral Commission acted unlawfully, when the only reasonable conclusion of paragraph 83 is that the Electoral Commission did act unlawfully. The Tribunal clearly made a perverse finding in paragraph 92.

46. The issue before the Tribunal related to the corporate veil, but in his skeleton arguments, the Appellant stated:

10. In deciding whether it is in the public interest to disclose the case law, relating to the issue of the corporate veil, the Tribunal is entitled to look at all the evidence submitted by the Appellant and not just the evidence relating to the corporate veil. There are issues of credibility in this case and evidence of similar facts relating to other issues is relevant.

11. In *O'Brien –v- Chief Constable of South Wales* (2005) *UKHL 26*, Lord Phillips stated:

I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action."

12. The Appellant believes all his evidence is relevant because it shows a course of related and similar conduct, which taken as a whole tends to supports the conclusion there was misrepresentation, unlawfulness and a lack of transparency in relation to the assertion, by the Electoral Commission, that a court was unlikely to remove the corporate veil and consequently it is in the public interest to disclose the case law on this matter. The issues are so intertwined, the correct approach is to look at the evidence as a whole and then draw the appropriate conclusion. Additionally, in her statement, the witness for the Electoral Commission, [Name], argues there was no reasonable basis for concluding 5th Avenue Partners Ltd was not a permissible donor or the donor was anyone other than 5th Avenue. In essence, this covers the broad range of evidence submitted by the Appellant, so the Appellant and Electoral Commission have put the same matters into issue. If any part of the witness statement submitted by the Electoral Commission cannot be supported by the evidence and law, this becomes a credibility issue, in which all the evidence is relevant.

47. The principal issue relates to the corporate veil, but the other issues related to agency and whether 5th Avenue Partners Ltd was carrying on a business, a requirement for it to be a donor under the PPERA 2000. Agency is strictly part of the corporate veil issue because the corporate veil would have to be removed from 5th Avenue Partners Ltd for it to be said it was acting as an agent for another person or entity. The only issue separate to matters relating to the corporate veil was the issue of whether 5th Avenue Partners Ltd was carrying on a business.

48. The Tribunal acknowledged that the Appellant raised the permissibility of donors, as an issue, because it states this to be the case in paragraph 84. The only issue relating to the permissibility of donors was whether 5th Avenue Partners Ltd was carrying on a business, so it must be presumed this is what the Tribunal was referring to in paragraph 84. However, in paragraph 85, the Tribunal refers to a recommendation by the Committee on Standards in Public Life that all companies should have to demonstrate they are trading in the UK, so this was something the Tribunal found fit to comment on. It is not, in itself, relevant to the appeal other than it indicates that the Tribunal, on its own initiative, decided to look at a report, none of the parties had put into evidence, relating to corporate donors being required to carry on a business in the UK. This indicates the Tribunal regarded this as an issue before it.

49. In paragraph 32, the Tribunal states:

32. He further states in paragraph 9 of his Grounds of Appeal, citing the terms of a complaint he has apparently made to the Parliamentary and Health Services Ombudsman about the EC:

"**In reality 5th Avenue Partners Ltd was an off-the-shelf company with no trading record and its *raison d'etre* was crime. Brown himself was a convicted criminal wanted in the USA. In summary,**

the business carried on by the company was facilitating financial crime. All this and more was known to the Electoral Commission from evidence provided by the police when it wrote the case summary

50. This was a clear reference to the business carried on by 5th Avenue Partners Ltd and something the Tribunal chose to highlight, so again this indicates that whether the company was carrying on a business was an issue before the Tribunal.

51. In paragraph 75, the Tribunal states:

75. The remainder of his submissions revisited the materials appended to his Grounds of Appeal. He also referred to the various other statutory provisions, such as the Companies Act 1985, in particular section 458, now in fact re-enacted as section 993 of the 2006 Act which sets out the ingredients of the offence of fraudulent trading. Reference was also made to section 9 of the Fraud Act 2006. The stated aim of these references was to show that it was not "Parliament's intention to include financial crimes in any interpretation of carrying on a business".

52. Paragraph 75 clearly shows that the Appellant quoted various statutes to show that it was not Parliament's intention to include financial crime in any interpretation of carrying on a business and through highlighting it, the Tribunal has indicated that it was an issue in the case. It must be presumed, on the basis of the evidence and the absence of any evidence to the contrary, that the Tribunal's exoneration of the Electoral Commission, in paragraph 92, is a blanket exoneration covering all issues raised by the appellant including whether 5th Avenue Partners Ltd was carrying on a business. If, for any reason, the upper-tribunal decides the lower-tribunal did not regard whether 5th Avenue was carrying on a business as an issue, the Appellant submits that it ought to have done so because the credibility of the Electoral Commission is an issue and it tends to corroborate that the Electoral Commission acted unlawfully, made misrepresentations and lacked transparency in the rationale for its actions.

53. The Appellant now turns to his main evidence that the Tribunal made a perverse finding in paragraph 92 and "*in all the circumstances of the case the public interest in*" disclosing the information outweighs the public interest in maintaining the exemption.

54. It is first necessary to establish the factual basis for the Appellant's case, as argued before the lower-tribunal. This is set out in paragraph 17 of his witness statement (289-297) and is based on press court reports of Michael Brown's trial and a post conviction interview with the police (pages 286-288 and 52-53 respectively):

Southwark Crown Court in London heard Brown was a bogus bond dealer who funded a "*life of luxury*" from cash swindled out of [investor] and other victims. In just a few months he managed to squander almost £8million to "*create the illusion of a wealthy and influential man.*" That included a record £2.3million donation to the Lib Dems.

Mr [Prosecuting QC] said Glasgow-born Brown also blew a fortune on a Mayfair flat where he later met [the investor]. A plush office followed, then a Range Rover with a personalised number plate, a £2.5million private jet and a £327,000 entertainment system for his home in Majorca. The prosecutor told jurors: "*Then there are the holidays, luxury travel and the like. What you'll see is money going out on a grand scale, providing the costs of the business, accommodation and staff, providing a luxury lifestyle — and all of it funded by investors' money. It is the old story: if you tell a big enough lie, people swallow it. He had a front to maintain.*"

"When you look at the bank accounts, what they show is money comes in from **[investor]** ***and other investors. Profits never come in, because there is never any dealing. Money comes out, apparently to pay pretend profits on pretend bond deals that never actually took place, and apparently to pay for Mr Brown's extravagant lifestyle, his business expenses and, apparently, donations. In particular, multi-million-pound donations to the Liberal Democrat party, which enabled him to create the impression that he was an important and well- connected man. If you donate, as he did, £2.3m to the Liberal Democrats, you come across as a man of importance. You create the illusion of a wealthy and influential man."***

"He deceived **[investor]** ***to get hold of his money, then used it as if it was somehow his own."***

Brown also used some of his alleged victim's cash to pay "pretend" profits to other investors to prevent them becoming suspicious.

But Brown's 5th Avenue Partners was "*just a sham*", Detective Sergeant [Name], of City of London Police's Economic Crime Department, told The Times. "*It's just a company that didn't trade in anything. He just had it as an off-the-shelf company. It sounded good but he never actually traded in any bonds*."

The company, with its blue-chip name, formed part of a lavish façade erected by the garrulous Glaswegian to fool rich investors into trusting him. "*It's part and parcel of the offence*," Mr [Detective Sergeant] said. "*It's part of the thing about him having a chauffeur and being a member of the Caledonian Club and working from fancy offices in Mayfair. It's part of the persona. 5th Avenue sounds very prestigious.*" Brown was found guilty in his absence of theft, furnishing false information and perverting justice.

55. This synopsis was referred to extensively at the hearing. It has never been challenged by the Electoral Commission, despite many opportunities to do so. At the hearing, the Appellant's statement was accepted as read and he was not cross examined by the other parties, so the total lack of any challenge raises the presumption that the Electoral Commission accept the synopsis as accurate- not to do so would be to call into question the Crown's outline of a case before the courts, which led to convictions, and what a police officer, closely involved in the case, told the Times after the convictions.

56. In paragraph 1.1 and 1.2 of the case summary (55-59), the Electoral Commission state:

1.1. Enquiries concerning the donations began in May 2005 but were suspended in March 2007 at the request of the City of London Police. The Commission was only able to resume its investigation at the conclusion of the criminal proceedings in November 2008, at which time Michael Brown, the sole director of 5th Avenue Partners Limited, was convicted of theft, furnishing false information and perverting the course of justice.

1.2 During its investigation the Commission made a number of enquiries and *obtained and considered* a large volume of documents, including evidence used in the criminal proceedings against Michael Brown. These documents became available to the Commission in May 2009, some time after the investigation was resumed.

57. This is the only reference in the case summary to the criminal proceedings against Brown and, as the Appellant pointed out in his statement, in context it is an explanation why the investigation

took from May 2005 to November 2009 to complete. It was not an attempt to be transparent or explain why the criminal proceedings were or were not relevant to the issues before the Electoral Commission.

58. Under cross examination, [the Commission's witness], from the Electoral Commission, confirmed that the synopsis reflected the evidence the Electoral Commission "*obtained and considered*" in relation to the criminal proceedings against Brown. Taken with the other evidence, referred to above, the Tribunal ought reasonably to have accepted the synopsis as the undisputed factual basis for the Appellant's case.

59. During cross examination, [the Commission's witness] also confirmed that the case summary only reflected evidence the Electoral Commission considered relevant, so if evidence was omitted it was on grounds that it was not relevant to the issues before the Electoral Commission.

60. There is no evidence, in the case summary, which reflects the Appellant's synopsis , so on the basis of [the Commission's witness'] admission that the synopsis reflected the evidence the Electoral Commission "*obtained and considered*" and her evidence that only relevant evidence was referred to in the case summary, it could not have been clearer, to the Tribunal, that the evidence relating to the criminal proceedings was not relevant to the Electoral Commission's decision that "*..... there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.*" Obviously, if the evidence was relevant, then as a matter of law the Tribunal ought to have found that the Electoral Commission acted unlawfully by not taking account of evidence it had a duty to take account of and misled the public by omitting relevant evidence from the case summary.

61. The Tribunal failed to mention that [the Commission's witness] confirmed that the evidence obtained and considered by the Electoral Commission reflected the evidence in the Appellant's synopsis and that the case summary only reflected evidence the Electoral Commission considered relevant. It is unlikely that the Tribunal could not understand the significance of this evidence, so it must be presumed that it also took the view that view that the synopsis was irrelevant to the issue of the corporate veil.

62. The Appellant now analyses his synopsis to show that it was highly relevant to the issue of the corporate veil and that the Tribunal made a perverse decision in this case. This analysis was done during the hearing, through cross examination of [the Commission's witness] and submissions, so it is nothing new.

63. It is usual in criminal trials, before a jury, for the Crown to outline the evidence it intends calling to prove its case. Although the Appellant's synopsis is based on news paper reports, of the trial and post case comments by the police, in the main he relies on direct quotes from the Crown and police, which [the Commission's witness] concedes reflect the evidence the Electoral Commission "*obtained and considered*." The Electoral Commission not only "*obtained*" this evidence, they also claim to have "*considered*" it, but having done so they self-evidently did not consider it relevant.

64. What the Crown outlined, to the court, was that Brown ran a classic Ponzi fraud in which he pretended to pay profits to the original investors with money he stole from subsequent investors and so on. He did this through 5th Avenue Partners Ltd; a company described by Detective Sergeant [Name], post Brown's conviction, as "*just a sham.....just a company that didn't trade it anything. He just had it as an off-the-shelf company. It sounded good but he never actually traded in*

any bonds." The business carried on by 5th Avenue was therefore theft of investors' money and concealing the theft by pretending to pay profits to investors. with money stolen from other investors, and financing the cost of the business and donations to the Lib Dems with stolen money disguised as profits from bond dealing that never took place.

65. According to the court report (pages 286-288), Southwark Crown Court in London heard Brown was a bogus bond dealer who funded a "*life of luxury*" from cash swindled out of [investor] and other victims. In just a few months he managed to squander almost £8million to "*create the illusion of a wealthy and influential man*." This included a record £2.3million donation to the Lib Dems.

66. This is a clear reference to money swindled from a [investor] and other victims being used, by Brown, to finance his life of luxury and make a record donation to the Liberal Democrats. The Crown was therefore referring to victims additional to [investor].

67. The Crown then alleged that money is "*going out on a grand scale, providing the costs of the business, accommodation and staff, providing a luxury lifestyle — and all of it funded by investors' money*." This is another unambiguous reference to investors' and not just one investor.

68. The Crown continued:

"*When you look at the bank accounts, what they show is money comes in from* [investor] *and other investors. Profits never come in, because there is never any dealing. Money comes out, apparently to pay pretend profits on pretend bond deals that never actually took place, and apparently to pay for Mr Brown's extravagant lifestyle, his business expenses and, apparently, donations. In particular, multi-million-pound donations to the Liberal Democrat party, which enabled him to create the impression that he was an important and well- connected man. If you donate, as he did, £2.3m to the Liberal Democrats, you come across as a man of importance. You create the illusion of a wealthy and influential man.*"

69. The money was paid into bank accounts by "[investor] *and other investors*." Again, this is a clear reference to more than one investor- the Appellant will return to the significance of this later. Profits never came in because there was never any bond dealing, consequently, according to the Crown, the money coming out was to "*apparently pay pretend profits on pretend bond deals that never actually took place*" and these pretend profits were "*apparently*" used to finance Browns extravagant life style and business expenses and "*apparently*" to make donations," *in particular, multi-million-pound donations to the Liberal Democrat party, which enabled him to create the impression that he was an important and well- connected man. If you donate, as he did, £2.3m to the Liberal Democrats, you come across as a man of importance. You create the illusion of a wealthy and influential man*."

70. The Crown's case was unequivocal; the business appeared to be successful and legitimate when in reality it was nothing but a vehicle for Brown to deceive and cheat a "[investor] *and other investors*." Money was stolen from some investors to pretend to pay profits to other investors and these pretend profits- stolen money- were also used to finance the business cost, luxury life style and donations to the Lib Dems. In other words, everything was financed with money stolen from investors and Brown hid his crimes and the benefits of his crimes by creating the illusion it was all paid for with genuine profits from successful bond dealing- the business carried on was facilitating financial crime.

71. The court reports do not specifically mention 5th Avenue Partners Ltd, but it is beyond doubt that the Crown was referring to 5th Avenue. After Brown's conviction, Detective Sergeant [Name], who was closely involved in the criminal investigation, told The Times (pages 52-53) that although "*5th Avenue sounds very prestigious*" with "*fancy offices in Mayfair*" it was "*just a sham*" with a blue-chip name, which formed part of a lavish façade, erected by Brown to fool rich investors, but in reality it was"*just a **compan**y that didn't trade in anything.....it sounded good but he never actually traded in any bonds*." In essence, Sergeant [Name] describes the same fraud as that outlined by the Crown, but leaves no doubt that the fraud was committed by Brown behind the corporate façade of 5th Avenue.

72. If the court reports and statements from Sergeant [Name] are read together and in context, there is no doubt that the donations to the Lib Dems were made from money stolen from investors and disguised as pretend profits on pretend bond dealing to conceal that 5th Avenue was a vehicle for fraud by Brown. On the basis of the synopsis and [the Commission's witness'] agreement that it reflected the evidence relating to the criminal proceedings, the Tribunal ought to have accepted that the synopsis was the factual basis for the Appellant's case and applied the law argued by the Appellant to this undisputed factual basis. Had it done so, it could not lawfully have reached the conclusions it did in paragraph 92. Everything was financed with the pretend profits- stolen money- including the cost of the business and donations to the Lib Dems and that 5th Avenue Partners Ltd was a vehicle for theft or fraud by Brown. In short the *raison d'être* of the company was to facilitate financial crime by Brown. Additionally, as the Appellant will show later, [the Commission's witness] admitted under oath that the money donated to the Lib Dems was stolen money.

73. In paragraph 1.3 of the case summary (page 55) the Electoral Commission state:

The Commission also considers that there is no reasonable basis, on the facts of this case and taking into account the relevant law, to conclude that the true donor was someone other than 5th Avenue Partners Limited.

74. This removes all doubt that the Tribunal knew the crimes were being committed through 5th Avenue Partners Ltd because if this were not the case then self-evidently someone other than the company was the donor.

75. In one of the many civil cases resulting from the criminal activity conducted by Brown ,through 5th Avenue Partners Ltd, Mr Justice Walker in a finding of fact in the case of HSBC Bank Plc v 5th Avenue Partners Ltd & Ors [2007] EWHC 2819 (Comm) (07 December 2007) stated:

Large sums were transferred to accounts of 5th Avenue held with HSBC - $10m by [investor]*, $5m by* [another investor] *and $30 million by* [further investors]*. Mr Brown pretended that these funds enabled him to make substantial profits for the investors, but the trades he reported were fictions. Meanwhile he made transfers out of the accounts into which the funds had been transferred.*

76. This was a case in the Queens Bench Division, so the statement of fact, by a senior judge, is authoritive. The finding clearly shows that the court found that huge sums were transferred into the account of 5th Avenue, by various named investors, and Brown pretended these funds would enable him to make substantial profits, but the trades reported were a fiction and Brown transferred the money out of the accounts "*into which it had been paid*." This is entirely consistent with the evidence set out above and although it was not available to the Appellant, at the Tribunal hearing, it

is reasonable to presume it formed part of the evidence relating to the criminal proceedings against Brown and was therefore known to the Electoral Commission. The sums involved indicate of the scale of the criminal activity conducted through 5th Avenue. $45m stolen through 5th Avenue was unlikely to be a peripheral activity and further proof that the Electoral Commission knew that the *raison d'être* of 5th Avenue was facilitating financial crime- unless the Electoral Commission took the view that $45m is peripheral. Of course, the Crown stated that everything was financed with stolen money, so obviously the reason for the company's existence was facilitating financial crime.

77. Before continuing this particular thread, the Appellant will address a related issue. In their skeleton arguments, the Electoral Commission state in paragraph 20 that the offences Brown was convicted of were counts 4, 7, 8 and 9 of the Indictment and these counts relate only to a [investor]. They state in paragraph 78 that the money Brown was convicted of stealing was not used as donations to the Lib Dem- the Appellant presumes they know this from the evidence they "*obtained and considered*" in relation to the criminal proceedings against Brown. If the donated money was not stolen from [investor], it must therefore have come from the money stolen from the "*other investors*" the Crown so clearly referred to. The full indictment can be seen on pages 69-71- the Appellant sets out the relevant counts Brown was convicted of below when he addresses another issue.

78. The Appellant accepts that the counts Brown was convicted of only refer to [investor] and that none of [investor's] money was used as donations to the Lib Dems- for the purpose of this case count 9 can be ignored as irrelevant.

79. In complex fraud cases, it is usual for the Crown to make specimen charges, in relation to just one victim, and use the evidence from other victims to help prove the offences against just the one victim. This is what seems to have happened in relation to Brown and a point the Appellant made to the Tribunal. While the counts Brown was convicted of relate to [investor], the evidence relating to the "*other investors*," referred to above, was clearly relevant to the Crown's case otherwise the court would not have allowed the evidence to be used against him. It therefore seems that to some degree, evidence relating to the "*other investors*" led to Brown's convictions. Furthermore, as the donated money was not the property of [investor], it could only have been money Brown stole from the other investors referred to by the Crown, probably [further investors].

80. The identity of individual investors is not relevant; what ought to have mattered to the Tribunal was that 5th Avenue was a vehicle for financial crime by Brown and the money donated to the Lib Dems was money he stole from investors.

81. In paragraph 78 of the Electoral Commission's skeleton arguments, they state that "*as a matter of fact it has not been established that any of the money donated to the Liberal Democrats by 5APL was the proceeds of crime*." However during cross examination, [the Commission's witness] was taken through paragraphs 3.7 and 3.9 of the case summary (555-59). In 3.7 the Electoral Commission state that £883,000 of the donated money was transferred directly into 5th Avenue Partners Ltd by investors. In 3.9 they state that £1.54m of the donated money originated from investments in the Swiss parent company of 5th Avenue Partners Ltd- 5th Avenue Partners GmbH- and then transferred to the UK company for onward transfer to the Lib Dems. In paragraph 3.6 of the case summary the Electoral Commission state there was no credible evidence that any of the donated money was Brown's own money. All the donated money therefore belonged to other people who believed their money was to be used for investment purposes and not to finance the Lib Dems. The investors

expected to receive their money back with profits; instead, without their consent, their investment was used as donations to the Lib Dems and this is theft.

82. Under cross examination, [the Commission's witness] admitted that the multi- million pound donations, to the Lib Dems, referred to by the Crown, were the same donations referred to in paragraphs 3.7 and 3.9 of the case summary. In other words, the donations in the name of 5th Avenue Partners Ltd were from money Brown had stolen and disguised as pretend profits on bond dealing that never took place. To put the matter beyond doubt, [the Commission's witness] was asked if she agreed that the donations referred to in 3.7 and 3.9 of the case summary was stolen money she agreed it was. Unless she wanted to perversely argue that the investors wanted their investment money to be used to finance the Lib Dems, [the Commission's witness] had no choice but to admit that the money was stolen.

83. From the evidence they "*obtained and considered*" in relation to the criminal proceedings and the evidence in 3.7 and 3.9 of the case summary, it ought to have been obvious to the Electoral Commission that the money was stolen, yet in their skeleton arguments insist that "*as a matter of fact it has not been established that any of the money donated to the Liberal Democrats by 5APL was the proceeds of crime*." This is an issue of credibility, which the Appellant will return to, but the point is the Tribunal undoubtedly knew, from the Appellant's unchallenged synopsis and [the Commission's witness'] admissions under oath, that the money used as donations was money Brown had stolen. Significantly, the Tribunal failed to mention [the Commission's witness'] admissions, in its judgment. Through its findings, in paragraph 92, the Tribunal clearly found that the Electoral Commission carried out a "*thorough and properly conducted*" investigation, so it must be presumed that the Tribunal decided, as a matter of law, there was no lawful requirement for the Electoral Commission to investigate whether the money was stolen because it was irrelevant to the issue of whether a court was likely to remove the corporate veil. Alternatively, the Tribunal may have accepted the submission, against the weight of evidence, that "*as a matter of fact it has not been established that any of the money donated to the Liberal Democrats by 5APL was the proceeds of crime*," something the Appellant will address below.

84. So far, the Appellant has established that that the Tribunal knew 5th Avenue was a vehicle for financial crime by Brown and everything connected to it was financed with the proceeds of crime, particularly the multi-million pound donation to the Lib Dems.

85. From the Appellant's witness statement, the Tribunal was aware that he relied upon two cases on the circumstances in which a court would remove the corporate veil. The first is *Standard Chartered Bank v Pakistan National Shipping Corporation {[2002] UKHL 43}*, in which Lord Hoffmann stated: "*No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and am not to be personally liable*'". This quote is in paragraph 22 of the full House of Lords judgment. The "*someone else*", in the context of the case was a limited company and the person trying hide behind the corporate veil to evade personal liability for fraud was the company's director. For the purpose of removing the corporate veil, it is irrelevant whether the crimes are theft or fraud or money laundering or other related financial crimes.

86. The other case the Appellant relied upon was the Supreme Court case of *R v Mornington Stafford Seager and Endon Barry Blatch (2009)* in which three separate grounds for removing the corporate veil were set out in paragraph 76 of the judgement:

87. The Appellant will first deal with issues relating to the *Standard Chartered Bank* case. It is clear from the *Standard Chartered Bank* case that a director committing financial crime, through a company, cannot escape personal liability by claiming it was the separate legal entity of the company and not him that committed the crime. The evidence before the Tribunal was that Brown committed theft, through 5th Avenue Partners Ltd, but the Tribunal clearly decided, against the weight of evidence, that Brown was not personally liable for the actions he took in the name of the company. The Appellant's case was that Brown stole the money and therefore the donations were from him, not the company- he will address this issue, in detail, below, but will first deal with a related issue.

88. The Tribunal was chaired by a judge, so the Appellant was entitled to believe that he knew the law and how to apply it to the facts. The Tribunal ought to have considered the implications of the offences Brown was convicted of, set out below:

Count 4

STATEMENT OF OFFENCE

THEFT, contrary to section 1(1) of the Theft Act 1968

PARTICULARS OF OFFENCE

MICHAEL BROWN on a day unknown between the 9th day of February 2005 and the 27th day of May 2005 stole a chose in action, namely a credit of $7,200,000 belonging to [investor] and due from 5th Avenue Partners Limited to the said [investor].

Count 7

STATEMENT OF OFFENCE

TRANSFERRING CRIMINAL PROPERTY, contrary to section 327(1) of the Proceeds of Crime Act 2002

PARTICULARS OF OFFENCE

MICHAEL BROWN on or about the 27th day of June 2005, transferred criminal property, namely an amount of $1,291,809.41 from account number 59099344 in the name of 5th Avenue Partners Limited held with the HSBC Bank to Landbase LLC, such criminal property having been dishonestly obtained from its true owner, [investor].

PART FOUR

Count 8

STATEMENT OF OFFENCE

FURNISHING FALSE INFORMATION, contrary to section 17(1)(b) of the Theft Act 1968

PARTICULARS OF OFFENCE

MICHAEL BROWN on or about the 6th day of September 2005 in furnishing information to [Party staff member] with respect to investments purportedly made on behalf of [investor] dishonestly

and with a view to gain for himself or another or with intent to cause loss to another produced to the said [Party staff member] a bank statement showing a closing balance for 1st August 2005 of HSBC account number 59099344 for 5th Avenue Partners Limited which to his knowledge was or might be misleading, false or deceptive in a material particular in that it purported to show that the closing balance on 1st August 2005 was $14,860,008.02.

89. In count 4 Brown stole $7.2m due to [investor] from 5th Avenue Partners Ltd. This was money due from 5th Avenue and clearly related to transactions in the name of 5th Avenue. In count 7, Brown transferred $1.2m he had stolen from [investor] from the bank account of 5th Avenue Partners Ltd. Again, this was a transaction in the name of 5th Avenue Partners Ltd. In count 8 Brown falsely showed that investments by [investor], to the value of $14.8m were held in the bank account of 5th Avenue Partners Ltd. Once again this related to transactions in the name of 5th Avenue Partners Ltd. The Appellant has omitted count 9, the fourth count Brown was convicted of because it is not relevant.

90. The court had clearly removed the corporate veil to make Brown responsible for actions he took through 5th Avenue Partners Ltd otherwise he could not have been prosecuted and convicted. While the Appellant accepts that the counts do not relate directly to the stolen money, used as donations to the Lib Dems, the point is they do relate to actions Brown took through the company. If actions Brown took through the company were deemed, by the convicting court, to be his actions, it is likely that a court would remove the corporate veil to make him personally responsible for similar actions he took, through 5th Avenue Partners Ltd, relating to money he stole from the other investors. This is particularly so as evidence relating to the other investors was used by the Crown to help convict Brown. This is consistent with the *Standard Chartered Bank* case because Brown could not hide behind the corporate veil and pretend that the actions he took through the company had nothing to done with him, including the donations in the name of the company.

91. In a written submission, before the Tribunal (paragraph 39, pages 66-67), the Appellant argued that removing the corporate veil, to allow Brown to be convicted of actions he took through 5th Avenue Partners Ltd, made it likely a court would remove the corporate veil in relation to all the criminality he committed through the company and not just the counts he was convicted of. Unless the upper-tribunal is prepared to certify, as a matter of law, this is not the case, then it must accept that the lower-tribunal erred in law because the Electoral Commission would have acted unlawfully through not investigating something it had a duty to investigate, namely, the implications of Brown's conviction on the removal of the corporate veil.

92. The Appellant now deals with the implications of theft on this case. Under Section 1, Theft Act 1968 theft is the dishonest appropriation of property "*belonging to another*." Under Section 3(1) "*appropriates*" includes "*any assumption by a person of the rights of an owner.*" If Brown stole the money in question, he assumed the rights of an owner over it and if he assumed the rights of ownership, he was treating the money as his own; therefore, if he made political donations, in the name of 5th Avenue Partners Ltd, with money he was treating as his own, then Brown was the true donor and the company a mere conduit through which Brown chose to make a donation. This is a point the Appellant has been making for two years.

93. The issue before the Tribunal was not whether the donations were lawful or unlawful, under the PPERA 2000, but whether the Electoral Commission acted unlawfully through not investigating evidence, in its possession, indicating Brown did steal the money and the consequential implications,

of the *Standard Chartered Bank* case and Section 3(1) Theft Act 1968, on the issue of the corporate veil and the identity of the true donor. This is consistent with the *Wednesbury* case, quoted in the Appellant's skeleton arguments and his related submissions. Any degree of diligence, on the part of the Electoral Commission, would have established that Brown did steal the money, but the issue before the Tribunal was whether the Electoral Commission took account of matters they had a duty to take account of in reaching its decision that a court was unlikely to remove the corporate veil.

94. In paragraph 15, page 95 of the Electoral Commission's response, to the Information Commissioner case, the Electoral Commission emphasize what they stated the their skeleton arguments, namely, that *"as far as the Electoral Commission is concerned, it has not been established whether the donations to the Liberal Democrats from 5th Avenue Partners Limited were made from the proceeds of crime."* However, paragraph 15 continues and makes it clear that their investigation into 5th Avenue "*did not seek to establish whether the donations were the proceeds of crime, nor could it have under the statutory powers available to the Commission. The investigation solely concerned whether 5th Avenue Partners Limited was an impermissible donor and whether it was the true donor*." In paragraph 79 of skeleton arguments, the Electoral Commission state:

***Secondly*, whether the monies were stolen or not is a matter for the police and the Crown Prosecution Service not the Commission, as is the question of whether the money is recoverable as proceeds of crime under the Proceeds of Crime Act 2002.**

95. The Electoral Commission admitted not seeking to establish whether the donations were the proceeds of crime, so they could not have considered the implications of the *Standard Chartered Bank* case and the Theft Act 1968 so this is a matter of undisputed fact.

96. The Electoral Commission did not need statutory powers to seek to establish whether the donations were the proceeds of crime because, as they rightly point out, this was a matter for the police and CPS. The police and CPS had already made that determination and all the Electoral Commission had to do was apply this to the law they did have a duty to enforce. [The Commission's witness] promptly admitted, when confronted with essentially the same evidence the Electoral Commission "*obtained and considered*," that the money in question was stolen. It is clear that had they acted with the slightest degree of diligence, the Electoral Commission would have known that there was evidence that Brown stole the money. They simply did not care whether the money was stolen or give any thought to what is basically common sense: thieves treat other peoples property as their own and what ever they do with it is the thieves responsibility.

97. The Electoral Commission state" *the question of whether the money is recoverable as the proceeds of crime under the Proceeds of Crime Act 2002*" is a matter for the police and CPS and not the Electoral Commission. This is correct, but the Electoral Commission is confusing issues, deliberately or negligently. One issue before the Electoral Commission was whether the donations were from Brown, an impermissible donor. If Brown was the donor, the Electoral Commission would apply for the donated money to be forfeited, under Section 58 PPERA 2000, on grounds that he was an impermissible donor. The forfeiture application would be on grounds that Brown was an impermissible donor and not on grounds that the money was the proceeds of crime. However, in determining whether Brown was the donor, the Electoral Commission ought reasonably to have considered whether, through theft of the money, Brown assumed the right of ownership and thereby treated the money as his own to make him the donor. The issue before the Tribunal was not

whether the Proceeds of Crime Act 2002 applied, but whether the law on theft made Brown the donor through his assumption of the rights of ownership over investors' money.

98. The skeleton arguments of the Electoral Commission, for the original Tribunal case, were prepared by lawyers, so one would expect them to understand the point in the preceding paragraph, but clearly they did not. The difficulty is the Electoral Commission made a legal submission that "*whether the monies were stolen or not is a matter for the police and the Crown Prosecution Service not the Commission, as is the question of whether the money is recoverable as proceeds of crime under the Proceeds of Crime Act 2002*." As shown earlier, the Tribunal seems to have made the presumption that legal advice is always right or cannot be challenged, so it is likely, like the Electoral Commission, it too confused the issues- as set out in the preceding paragraph. This is something for the upper-tribunal to take into account.

99. The Appellant will make a related point before continuing with his main theme on the issue of the corporate veil. In paragraph 78 of their open skeleton arguments, the Electoral Commission emphatically state: "*First, as a matter of fact it has not been established that any of the money donated to the Liberal Democrats by 5APL was the proceeds of crime*." The clear implication of this statement is that it is based on fact and something the Tribunal could rely on, "*as a matter of fact*." This should be contrasted with the following statement, in paragraph 15 of the Electoral Commissions response (page95): "*The Electoral Commission's investigation did not seek to establish whether the donations were the proceeds of crime, nor could it have under the statutory powers available to the Commission*". If the Electoral Commission did not investigate or seek to establish whether the donations were the proceeds of crime, they could not possibly have known "*as matter of fact*" that "*it has not been established that any of the donated money*" was the proceeds of crime. The statement was brazenly misleading because it was baseless, yet it purported to be "*a matter of fac*t" and a clear invitation to the Tribunal to accept it as such. It was a negligent misrepresentation because it was made not knowing or caring whether it was true or false- there is no other reasonable explanation. Of course, it was an untrue statement because [the Commission's witness] had to admit the donations were the proceeds of crime, when confronted with the evidence known to the Electoral Commission; this probably something she and the Electoral Commission knew or ought to have known at the time the skeleton arguments were prepared for the case.

100. Several issues arise from this. A central issue in the case was whether the Electoral Commission made misrepresentations in the case summary. The casual disregard for the truth, in the skeleton arguments of the Electoral Commission, indicates that if they were prepared to make misrepresentations in document prepared for juridical proceedings, they were likely to do so in the case summary- it comes down to credibility. Furthermore, the skeleton arguments were prepared by lawyers, on behalf of the Electoral Commission, and as the Tribunal based its findings on the presumption that it could not challenge findings of fact based on legal advice, it may have erroneously decided that it had to accept that the donated money was not stolen because this too was a finding of fact based on legal advice. There is a substantial risk that the Tribunal did accept the statement as true, when it ought to have known from [the Commission's witness] and other evidence that it was false. The only safe course is to proceed on the basis that the Tribunal did accept the statement as true because if it did, it would certainly have caused the Tribunal to accept that there was no lawful reason for the Electoral Commission to investigate the implications of theft. Of course, the Tribunal may have decided that the issue of theft was simply irrelevant to the

issue of the corporate veil. In either case, the Appellant says the Tribunal acted perversely.

101. As a matter of fact and law, the Tribunal was wrong to state "*that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" because through not seeking to "*establish whether the donations were the proceeds of crime*" the Electoral Commission could not possibly have known whether Brown's assumption of the rights of an owner made him the donor for the purposes of the PPERA 2000. If the upper-tribunal dismisses this appeal, it must certify that there was no reasonable evidence Brown stole the donated money or evidence relating to Brown stealing the money was not relevant to the issue of who made the donations and that the assumption of the right of ownership under Section 3(1) Theft Act 1968 is irrelevant to the circumstances of the 5th Avenue case and legally incapable of making Brown the donor for the purposes of the PPERA 2000. Unless the upper-tribunal is prepared to make this certification, there must be a presumption that the Electoral Commission acted unlawfully by not carrying out such investigations as circumstances required and was wrong to inform the public "*that there is no reasonable basis taking into account the facts of this case and the relevant law, to conclude that the true donor was anyone other than 5th Avenue Partners Limited*" and there was "*no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation*."

102. The Appellant will now deal with another point arising from the Theft Act 1968. It is known from paragraphs 3.7 and 3.9 of the case summary that all the donated money was transferred from the bank account of 5th Avenue Partners Ltd to the bank account of the Lib Dems. There is therefore, no dispute that all the donated money was in the bank account of 5th Avenue Partners Ltd at some point prior to the transfer to the Lib Dems. If the money referred to in paragraphs 3.7 and 3.9 of the case summary, was in the lawful possession or control of 5th Avenue Partners Ltd as opposed to have been immediately rendered into the assumed ownership of Brown, then Section 5(1) of the Theft Act 1968 becomes relevant. The section states that "*property shall be regarded as belonging to any person having possession or control of it*." A limited liability company counts as being "*any other person*" because the law regards such a company as a separate legal entity

103. Under the *Attorney General's Reference (No. 2 1982) CA* it was held that a person in total control of a limited liability company (by reason of his shareholding and directorship) is capable of stealing the property of the company. Brown was in total control of 5th Avenue Partners Ltd, by reason of his shareholding and directorship, so he was capable of stealing from the company. Brown stole the money, so if he stole it from the possession or control of 5th Avenue Partners Ltd, he assumed the right of ownership over it prior to it being used as donations to the Lib Dems. Immediately money is stolen, from the possession of control of 5th Avenue Partners Ltd, the company no longer has possession or control of it because Brown has assumed the right of ownership over it. The money may still have been in the company's account, but it was Brown's to treat as his own, not the company's.

104. The assumption of the right of ownership occurred immediately Brown decided to treat it as his own. Clearly, deciding to transfer investors' money to the Lib Dems was a dishonest assumption of the right of ownership and of necessity this took place prior to the transfer. It may have been seconds, hours or weeks before, but at some point prior to the transfer, Brown assumed the right of ownership. When the actual transfer occurred, Brown had already assumed the right of ownership over the money and for all the reasons given above the donation was from him not the company.

All this was an issue set out in documents before the Tribunal, although it should be noted that the Attorney Generals Reference in the Authorities bundle is the *Attorney Generals Reference (No2 1998)* and not No2 of 1982. This was a mistake on the part of the Information Commissioner because the correct identification is in the index to the Authorities. Had the Tribunal taken the trouble to read the Authorities they would have known of this error or if they did read it, they clearly misdirected themselves as to the law because the 1998 case is completely different to the 1982 case.

105. The Electoral Commission did not even consider the implications of theft, so they could not possibly have considered whether the *Attorney General's Reference (No. 2 1982)* was relevant. The evidence clearly shows that there were reasonable grounds for the Electoral Commission to investigate whether the assumption of the rights of ownership, under the Theft Act, was relevant, so through not doing so they neglected to consider whether Brown stole the money from the possession or control of the company and whether this made him the donor rather than the company. The Electoral Commission could not possibly know whether it was true or false to state "*that there is no reasonable basis taking into account the facts of this case and the relevant law, to conclude that the true donor was anyone other than 5th Avenue Partners Limited*" and similarly the Tribunal cannot justify a finding that the Electoral Commission carried out a "*thorough and properly conducted*" investigation.

106. As a matter of fact and law, the Tribunal was wrong to state "*that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" because through not seeking to "*establish whether the donations were the proceeds of crime*" the Electoral Commission could not possibly have known whether the Attorney General's Reference was relevant to who the donor was. If the upper-tribunal dismisses this appeal, it must certify that the Attorney General's Reference was incapable of being relevant to the circumstances of the 5th Avenue case. Unless the upper-tribunal is prepared to make this certification, there must be a presumption that the Electoral Commission acted unlawfully by not carrying out such investigations as circumstances required.

107. Whether the money was stolen from the investors or 5th Avenue Partners' Ltd or its Swiss parent company, the net result is the same: Brown assumed the right of ownership over the money and the Electoral Commission did not investigate to see if this made him the donor.

108. The Appellant now returns to the second case he referred to in his witness statement; *R v Mornington Stafford Seager and Eldon Barry Blatch (2009)* in which the Supreme Court highlighted three examples of when the corporate veil could be removed:

First if an offender attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it: see Re H and others, per Rose LJ at 402A; *Crown Prosecution Service v Compton and others [2002] All ER (D) 395, [2002] EWCA Civ 1720, paragraph 44 – 48*, per Simon Brown LJ; R v Grainger, paragraph 15, per Toulson LJ. Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "*the veil of incorporation is not so much pierced as rudely torn away*": per Lord Bingham in Jennings v CPS, paragraph 16. Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", ie. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts: *R v Dimsey [2000] QB 744 at 772 (per Laws LJ)*, applying *Snook v London and West Riding Investment Ltd*

***[1967] 2 QB 786 at 802,* per Diplock.**

109. From the three sets of circumstances mentioned and approved in the Seager case, the first example, in which an offender shelters behind the corporate veil to hide his crimes and its benefits, is the most compelling because it exactly fits the circumstances of the 5th Avenue case. This simply means that if a director commits crimes, in the name of an incorporated company, he cannot attempt to attribute his crimes and the benefits of his crime to the separate legal entity of the company and so evade personal liability. This is entirely consistent with the *Standard Chartered Bank* case in which the Supreme Court held that a criminal cannot seek to evade personal liability by blaming his crime on the company in whose name he committed the crime.

110. In the *Crown Prosecution Service v Compton and others [2002] All ER (D) 395, [2002] EWCA Civ 1720*, one of the cases referred to in the first Seager example, it was held, in paragraph 48 of the judgement, that where a company is essentially a vehicle for crime, by its director, it was "*appropriate to pierce the corporate veil and impute to the director involved the ownership of the assets of the company*." In the Compton case, the crime was money laundering, but all the authorities are agreed that the Compton case is applicable to any financial crime.

111. The Tribunal were aware of the undisputed facts set out in Appellant's synopsis and the *Standard Chartered Bank* case, the *Seager* case and the *Compton* case referred to in the *Seager* case, yet came to the conclusion, in paragraph 92 of its judgment, that there was no evidence the Electoral Commission misled the public, neglected to carry out a thorough investigation or acted perversely or unlawfully. 112. 112. Paragraph 92 came within the Tribunal's analysis of the evidence and law and had it carried out a correct analysis, it could have come to the conclusions it did in paragraph 92.

113. In the 5th Avenue case, the evidence is quite clear that the company was a vehicle for systematic theft by Brown; he committed theft in the name of the company and thereby attempted to attribute his crime and his benefits from his crimes to the separate legal entity of the company. In respect of the £2.4m donated to the Lib Dems, in the name of the company, it is necessary to understand the terms in which this money was held by 5th Avenue Partners Ltd

114. Section 5(3) Theft Act 1968 states:

(3)Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

115. The investors' entrusted £2.4m to 5th Avenue Partners Ltd for the purpose of investment in bonds. The company was under an obligation to retain and deal with the property or its proceeds in a particular way, so the property or its proceeds were therefore, as a matter of law, regarded as the property of the investors'. Self-evidently the investors' were expecting their money back, at a future date, and as they retained legal ownership of the property or its proceeds, they had a right to sue for its return if the repayment was not made in the agreed way or at the agreed time. The money was not used for the purpose of investment and instead was given away to the Lib Dems- this is a matter of fact. Obviously the money could not be repaid, so the investors' had the right to sue 5th Avenue Partners Ltd. The right to sue is called a chose in action, something the Tribunal and lawyers from the other parties ought to have known. In short, 5th Avenue had a liability of £2.4m to the

investors'; a liability is a legally enforceable debt owed to someone, in this case the investors.

116. A chose in action is intangible because it is just the legal right to receive something entrusted to the possession or control of another. In this case, the chose in action was a legally enforceable debt of £2.4m owed by 5th Avenue to the investors. However, 5th Avenue had possession or control of investors' money to use for the purpose of investment in bonds, so the investors were only legally entitled to a payment of £2.4m and not the actual cash they originally invested. This would be no different to a person handing a £50.00 bank note, to his High Street bank, to be credited to his account. The person is obviously entitled to withdraw £50.00 from his account, on demand, but clearly it will not be the same £50.00 note he originally deposited. This is a chose in action and is exactly the same as the chose in action in the 5th Avenue case; the investors had a legal right to receive £2.4m from the company. Unless the Tribunal perversely believed the investors' were expecting their money to be given away to the Lib Dems, it ought to have understood that there was a liability for 5th Avenue Partners Ltd to repay the investors and the implications of this.

117. 5th Avenue had possession or control of the £2.4m investors' entrusted to the company. Brown stole the money and used it entirely as his own. He could have squandered it on gambling or anything, but he chose to use it as donations to the Lib Dems. However, liability for the crime and its benefits remained with 5th Avenue because without the corporate veil being removed the investors' still had the legal right to demand £2.4 from the company. Put another way, Brown committed theft and enjoyed all the benefits of his crime, but liability for his crimes and his benefits from it remained with 5th Avenue. This is attempting to hide his crimes and its benefits behind the corporate veil.

118. From the *Compton* case, it is known that the effect of removing the corporate veil is to impute ownership of the assets attributed to the company to its director. That is all it is, but the consequences will depend on circumstances- before there can be a consequence the corporate veil must first be removed. In the 5th Avenue case, the £2.4m asset, attributable to 5th Avenue, had been stolen by Brown. However, the chose in action still existed and its value remained at £2.4m because it was still due to the investors' from 5th Avenue. The effect of removing the corporate veil would be to impute the £2.4m, due to the investors to Brown, as per the *Compton*. A consequence of imputing ownership to Brown would be to make him the donor because he was the imputed owner and therefore entirely responsible for what he did with the money. Frequently the assets imputed to the director will be tangible, like a house, but a debt of £2,4m, although not tangible, is still worth £2.4m- this is a matter of fact and law. For example, a debt can be sold to another person in the same way as physical property.

119. In summary 5th Avenue was a clearly a vehicle for theft by Brown and although he committed crime in the name of the company and enjoyed the personal benefits of his crime, he attempted to hide them behind the corporate veil by imputing his personal liability to the company. These are reasonable grounds for piercing the corporate veil and the effect of this would be to attribute the £2.4m to the ownership of Brown to make him the donor. The fact that Brown made the donation in the name of 5th Avenue Partners Ltd is evidence that he put the liability in the name of the company rather than his own name.

120. As far as the Electoral Commission is concerned, Brown was entitled to hide his crimes and benefits behind the corporate veil because they imputed ownership of the £2.4m to 5th Avenue Partners Ltd. and thereby made the company the donor rather than the thief who stole the money.

However, in paragraph 3.5 of the case summary, the Electoral Commission state:

The Commission also considered whether company law made the actions of 5th Avenue Partners Limited to be treated as the actions of Michael Brown or 5th Avenue Partners GmbH. The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.

121. The Appellant will deal with 5th Avenue Partners GmbH when he deals with agency, but read in context the above passage clearly implies it is the Electoral Commission's view that had the corporate veil been removed this would have made the actions of 5th Avenue Partners Ltd the actions of Michael Brown. There were grounds to remove the corporate veil, so on the Electoral Commission's own reasoning the actions of 5th Avenue were the actions of Brown, making him the donor.

122. The Appellant did not specifically argue points relating a chose in action, before the Tribunal, but he did specifically refer to the *Standard Chartered Bank* case, the *Seager* case and by implication the *Compton* case, so he is entitled to expect that a judge knows the law and can apply it to the facts before him. Had the judge done so, it is unlikely that he could have reached the findings in paragraph 92 of the judgment.

123. The following FOI Act request and response are highly relevant to the Standard *Chartered Bank*, *Seager* and *Compton* cases (pages 280-281):

2) Does the Electoral Commission hold any information whatsoever, indicating that at the time of incorporation or subsequent to incorporation, 5th Avenue Partners was used as a vehicle for impropriety: namely facilitating theft or fraud or otherwise acquiring, retaining or controlling money obtained through dishonesty?

3) Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd was corporately a party to theft or fraud?

The scope of the Commission's investigation was whether there was compliance with the party funding controls in the Political Parties Elections and Referendums Act 2000 (PPERA) and in particular the permissibility of donations under section 54 of that Act. It was not a matter for the Commission to determine whether a company was used as a vehicle for facilitating theft or fraud; this would generally be a matter for the police.

124. It was clearly irrelevant to the Electoral Commission whether 5th Avenue Partners Ltd was a vehicle for financial crime, so it is a legal impossibility for them to have properly investigated whether, in accordance with the *Standard Charted Bank*, *Seager* and *Compton* cases, 5th Avenue was a vehicle for financial crime by Brown and whether a court was likely to remove the corporate veil. This is emphasised by [the Commission's witness'] admission that if evidence was not mentioned in the case summary, it was because it was not relevant to the Electoral Commissions considerations. This is proved by the Electoral Commission's description of 5th Avenue Partners Ltd in 3.2 of the case summary:

3.2. The evidence indicates that 5th Avenue Partners Limited undertook a number of actions consistent with carrying on business, including; opening business bank accounts with a major high street bank, opening trading accounts with a financial services broker, contracting for staff/

services and passing company resolutions. In February 2005 it deposited a substantial sum of money into one of its trading accounts, which was then used for options trading and in March 2005 the company entered into a lease for offices. During February and March 2005 it also spent substantial sums on office furniture and equipment. Some of these activities occurred shortly after the initial donations were made; a number of others were undertaken in advance of the donations.

125. There is no hint 5th Avenue Partners Ltd was a vehicle for financial crime; on the contrary the Electoral Commission gave the public the firm impression that the business carried on was normal and legitimate. Obviously, the Electoral Commission did not regard evidence, in its possession, that 5th Avenue was a vehicle for financial crime relevant t to the issue of the corporate veil and through its findings, in paragraph 92, the Tribunal clearly agrees. The Electoral Commission and Tribunal knew, from the legal advice received by the Electoral Commission, "*whether the corporate veil could be pierced in the circumstances of the 5th Avenue case*" (page 217-paragraph 8). It therefore seems the Electoral Commission did not regard the evidence they obtained and considered, in relation to the criminal proceedings, as being capable of being relevant to the extensive case law argued by the Appellant. This is obviously wrong, particularly as the evidence they obtained is substantially the same as that presented in the Appellant's synopsis.

126. The second example in the *Seager* case states: **Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "***the veil of incorporation is not so much pierced as rudely torn away*"

127. There is no argument that the offences Brown was actually convicted of did not involve the donated money, but, as shown above, other criminal acts done in the name of the company did involve the donated money and because these criminal acts contributed to Brown's conviction, they constituted a criminal offence "*which leads to the offenders conviction*." However, the offences Brown was convicted of would themselves have justified the corporate veil being "*torn away*" and once it is torn away it is torn away, it is torn away for all criminal conduct and not just the offences he was convicted of. This is an arguable point, but it is certainly one the Electoral Commission had a duty to consider and they did not.

128. The third example from the *Seager* case states: **Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", ie. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts.**

129. The transaction or business structure must be a sham to disguise an existing liability, so as to deceive third parties. An example would be a person with heavy personal debts, who to cheat his creditors transferred his personal assets to the ownership of a limited liability company for the sole purpose of preventing the creditors taking possession of his personal assets. Brown certainly stole the £2.4m, from the possession or control of 5th Avenue, but, for the reasons stated above, left the company with the legal liability to repay the investors.' This was an existing liability and through stealing the £2.4m, the existing liability ought to have transferred to Brown. However, he attempted to evade what had become his existing liability by disguising it as a liability of the company, "*so as to deceive third parties*;" the investors who thought the liability was with the company. The Electoral Commission did not determine whether Brown stole the £2.4m, because they did not consider it relevant, so they cannot know if theft transferred the existing debt, owed by the company to the

investors, from the company to Brown and whether through leaving this existing liability in the name of the company Brown attempted to disguise it as a liability of the company rather than his. They therefore did not know if a court was likely to remove the corporate veil in the circumstances of the third Seager example and cannot reasonably claim there was no reasonable likelihood a court would remove the corporate veil. The Tribunal obviously agreed with the Electoral Commission, so it too could not have had any idea whether the third *Seager* example was relevant to all the circumstances of the 5th Avenue case.

130. The evidence relating to the criminal proceedings against Brown was clearly relevant to the issue of the corporate veil, yet the Electoral Commission and by implication the Tribunal perversely believe that all the evidence relating to the criminal proceedings was irrelevant. If the upper-tribunal does not grant the appeal, it must certify that, as a matter of law, evidence relating to 5th Avenue being a vehicle for financial crime by Brown is not relevant to the issue of removing the corporate veil or that evidence contributing to Brown's conviction was incapable of being relevant to removing the corporate veil or that the circumstances described by the Appellant in relation to the third Seager example are incapable of justifying the removal of the corporate veil, then it must find that the Electoral Commission acted un lawfully by not investigating matters it had a duty to investigate and therefore there is suspicion of unlawful behaviour and misrepresentation In short, the Tribunal must certify that the evidence in the Appellant's synopsis is not relevant to the *Standard Chartered Bank*, *Seager* and *Compton* cases.

132. In paragraph 3.5 of the case summary (page) the Electoral Commission state:

The Commission looked at the relevant evidence and considered that there was no reasonable likelihood that a court would find that 5th Avenue Partners limited acted as an agent on behalf of either Michael Brown or 5th Avenue Partners GmbH when making the donations.

133. Section 54(6) PPERA states:

(6)Where—

(a)any person ("the agent") causes an amount to be received by a registered party by way of a donation on behalf of another person ("the donor"), and

(b)the amount of that donation is more than [£500] ,

the agent must ensure that, at the time when the donation is received by the party, the party is given all such details in respect of the donor as are required by virtue of paragraph 2 of Schedule 6 to be given in respect of the donor of a recordable donation.

134. The purpose of Section 54(6) is to ensure that donors making donations, through an agent, are identified as permissible donors under Section 54(2) of the Act. A donation made by an impermissible donor, through an agent is impermissible. The purpose of the law is to stop impermissible donors circumventing the PPERA 2000 by using agents who are permissible donors. There is no dispute that Brown and 5th Avenue Partners GmbH were impermissible

135. There is no requirement to repeat all the arguments about theft and the assumption of the rights of ownership, but there is reasonable evidence that Brown did steal the £2.4m, so it follows that the Electoral Commission ought to have investigated whether theft made 5th Avenue Partners Ltd the agent for Brown on grounds that he had assumed the right of ownership over the money and therefore it was his money and the company merely his agent. As theft was irrelevant to the

Electoral Commissions considerations, they did not consider this, so had no idea whether it was relevant.

136. If the upper-tribunal does not grant the appeal, it must certify, as a matter of law, that there was no reasonable evidence Brown stole the money or if there is such evidence theft is incapable of making Brown the assumed owner and therefore 5th Avenue was not acting as his agent because it was acting on its own behalf, as a separate legal entity. Unless the upper-tribunal is prepared to make such certifications, it must accept that the Electoral Commission unlawfully neglected to carry out investigations into matters it had a duty to investigate and could not know whether 5th Avenue Partners Ltd was an agent for Brown.

137. In paragraph 3.9 of the case summary (page11) the Electoral Commission state:

3.9. The source of funds for the donation of approximately £1.54m can be traced as having originated with investments into the parent company. Funds were transferred from the parent company bank account to the UK company bank account. E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party. The sum of €2,250,000 was transferred to 5th Avenue Partners Limited. Shortly thereafter €2,225,000 was transferred from 5th Avenue Partners Limited bank account to the Liberal Democrats. The money arrived in one of the Party's accounts on 22 March 2005 having already been converted into sterling in the sum of £1 ,536,064.80.

138. Ignoring the exchange rate between the Euro and pound sterling, there is no doubt that £1.5 million of the donated money originated from investments in the Swiss parent company, 5th Avenue Partners GmbH. This £1.5m was transferred from the bank account of the parent company to the bank account of 5th Avenue Partners Ltd and then transferred from the bank account of the UK company to the bank account of the Lib Dems. Significantly, "*E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party." It was "confirmed"* that the *"purpose"* of the transfer was*" onward transfer of those funds to the Liberal Democrat Party.*" "*Prior*" means previous to; "*confirmed*" means something is not subject to change and "*purpose*" means the reason why something is done. E-mails previous to the transfer of funds, from 5th Avenue Partners GmbH to 5th Avenue Partners Ltd, stated that the reason for the transfer was "*onward transfer of those funds to the Liberal Democrat Party*" and this was not subject to change. It was pre-determined that 5th Avenue Partners Ltd would transfer the £1.5m to the Lib Dems, so it had no discretion on what it did with the money. 5th Avenue Partners Ltd carried out the intention, to transfer £1.5m, because on 22nd March 2005, the £1.5m was transferred from the bank account of 5th Avenue Partners Ltd to the bank account of the Lib Dems. The evidence is unequivocal; 5th Avenue Partners Ltd acted as agent for 5th Avenue Partners GmbH, an impermissible donor.

139. It is difficult to imagine a more straight forward case of agency and the only reasonable explanation of "*E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party*" is that 5th Avenue Partners Ltd was acting as agent for 5th Avenue Partners GmbH. No doubt, the Electoral Commission based its decision that there was no evidence of agency on legal advice and if so, this is a perfect example that the legal advice of the Electoral Commission is absurd.

140. In paragraph 3.10 of the case summary (page 11) the Electoral Commission state:

3.10.The Commission considered whether the transfers amounted to an agency arrangement. An agency arrangement is a form of agreement that one person acts on behalf of another. An agency arrangement would not arise purely because a holding company made funds available to its subsidiary. It is commonplace for holding companies to transfer funds to subsidiaries.

141. 5th Avenue Partners Ltd was a separate legal entity to 5th Avenue Partners GmbH and as such it was legally capable of acting on behalf of the separate legal entity of 5th Avenue Partners GmbH. As a matter of law 5th Avenue could act as agent for its parent company. If this were not the case, 5th Avenue would not be a separate legal entity.

142. It is indeed common place for a parent company to transfer funds to a subsidiary, but a parent company/ holding company and its subsidiary are separate legal entities. So, for example, the liability of a subsidiary does not accrue to the holding company if the subsidiary becomes insolvent. It ought to be noted that 5th Avenue Partners GmbH held all the shares in 5th Avenue Partners Ltd and therefore had the controlling interest in the subsidiary, albeit that Brown held all the shares in the parent company so was the ultimate controlling party of both companies. However, for the purpose of this thread, it is irrelevant that Brown controlled all the shares in the parent company because what matters is that the structure of the group of companies was such that 5th Avenue Partners GmbH was the sole shareholder of the subsidiary. Controlling interest does not mean that 5th Avenue Partners GmbH was legally liable for the assets and liabilities of 5th Avenue Partners Ltd. It simply entitled the parent company to exercise voting rights in the subsidiary, appoint or sack directors, set policy and receive dividends, but that is all. They were totally separate legal entities and as such they were liable in law for their own actions. The actions of one could not normally be imputed to the other- this is a matter of law.

143. Had the parent company transferred £1.5m to the subsidiary, in the normal course of business, the money would have been an asset of the subsidiary, to treat as its own, because 5th Avenue Partners Ltd was a separate legal entity and it was its business what it did with the money- this is a matter of law. However, 5th Avenue Partners GmbH transferred the money conditional on it being transferred on to the Lib Dems, so it was the business of the parent company what happened to the money because the subsidiary had no discretion to treat to treat the money as its own. The subsidiary did not have the legal right of a separate legal entity to treat the money as its own, so as a matter of law it was an agent of the parent company- the Appellant is entitled to believe that the Tribunal knew the law on the circumstances in which a subsidiary can act as agent for its parent company, but apparently it did not.

144. It is a common transaction for a bank to receive cash from a customer, in one part of the country, under instructions that it be transferred to the bank account of another person somewhere else in the country, but no one would claim that the bank was other than an agent. This is no different to 5th Avenue Partners Ltd receiving funds from the separate entity of its parent company "*for the purpose of onward transfer of those funds to the Liberal Democrat Party.*"

145. In 3.11 of the case summary (page 11) the Electoral Commission state:

3.11. The Commission considered whether the transfer amounted to agency, whereby 5th Avenue Partners GmbH arranged for 5th Avenue Partners Limited to act on its behalf. The facts do not support such a conclusion. There is no evidence of an express agency agreement.

146. "*E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party*" is expressed evidence of an agency agreement and it is patently absurd for the Electoral Commission to claim there was no evidence of agency and a blatant misrepresentation.

147. Brown sent the following e-mail to Lib Dems soon after the Electoral Commission started their investigation in 2005 and there is no dispute that the Electoral Commission was aware of it during their investigation:

"*As a donor, I do not have detailed knowledge of the rules and rely on the party to verify that the donation is proper. In the case of the donation made by my company, very little due diligence was undertaken.* ***Whilst there is no question that the company was set up as a shell vehicle through which to make the donation****, it was evident from the public records that the company was recently incorporated and had not filed statutory accounts*."

148. The Electoral Commission knew from this e-mail that "*there is no question that the company was set up as a shell vehicle through which to make the donation.*" A shell vehicle through which donations were made is evidence, from Brown himself, that 5th Avenue was an agent acting on behalf of others. That is what a shell company does; it has no assets of its own, but acts on behalf of others who want to do something using a shell vehicle. Shell companies can serve a legitimate business purpose, but frequently they are used to hide who is behind a transaction. ." In context, "*through*" means 'via' the company or 'by the means' of the company or more to the point, by the agency of the company. In other words 5th Avenue Partners was the conduit through which a person or entity other than 5th Avenue Partners Ltd made the donations. This is difficult to reconcile with the Electoral Commissions claim in paragraph 1.3 of the case summary that" *there is no reasonable basis, on the facts of this case and taking into account the relevant law, to conclude that the true donor was someone other than 5th Avenue Partners Ltd*." It should be noted that this e-mail only came to light through the efforts of the Sunday Telegraph and was published in that paper on 18th September 2011 and referred to by the Appellant in his statement. The Electoral Commission clearly did not consider evidence from Brown himself that the company "was set up as a shell" relevant to their investigation. Of course, 5th Avenue Partners Ltd was a shell to deceive and cheat investors as well as making donations to the Lib Dems, but Brown was hardly likely to admit he was using the company as a vehicle for financial crime. Nevertheless, these were his words and they were relevant to the key issues before the Electoral Commission and cast doubt on the credibility of the case summary.

149.Through its blanket endorsement of the actions of the Electoral Commission, in paragraph 92 of its judgment, the Tribunal clearly believes that "*E-mails prior to the transfer confirmed that the transfer was for the purpose of onward transfer of those funds to the Liberal Democrat Party* and the email from Brown stating that "*the company was set up as a shell vehicle through which to make the donation*" are incapable of being evidence of agency and the Electoral Commission were correct to state, in 1.3 of the case summary, " *there is no reasonable basis, on the facts of this case and taking into account the relevant law, to conclude that the true donor was someone other than 5th Avenue Partners Limited*."

150. All this was known to the Tribunal, so it clearly agreed there was no evidence of agency- in the circumstances this is perverse ion the extreme. If the upper-tribunal does not grant this appeal, it must certify that as a matter of law "*E-mails prior to the transfer confirmed that the transfer was*

for the purpose of onward transfer of those funds to the Liberal Democrat Party is incapable of being reasonable evidence of an expressed agency agreement agency. Unless it is prepared to make this certification, it must find there was evidence the Electoral Commission unlawfully neglected to take proper account of evidence it had a duty to take proper account of.

151. This section on the issue of agency is strictly an issue relating to the corporate veil because the donations were in the name of 5th Avenue Partners Ltd and for either Brown or 5th Avenue Partners GmbH to be the donor, the corporate veil would have to be removed from 5th Avenue Partners Ltd. This is a matter of law.

152. This concludes the evidence relating to the corporate veil and the Appellant now turns to his supporting evidence relating to whether 5th Avenue Partners Ltd was a permissible donor. This was identified by the Electoral Commission as a key issue and [the Commission's witness] refers to it extensively in her witness statement (pages 298-302). She concludes:

Based on the evidence, the Commission concluded that 5th Avenue Partners Ltd met the requirements under PPERA and was, therefore, a permissible donor.

153. This evidence was sworn and clearly the Electoral Commission considered it relevant to their case that it was not in the public interest that legal precedents relating to the corporate veil be disclosed. If this statement is false or misleading, it affects the general credibility of the Electoral Commission- as argued above. Through its blanket finding, in paragraph 92, the Tribunal clearly found the statement to be true.

154. Section 54(2b) PPERA 2000, requires that for a limited liability company to qualify as a donor, it must be incorporated, registered under the Companies Act 1985 and be carrying on a business in the UK. There is no dispute that the company was incorporated, registered and operating in the UK, so the only issue is whether it was carrying on a business.

155. In support of its case that 5th Avenue Partners Ltd was carrying on a business, in paragraph 3.2 of the case summary the Electoral Commission states:

3.2. The evidence indicates that 5th Avenue Partners Limited undertook a number of actions consistent with carrying on business, including; opening business bank accounts with a major high street bank, opening trading accounts with a financial services broker, contracting for staff/ services and passing company resolutions. In February 2005 it deposited a substantial sum of money into one of its trading accounts, which was then used for options trading and in March 2005 the company entered into a lease for offices. During February and March 2005 it also spent substantial sums on office furniture and equipment. Some of these activities occurred shortly after the initial donations were made; a number of others were undertaken in advance of the donations.

156. The description of 3.2 of the case summary should be contrasted with The Appellant's description in paragraph 18 of his original complaint to the Ombudsman (page 247):

18. What the Electoral Commission knew and chose to conceal is relevant and of fundamental importance.5th Avenue Partners Ltd was a sham; a total deception intended to give the impression of being a prestigious and successful business when in fact it was entirely a facade, created and managed by Mr. Brown, to attract, deceive and cheat wealthy investors. It was

a vehicle used exclusively to facilitate theft, fraud and money laundering; nothing more. Its resources were financed, wholly or mainly, from the proceeds of crime and were part of the facade to deceive investors. Its bank account was used to facilitate theft, fraud and money laundering and what business it did was part and parcel of the deceit. The £2.4 million in donations to the Liberal Democrats was money stolen by Brown from investors and then transferred from the company's account to the party's account. The donations were status symbols intended deceive investors into believing Mr. Brown and his company were successful, important and well connected; as were the prestigious Mayfair address; the chauffeur driven company car with personalized plates; the executive jet and the donation to the Caledonian Club- all financed with the proceeds of crime. In reality the 5th Avenue Partners Ltd was an off-the -shelf company with no trading record and its *raison d' etre* was crime. Brown himself was a convicted criminal wanted in the USA. In summary, the business carried on by the company was facilitating financial crime. All this and more was known to the Electoral Commission, from evidence provided by the police, when it wrote the case summary.

157. The Appellant's description of 5th Avenue Partners Ltd is based on his synopsis and as [the Commission's witness] accepts that the synopsis reflects the evidence the Electoral Commission "*obtained and considered*" in connection with the criminal proceedings, the Tribunal ought to have accepted it as a fair description of the real nature of 5th Avenue. There is absolutely no suggestion in 3.2 of the case summary that the *raison d'être* of 5th Avenue was financial crime, so it must be presumed that the Electoral Commission did not consider this relevant to the issue of the company's permissibility as a donor- this is particularly so as [the Commission's witness] confirmed that only relevant evidence is referred to in the case summary. It would be a monstrous deception if the Electoral Commission considered evidence of the criminal nature of the company relevant and deliberately omitted it to deceive the public into believing the company was a normal legitimate company. It is the Appellant's consistent view, argued before the Tribunal, that while 5th Avenue had the means to carry out normal legitimate business activity, those means were devoted to financial crime and it was not Parliament's intention that such a company could be characterized as carrying on a business for the purpose of the PPERA 2000. If the evidence that the *raison d'être* of 5th Avenue was financial crime is relevant to whether the company was carrying on a business, then clearly the Electoral Commission neglected to investigate it and misled the public by omitting the evidence from the case summary.

158. The Appellant has never disputed that had the *raison d'être* of 5th Avenue not been financial crime, the circumstances set out in paragraph 3.2 of the case summary could amount to carrying on a business for the purpose of the PPERA 2000 and other legislation. However, it is the Appellant's case that facilitating theft or fraud is not a "*business*" in the first place and therefore 5th Avenue Partners Ltd could not be carrying on a business. It ought therefore to have been elementary for the Electoral Commission to establish if there was a business and if there was not then clearly there was no business to be carried on. The PPERA 2000 does not define "*carrying on a business*," but Section 160 PPERA defines business as including "*every trade, profession and occupation*" Business has a wider meaning than trade, so the Appellant will deal with business first.

150. In the *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association (1978*), it was held that business must have " *every mark of a business activity: it is regular, conducted on sound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking, and it*

has as its declared purpose the provision of goods and services which are of a type provided and exchanged in on course of everyday life and commerce."

160. In the *Commissioners of Customs & Excise -v- Lord Fisher [1981]* one of the key tests for business was held to be: "*Is the activity conducted in a regular manner and on sound and recognised business principles?*"

161. Profit is not a necessary element, but clearly the activity must be "*conducted on sound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking, and it has as its declared purpose the provision of goods and services which are of a type provided and exchanged in the course of everyday life and commerce*."

162. It is irrelevant whether the business is an incorporated company, so the definition applies to all types of business. There are three limbs to the definition. The first is that the activity must be regular. This requires no explanation. Secondly, the activity must be conducted "on s*ound and recognised business principles, with a structure which can be recognised as providing a familiar constitutional mechanism for carrying on a commercial undertaking*." This does not refer to the constitution of an incorporated company, required by the Companies Act, but to something with the characteristics of a commercial undertaking which is conducted on sound and recognised business principles. Profit is not necessary, but there must be the characteristics associated with legitimate commerce. For example, an organisation providing or offering goods or services on sound business principles, which properly accounts for income and expenditure and intends to accept and honour obligations and will usually have resources like premises, communications, transport, bank accounts etc. In short something the public will recognise as a business. The third requirement is that the organisation must have "*as its declared purpose the provision of goods and services which are of a type provided and exchanged in the course of everyday life and commerce*." This means what it says: the business must have as its stated objective or intention or goal the provision of goods or services of the type provided in the course of every day commerce. The clear purpose must be to provide goods and services recognisable as those provided in normal life and commerce.

163. The question before the Electoral Commission and Tribunal was whether 5th Avenue fitted the legal requirements of business. It certainly had all the means to operate as normal business because the whole intention was to make the company look like a legitimate business, so there is little or no doubt it had the mechanisms to carry on a commercial undertaking. However, the activity was not "*conducted*" on sound business principles because theft of investors' money is not a sound and recognised business principle nor is falsifying accounts to cover up theft by pretending to pay profits to some investors with money stolen from other investors. It is not just a question of having the mechanism to carry on a commercial undertaking; the processes must be "*conducted*" on sound and recognised business principles.

164. Did 5th Avenue have "*as its declared purpose the provision of goods and services which are of a type provided and exchanged in the course of everyday life and commerce?*" In the case of 5th Avenue, the declared purpose of the business was providing a bond investment service to investors. "*Declared*" and "*purpose*" have their ordinary meaning, so 5th Avenue declared that the purpose of the business- the reason for its existence- was the provision of an investment service to investors' when its true purpose and *raison d'être* was to deceive investors and steal their money. The word "*purpose*" implies an intention and if the purpose or intention is theft, then the purpose is not the

"*declared purpose*" of providing a bond investment service. The purpose or intention must be the same as that declared otherwise the purpose has not been stated. The declared purpose of 5th Avenue ought to have been theft of investors' money and as this does not have the characteristics of an every day commercial service, the third limb of the *Morrison* case has not been met. Theft of investors' money is not the provision of a service, it is theft and the investors are victims of theft, not recipients of a service. To take the contrary view would be to perversely claim that thieves were providing a service to their victims. Nevertheless, it seems to be the view of the Electoral Commission and by extension the Tribunal that 5th Avenue was providing customers with a service by stealing from them.

165. Unless 5th Avenue Partners Ltd had "*every mark of a business activity*" it was not a business, so there was no business to be carried on.

166. Section 160, PPERA 2000 next refers to "*trade*" in the definition of business. Lord Reid in *Ransom v Higgs [1974]* defined trade as meaning:

Operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.

167. The *raison d'être* of 5th Avenue Partners Ltd was theft of investors money and for the reasons given above, theft is not providing customers with a service for reward. No service was provided, so there was no trading, just theft. Unless the Tribunal thought theft is providing a commercial service to its victims, 5th Avenue was not trading for the purpose of the PPERA 2000.

168. Section 160, PPERA 2000 finally refers to "*profession and occupation*" in relation to the meaning of business. Profession and occupation implies providing a service for reward and although vocation could be included, it is more relevant to look at the reality of the situation rather than every permutation on what amounts to a profession or occupation. The profession or occupation, if there was one, was in the persona of 5th Avenue Partners Ltd; an incorporated company purportedly providing a bond investment service for reward. There was no service, just theft of investors' money and although thieves may describe themselves as having a profession or occupation, in the circumstances of the 5th Avenue case theft is not a service, so the company was not a profession or occupation.

169. These specific points relating Section 160, PPERA 2000 were not argued before the Tribunal, but they were implicit in his general arguments and the Tribunal ought to have known what does or does not amount to a business. If there was no business to be carried on 5th Avenue Partners Ltd did not meet the requirements of Section 54(2b) PPERA 2000.

170. The following FOI Act requests and responses are significant (pages 26-27):

9) Detective Sergeant [Name] of the City of London Police's Economic Crime Unit told the Times newspaper of 29/11/2008 that 5th Avenue Partners Ltd was "*just a sham*". In paragraph 3.2 of its judgment, the Electoral Commission gives examples to allegedly demonstrate that 5th Avenue Partners Ltd was carrying on a business. Does the Electoral Commission hold any information whatsoever indicating that while 5th Avenue Partners Ltd may have had the appearance or even the processes to operate as a genuine business, office, bank account etc, it fundamentally failed to operate as a legitimate business because its *raison d'être* was to facilitate

theft or fraud?

The Commission does hold information relating to your request. This information forms part of our investigation file and also, in so far as it is retained, relates to information provided by the City of London Police.

As stated in paragraph 3.2 of the case summary 5th Avenue Partners Ltd did make deposits into trading accounts which were then used for options trading.

12) Does the Electoral Commission hold any information whatsoever indicating that under the PPERA, a company used primarily to facilitate theft or fraud can be described as carrying on a business?

The Commission did not make a determination on 5th Avenue's facilitation of theft or fraud; this would be a matter for the police.

The Commission does hold information relating to this information. We do hold information in relation to whether or not 'a company used primarily to facilitate theft or fraud can be described as carrying on a business'.

171. The Appellant will deal with the options trading below, but from the response to very specific questions, the Electoral Commission confirmed that it held information that 5th Avenue Partners Ltd "*fundamentally failed to operate as a legitimate business because its raison d'être was to facilitate theft or fraud?* Fundamental does not mean the company entirely failed to carry out any legitimate actions consistent with carrying on a legitimate business, but it does mean that the principal business carried on was financial crime because the reason for the company's existence was to facilitate theft or fraud. By definition, a company whose principal reason for existence is financial crime is fundamentally carrying on the business of financial crime. It seems that the Electoral Commission knew 5th Avenue Partners Ltd was principally carrying on the business of financial crime because they state: "*We do hold information in relation to whether or not 'a company used primarily to facilitate theft or fraud can be described as carrying on a business'*."

172. The only reasonable explanation for holding this information is that they knew that 5th Avenue Partners Ltd primarily carried on the business of facilitating theft or fraud and considered "*whether or not*" such a company " *can be described as carrying on a business*" for the purpose of the PPERA 2000. Having considered this question, they clearly decided that for the purpose of the PPERA 2000, a company principally carrying on the business of facilitating crime was a permissible donor on grounds that it was carrying on a business.

173. The Electoral Commission state that they did not "*make a determination on 5th Avenue's facilitation of theft or fraud; this would be a matter for the police.*" Having confirmed that fundamentally 5th Avenue Partners failed to operate as a legitimate business, because its *raison d'être* was facilitating theft or fraud, then for the reasons given above, they knew that the fundamental purpose of 5th Avenue was "*facilitation of theft or fraud*." They did not have to make the determination because this had already been done by the Crown and the police and the Electoral Commission knew this from the evidence they "o*btained and considered*" in relation to the criminal proceedings and [the Commission's witness'] admission. The Tribunal ought to have proceeded on the basis that the business carried on by 5th Avenue Partners Ltd was primarily if not wholly facilitating financial crime and that the Electoral Commission knew this to be the case and

still regarded it as a permissible donor. It seems to be the Electoral Commission's case that provided the company had all the means to operate as a legitimate business, it is irrelevant for the purpose carrying on a business, under Section 54(2b) PPERA 2000, if those means are wholly or mainly devoted to facilitating financial crime.

174. The following FOI Act requests (pages 24-25 and responses are also significant:

2) Does the Electoral Commission hold any information whatsoever, indicating that at the time of incorporation or subsequent to incorporation, 5th Avenue Partners was used as a vehicle for impropriety: namely facilitating theft or fraud or otherwise acquiring, retaining or controlling money obtained through dishonesty?

3) Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd was corporately a party to theft or fraud?

The scope of the Commission's investigation was whether there was compliance with the party funding controls in the Political Parties Elections and Referendums Act 2000 (PPERA) and in particular the permissibility of donations under section 54 of that Act. It was not a matter for the Commission to determine whether a company was used as a vehicle for facilitating theft or fraud; this would generally be a matter for the police.

In answer to your questions 2 and 3, the Commission does hold some information used in the police investigation and criminal proceedings against Michael Brown. However, this information is held only in so far as the Commission holds copies the court decisions relating to Michael Brown and some of the City of London Police file provided to us in the course of our investigation by the Police. This file was provided to the Commission under the strictest confidence and constitutes evidence used in the police's investigation.

175. This confirms that the Electoral Commission did not seek to determine whether 5th Avenue was vehicle for financial crime, so they cannot know if such a company was carrying on a business. Furthermore, from [the Commission's witness'] cross examination and the presentation of the Electoral Commission's case, there does not seem to be any dispute that they did not consider it relevant whether the actual business carried on was facilitating financial crime. However, through not seeking to determine whether 5th Avenue was a vehicle for financial crime, they misled the public by claiming 5th Avenue was a permissible donor because they could not possibly know if such a company was carrying on a business for the purpose of the PPERA 2000.

176. Before trying to further establish whether crime can be classed as carrying on a business under the PPERA 2000, there is one matter arising from the FOI Act responses. In paragraph 3.2 of the case summary (pages 9-10) the Electoral Commission state that in February 2005, 5th Avenue Partners Ltd "*deposited a substantial sum of money into one of its trading accounts, which was then used for options trading.*" The synopsis, which [the Commission's witness] confirms reflected the evidence obtained and considered in relation to the criminal proceedings against Brown, puts it beyond doubt that everything relating to the business was financed with stolen money, so it is likely that this option trading was done with money stolen from investors and was simply part and parcel of the crime rather than an isolated incident of legitimate trading- neither Brown nor 5th Avenue Partners was authorised by the Financial Services Authority to carry on the business of investment, under the Financial Services and Markets Act 2000, so any options trading was a criminal offence *per*

se and part of the general criminality conducted through the business. The Tribunal may have been influenced by this options trading, but had it properly taken account of the evidence, would have known it was likely this was part of the overall criminality.

177. The evidence before the Tribunal was undisputedly that the business carried on was wholly or mainly facilitating financial crime and the Electoral Commission knew this or ought reasonably to have known this. The issue is what did Parliament intend, in Section 54(2b) PPERA 2000, when it referred to by carrying on a business. A leading case on the interpretation of the law is the *Attorney-General v. Prince Ernest Augustus of Hanover* [1957] A.C. 436, 461 in which 20. Lord Simonds stated:

> **'For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those other legitimate means, discern the statute was intended to remedy.'**

178. This case has been approved in more recent cases and was argued by the Appellant at the Tribunal. It gives clears guidance on how the law should be interpreted. The words "*carrying on a business*" cannot be interpreted in isolation, so all the things mentioned by Lord Simonds must be considered. As the Appellant demonstrated, the Electoral Commission took such a narrow view of what carrying on a business meant, they came to the conclusion that Parliament intended that political parties could be funded with the proceeds of crime committed through companies.

179. The context is the PPERA 2000, which, according to the preamble to the Act makes provision to regulate donations to political parties. Through its findings, the Electoral Commission and Tribunal decided that Parliament intended that an Act to regulate donations to political parties permitted a company, whose business was carrying on the business of financial crime, to finance political parties. As the Tribunal itself found in its findings in paragraph 83 of its judgment:

In this case it is clear that there is a strong public interest in the issues raised by the Appellant. On the face of it, it would seem, as he claims, inconceivable that Parliament envisaged that political parties could be funded by the proceeds of crime, as acknowledged by the ICO: "The Commissioner accepts that the implication of the EC's conclusion appears to be that political parties in the UK can be funded by the proceeds of crime." (para 24c of ICO response (page 89).

180. If it seems to the Tribunal that "*it is inconceivable that Parliament envisaged that political parties could be funded by the proceeds of crime*," then the Tribunal ought to have accepted that it was not Parliaments intention that a company carrying on the business of facilitating financial crime could be deemed to be carrying on a business for the purpose of legislation intended to regulate donations to political parties- this point is set out in greater detail above.

181. The Electoral Commission agreed that one of their key objectives is "*integrity and transparency in party and election finance*." From this it is reasonable to presume that their interpretation of the PPERA 2000 is that the purpose of regulating donations to political parties is integrity and transparency in the funding of political parties. This may seem obvious, but is confirmed by Section 61, PPERA 2000, which the Tribunal referred to in paragraph 51 of the judgment:

182. Section 61 , PPERA 2000 states:

(1)A person commits an offence if he—

(a) knowingly enters into, or

(b) knowingly does any act in furtherance of,

any arrangement which facilitates or is likely to facilitate, whether by means of any concealment or disguise or otherwise, the making of donations to a registered party by any person or body other than a permissible donor.

183. The explanatory note to this Section states:

In addition to a party's civil liability under section 58, *section 61* makes it a criminal offence for any person knowingly to participate in an arrangement or to withhold information, or supply false information, so as to evade the restrictions on the sources of donations. The bringing of criminal proceedings does not preclude the Commission from also applying for forfeiture of the donation in question (see *section 58(4)*).

184. The PPERA 2000 clearly intends that there must be transparency and integrity because it outlaws any concealment or disguise in relation to evasion of the restrictions "*on the sources of donation*s." Obviously there can be no transparency and integrity if there is concealment or disguise. In the case of a company that is a vehicle for crime, by its very nature there will be no transparency or integrity. There will be the appearance that everything is legitimate, as was the case with 5th Avenue, but that is simply concealment or disguise to hide the true nature of the company and the source of its income. If such a company decides to finance a political party, it is more likely than not that the company will conceal or disguise the sources of the donations because the whole purpose of the company is to hide the origins of its money. As a matter of common sense, donations from a company whose business is facilitating theft or fraud must be presumed to be disguising or concealing the origins of the donations and therefore it is unlikely that Parliament intended that such a company could be classed as carrying on a business for the purpose of the PPERA 2000- this ought to have been apparent to the Tribunal from its own examination of Section 61.PPERA 2000. If Brown was being transparent, he would have informed the Lib Dems that he had stolen the money from investors'.

185. Another way of looking at the issue is this. The Electoral Commissions view seems to be that it is irrelevant whether 5th Avenue was carrying on the business of financial crime. This must be wrong because the Theft Act 1968 prohibits facilitating theft or fraud and therefore the PPERA 2000 cannot override the criminal law by effectively legitimising criminal conduct.

186. Lord Simonds refers to the mischief that a statute was intended to remedy. Some mischiefs are so obvious they need not be addressed in the legislation because it would be absurd that any reasonable person would imagine that Parliament did not intend to prevent that mischief. Some things can be implied and surely one such thing is that companies carrying on the business of crime cannot fund political parties. If Parliament had stated that they could, there would have been public outrage and Parliament brought into disrepute.

187. Lord Simonds also refers to other statutes, so what can be learned from other statutes in relation to whether it was Parliaments intention that carrying on the business of theft or fraud counted as carrying on a business under the PPERA 2000.

188. The Tribunal referred to some of the other statutes highlighted by the Appellant in his skeleton arguments:

75. The remainder of his submissions revisited the materials appended to his Grounds of Appeal. He also referred to the various other statutory provisions, such as the Companies Act 1985, in particular section 458, now in fact re-enacted as section 993 of the 2006 Act which sets out the ingredients of the offence of fraudulent trading. Reference was also made to section 9 of the Fraud Act 2006. The stated aim of these references was to show that it was not "Parliament's intention to include financial crimes in any interpretation of carrying on a business".

189. Section 1, Companies Act 1985 states:

(1)Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

189. From Section 1, it is clear the Parliament intended that an incorporated company, like 5th Avenue, must be incorporated for a lawful purpose. It is unlikely that Brown would put in the memorandum of association that the purpose of the business was facilitating theft and fraud, but had he done so clearly Parliament would not have regarded this as a lawful purpose. This becomes more apparent under Section 458, Companies Act 1985, which states:

If **any business** of a company **is carried on** with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the **carrying on of the business** in that manner is liable to imprisonment or a fine, or both. This applies whether or not the company has been, or is in the course of being, wound up.

190. The business of 5th Avenue was "*carried on*" for a totally fraudulent purpose and meets every limb of the Section. The company facilitated defrauding investors and as the investors expected their money back they were creditors, but in any case the catch-all limb of "*any fraudulent purpose*" is covered by the circumstances of the 5th Avenue case. The business carried on was for a fraudulent purpose and Brown was knowingly a party to "*carrying on of the business in that manner*."

191.. The explanatory notes into a related offence under Section 9 Fraud Act 2006 give an insight into the interpretation of Section 458 Companies Act 1985.

Section 9 makes it an offence for a person knowingly to be a party to the carrying on of fraudulent business where the business is not carried on by a company or (broadly speaking) a corporate body. This new offence parallels the existing offence that applies in the case of fraudulent businesses carried on by companies and certain other corporate bodies. The existing offence is contained in section 458 of the Companies Act 1985 (for England and Wales and Scotland) or (for Northern Ireland) in Article 451 of the Companies (Northern Ireland) Order 1986. The extension of this criminal liability under the companies legislation to non-corporate traders was recommended by the Law Commission in their Report on *Multiple Offending* (Law Com No. 277, Cm 5609, 2002). Non-corporate traders covered by the new offence include sole traders, partnerships, trusts,

companies registered overseas, etc.

.A person commits the offence of fraudulent trading under the companies legislation if he is knowingly party to the carrying on of a company's business either with intent to defraud creditors or for any other fraudulent purposes. This section creates a similar offence that applies to persons knowingly party to the carrying on of non-corporate businesses in either of those ways. Fraudulent trading is in effect a general fraud offence, comparable to conspiracy to defraud, but requiring the use of a company instead of the element of conspiracy. The case law has established that:

- dishonesty is an essential ingredient of the offence;
- **the mischief aimed at is fraudulent trading generally**, and not just in so far as it affects creditors;
- the offence is aimed at **carrying on a business** but can be constituted by a single transaction; and
- it can be committed only by persons who exercise some kind of controlling or managerial function within the company.

It is intended that these principles should apply to the new offence in section 9 too.

192. Section 9 of the Fraud Act 2006 is post the donations in this case, but the explanatory notes clearly refer to case law on Section 458 Companies Act 1985, which is relevant. The mischief Parliament made unlawful was carrying on a fraudulent business generally and not just insofar as it affects creditors. These explanatory notes are authoritive and make it clear that it is Parliaments intention to outlaw carrying on a business for any fraudulent purpose and therefore it could not have been Parliaments intention that a company carrying on the business of financial crime was carrying on a business within the meaning of the PPERA 2000.

193. Section 6 Financial Services and Markets Act 2000 has the objective of reducing the extent to which it is possible for a business carried on to "*be used for a purpose connected with financial crime*:"

(1)The reduction of financial crime objective is: reducing the extent to which it is possible for a business carried on—

(a)by a regulated person, or

(b)in contravention of the general prohibition,

to be used for a purpose connected with financial crime.

(2)In considering that objective the Authority must, in particular, have regard to the desirability of—

(a)regulated persons being aware of the risk of their businesses being used in connection with the commission of financial crime;

(b)regulated persons taking appropriate measures (in relation to their administration and employment practices, the conduct of transactions by them and otherwise) to prevent financial crime, facilitate its detection and monitor its incidence;

(c)regulated persons devoting adequate resources to the matters mentioned in paragraph (b).

(3)"Financial crime" includes any offence involving—

(a)fraud or dishonesty;

(b)misconduct in, or misuse of information relating to, a financial market; or

(c)handling the proceeds of crime.

(4)"Offence" includes an act or omission which would be an offence if it had taken place in the United Kingdom.

(5)"Regulated person" means an authorised person, a recognised investment exchange or a recognised clearing house.

194. The purpose of this particular law is to reduce the extent to which it is possible for the "*business carried on*" to be used for a purpose connected with financial crime. Parliament's intention is to reduce financial crime, so it clearly did not intend that carrying on the business of facilitating financial crime could be classed as carrying on a business for the purpose of any statute, including the PPERA 2000.

195. Sections 1 and 458 of the Companies Act and Section 6 Financial Services and Markets Act 2000 are strong indicators that it is not Parliaments intention to include financial crime in any interpretation of carrying on a business. Of course, as stated above, if one goes to the Theft Act 1968, theft and fraud are criminal offences per se, so it is unlikely Parliament intended that facilitating these offences was within the interpretation of carrying on a business under the PPERA or any other statute.

196. As a matter of law and common sense, a statute cannot be interpreted so as to be inconsistent with other statutes. Quite obviously carrying on a business under the PPERA 2000 would be inconsistent with other statutes if it is interpreted in such a way that it includes financial crime. There must be a presumption that Parliament did not intend carrying on a business under the PPERA to include carrying on financial crime.

197. In paragraph 1.3 of the case summary, the Electoral Commission stated:

Having carefully examined the evidence and the applicable law, the Commission has concluded that 5th Avenue Partners Limited met the permissibility requirements under PPERA, and therefore was a permissible donor.

198. Through its blanket findings in paragraph 92 of the judgment, the Tribunal self-evidently agree "*5th Avenue Partners Limited met the permissibility requirements under PPERA, and therefore was a permissible donor*. In light of the above evidence, if the upper-tribunal dismisses the appeal, it must certify that as a matter of law all the above evidence relating to whether 5th Avenue was carrying on a business have no validity and it is irrelevant, for the purpose of Section 54(2b) PPERA 2000, whether the business carried on was facilitating theft or fraud. Unless the upper tribunal is prepared to certify this, it must accept the Electoral Commission acted unlawfully by not investigating the interpretation of a business and whether this included carrying on the business of facilitating financial crime.

199. The purpose of this section on the permissibility of 5th Avenue Partners Ltd is to corroborate that if the Electoral Commission acted unlawfully in respect of this issue, it was just as likely to act unlawfully in respect of the specific issue of the corporate veil.

CONCLUSIONS

200. The duty of the Tribunal was to decide whether it was in the public interest to disclose the names of legal precedents the Electoral Commission relied on in deciding that a court was unlikely to remove the corporate veil. In making its decision, the Tribunal was asked to take in to account whether there was suspicion that the Electoral Commission acted unlawfully or made misrepresentations or lacked transparency in the rationale for its decisions.

201. The Tribunal was not required to determine whether the donations were lawful or unlawful under the PPERA 2000, but simply whether, for all the reasons discussed above, the Electoral Commission acted unlawfully by not considering maters it had a duty to consider- as per the *Wednesbury* case.

202. The Appellant submits that, as a matter of law, in all the circumstances of the case there was evidence the Electoral Commission acted unlawfully and the findings in paragraph 92 of the Tribunal's judgment are therefore perverse. If the Electoral Commission unlawfully failed to consider relevant matters, it follows they made misrepresentations by claiming to have done so in the case summary.

203. If there is evidence the Electoral Commission acted unlawfully and made misrepresentations, there is a suspicion of unlawful behaviour and misrepresentation and in accordance with the Information Commissioner's guidelines these matters should have been taken into account by the Tribunal in determining whether it is in the public interest to disclose the requested information.

204. From all the evidence before the Tribunal and the law argued or law it ought to have inferred, the Tribunal cannot lawfully justify its blanket findings in paragraph 92 of its judgment.

205. The upper-tribunal does not have to decide if all the legal issues argued by the Appellant are correct, merely if they were issues the Electoral Commission had a duty to investigate and if they did not take this into account in determining the public interest.

206. The Tribunal neglected to explain why the evidence in the Appellant's synopsis was not relevant or why it rejected the evidence, bearing in mind [the Commission's witness'] admission, or why evidence that 5th Avenue Partners was a vehicle for crime by Brown was irrelevant to the issue of the corporate veil or why evidence that the criminal nature of the business carried on by 5th Avenue was irrelevant to the issue of whether the company was carrying on a business or why the e-mail evidence of agency was not really evidence of agency etc. These were issues before it, but the Tribunal preferred not to give a reasoned explanation why they were not relevant.

207. The Appellant finds the judgment confusing and contradictory. The Tribunal professed not to have the power to investigate findings in the case summary and then does so, when in fact it did have such powers because it could not possibly investigate whether there was a "*suspicion of misrepresentation or unlawful behaviour*" without reviewing the case summary. The Tribunal stated in paragraph 91 that "w*ere there any basis for inferring that the EC ignored the legal advice it received or has misled the public, then there would be a genuine degree of public interest in*

ensuring that the EC reached a proper decision." Quite how it would do this without reviewing findings of fact is difficult to know.

208. The final limb of the Appellant's case relies on the following guidance from the Information Commissioner:

A lack of transparency in the rationale for the public authority's actions. There is some general public interest in the promotion of transparency, accountability and public understanding and involvement in public processes. A significant lack of transparency will therefore favour disclosure, although this must amount to more than mere curiosity over the content of advice and will carry less weight than arguments of misrepresentation backed up by evidence.

209. The relevant statement in the case summary is in 3.5 of the case summary:

The Commission also considered whether company law allowed the actions of 5th Avenue Partners Limited to be treated as the actions of Michael Brown or Avenue Partners GmbH. The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation.

210. This was an assertion and there was a lack of transparency in the rationale for this decision other than company law was unlikely to justify removing the corporate veil. This was a key matter because if the corporate veil was removed and either Brown or 5th Avenue Partners Ltd was the true donor, then the donations would have been impermissible under the PPERA 2000. Electoral Commission was prepared to identify that the law regulating donations to political parties is the PPERA 2000, but refuses to name the specific law on which this key decision was based. The reference to company law is too vague; company law is probably the most extensive area of English law.

211. The PPERA 2000 is undoubtedly referred to in the legal advice, but had the Electoral Commission merely mentioned electoral law, in the case summary, and did not specifically mention the PPERA 2000, it is unlikely a Tribunal would have found there was no public interest in disclosing identity of the specific electoral law. In fact it would have been thought bizarre if a public authority wanted to keep secret the name of the law it had a duty to enforce simply because it was mentioned in legal advice. The same principle applies to the legal precedents the Appellant has requested the names of. They were the very basis for the decision, yet the Electoral Commission want to keep the names of this law a secret.

212. Legal precedent is part of the Common Law and as much the law of the land as statute law. The Appellant merely wanted the name or names of the case law which the Electoral Commission referred to and not the text of the cases or any interpretation. This would be no different to stating that the name of the PPERA 2000. The harm done to justice would be nil or peripheral, but the public would be able to see what specific law led this key decision of the Electoral Commission, which appears to allow political parties to be financed by a company used as a vehicle for financial crime. In the wholly exceptional circumstances of this case there is a public interest in disclosing the names of the cases.

213. The legal advice on which the Electoral Commission relied was clearly not appropriate to the relevant circumstances of the case. Keeping the names of the legal precedents secret is having the effect of allowing the Electoral Commission to keep secret something which would expose that they had acted unlawfully and that is not in the public interest

214. The perversity of the Tribunal's findings in paragraph 92 is reflected in paragraph 93 of the judgment:

93. The Tribunal notes that, following a complaint from the Appellant in this case and subsequent correspondence between him and the Parliamentary and Health Services Ombudsman an investigation into aspects of the Electoral Commission's investigation of the donations in question has been initiated. The Tribunal confirms its view that the expressed concerns of the Appellant which go beyond the specific FOIA request considered by thisTribunal are addressed as appropriate by the Ombudsman.

215. The expressed concerns that the Ombudsman is currently investigating were set out in paragraph 1 of the Appellant's complaint to the Ombudsman (page 191 of the open bundle):

1. The action complained of is that the Electoral Commission, in the exercise of its administrative function relating to donations to a political party, committed the following acts of maladministration: reached a perverse decision, which the facts and law were incapable of supporting; through gross negligence failed to carry out such investigations as the circumstances required and made deliberate or negligent misrepresentations in a published case summary.

13. Through its blanket finding, in paragraph 92, that there was "*no indication of any evidence that the public has been misled*" and was satisfied that "*the advice the EC received was anything less than thorough and that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" or that "*the investigation was carried out in anything approximating a perverse or unlawful manner*," the Tribunal exonerated the Electoral Commission of any maladministration whatsoever.

216. The Tribunal knew that the Ombudsman was using her statutory powers, under the Parliamentary Commissioner Act 1967, to investigate statutory decisions taken by the Electoral Commission under the PPERA 2000, but through investigating matters it professes not to have authority to investigate, the Tribunal has expressed the judicial view that it is satisfied that the Electoral Commission carried out a thorough and properly conducted investigation and did not act perversely or unlawfully or mislead the public. It is therefore bizarre for the Tribunal to state that the Appellant's concerns, which go beyond the FOI Act request, be addressed, "*as appropriate by the Ombudsman*." All his concerns under investigation by the Ombudsman have been addressed by the Tribunal.

217. The findings in paragraph's 92 and 93 are conflicting. If the statement in paragraph 93 is correct, presumably the Tribunal feels the findings in paragraph 92 do not affect the Ombudsman's investigation, which can only mean the Tribunal did not really find there was "*no indication of any evidence that the public has been misled*" and was satisfied that "*the advice the EC received was anything less than thorough and that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted*" or that "*the investigation was carried out in anything approximating a perverse or unlawful manner*" and therefore there was a suspicion of unlawful behaviour etc, after all.

218. The Appellant submits that there is evidence that the findings in paragraph 92 are perverse and confusing and, as a matter of law, the Tribunal ought reasonably to have found the Electoral Commission acted unlawfully, by not investigating matters it had a duty to investigate; misled the

public by claiming to have considered relevant facts and law when it did not do so and lacked transparency in the rationale for its decisions and therefore it is in the public interest to disclose the requested information.

219. The Appellant respectfully request that the decision of the lower-tribunal be quashed and replaced with a decision that it is in the public interest to disclose the information.

Mr P
Appellant

Dated this 9th day of March 2012

Annex L: Summary of issues considered in legal advice received by the Commission

The following is a summary of the issues being considered by each piece of legal advice received by the Commission. It is not a summary of the advice itself.

Advice received on 3 November 2006

- We are asked to advise in relation to the powers of the Commission concerning donations totalling £2.4 million made in the spring of 2005 by 5th Avenue Ltd, a company owned by Mr Michael Brown.
- Section 58 of the *Political Parties, Elections and Referendums Act 2000* (the 2000 Act) confers power on the Commission to apply to the magistrates' court for an order for the forfeiture of an amount equal to the value of a donation received by a registered party if it was a donation which, by virtue of section 54, the party was prohibited from accepting.
- We understand that the Commission is currently considering whether 5th Avenue Ltd was a permissible donor for the purposes of section 54, which turns on whether, at the time of the donation, the company was one which '*carries on business in the United Kingdom*'.

Advice received on 27 March 2007

- If a company's sole activity is fraudulent, is it nonetheless carrying on business in the UK within the meaning of section 54(2)(b) of the 2000 Act?
- Are the tests compiled by the lawyers for the Liberal Democrat Party (the Party), as to whether or not a company is carrying on business, appropriate in the context of the 2000 Act and permissible donations; does the information presented justify a conclusion that 5th Avenue Ltd was carrying on business at the time that the donations were made?
- If information comes to light after the end of the 30-day period prescribed in the 2000 Act section 56, would it be reasonable for the Commission to seek forfeiture where:
    - a political party has taken reasonable steps to verify the permissibility of a donor within the prescribed timescale of 30 days and found no reason not to accept a donation;
    - a political party has not taken reasonable steps to verify the permissibility of a donor within the prescribed 30-day timescale but, even had it done so, all the evidence available at the time would have suggested that the donation was permissible?
- Are any of (a) the passage of time since the donation; (b) the fact that the donation has been spent by a party; (c) the possibility that an order for forfeiture could bankrupt a party; or (d) the possibility that an order for forfeiture could prevent the victim of a fraud that was the source of the funds from recovering their money, relevant considerations for the Commission in determining whether to seek forfeiture from the Party?
- Does the Party have an arguable legitimate expectation that the Commission will decide in the next few weeks whether or not to seek forfeiture based on private statements made by the Commission to the Party and/or on the statement made in the press release of 27 October 2006; or can the Commission legitimately wait for criminal proceedings against Mr Michael Brown to be concluded?
- Is the Commission's draft policy on taking forfeiture action reasonable, and in the context of the Commission's bringing

forfeiture actions, could it be improved in any way?

- Are there any other aspects of the matter of relevance in the Commission's determining and proceeding with a claim for forfeiture against the Party?
- A separate general issue: does the Commission have powers, if the political party recognises that the donation is from an impermissible donor, to accept the equivalent sum from the political party, and then pay it on to the Consolidated Fund, rather than applying for an order for forfeiture?

Advice received on 25 April 2008

- We are asked to advise ... on the limitation period for bringing forfeiture proceedings pursuant to section 28 of the *Political Parties Elections and Referendums Act 2000* (the 2000 Act).

Advice received on 30 April 2009

- What is the relevance and admissibility of evidence and judgments in the criminal and civil legal proceedings brought against 5th Avenue Ltd/Mr Brown?
- Does the evidence establish that 5th Avenue Ltd was not carrying on business at the time when the donations were made?
- Does the evidence enable the Commission to treat the donations as having been made by Mr Brown?
- What factors are relevant to the Commission's decision to bring forfeiture proceedings and what weight should the Commission attach to them?
- What further evidence is required/ investigations should be conducted by the Commission?
- Should the Commission consider and review seeking voluntary forfeiture of some or all of the donations, from the Party?

Advice received on 3 June 2009

- Advice on '*piercing the corporate veil*'.

Advice received on 15 September 2009

- On the current evidence what is the scope for the Commission to argue that '*the donation*' was made by 5th Avenue Partners GmbH because it was '*funnelled/ channelled*' through 5th Avenue Ltd or because 5th Avenue Ltd was acting as an agent for 5th Avenue Partners GmbH? In particular, a) does section 54(1) the 2000 Act prohibit the funnelling/channelling of funds in the way '*the donation*' was made in this case? b) if so, is the current evidence sufficient to prove that the donation came from 5th Avenue Partners GmbH, a foreign and therefore impermissible donor? c) where a donation is received via an agent (5th Avenue Ltd) who is acting on behalf of a principal (5th Avenue Partners GmbH), and the agency is concealed (ie where the agent does not make the declarations required by section 54(5) and (6) the 2000 Act), who is the donor for the purposes of section 54(1)(a)?
- Is there scope to argue that (a) section 54(1)(b) the 2000 Act extends to the kind of deception where a donor is acting as an agent for the true source of the donation but conceals the fact? and (b) suspicion of this kind of deception is sufficient for a party to be '*unable to ascertain the identity of*' the real donor? If so, what are the prospects of success with regards to '*the donation*'?

- What in our view are (a) the circumstances of '*deception*' envisaged in section 54(1)(b); and (b) the level of suspicion that would required for a party to be '*unable to ascertain the identity of the real donor*', in order to breach the prohibition in section 54(1)(b)?
- With respect to '*the donation*', do we remain of the view that it would not be reasonable or proportionate for the Commission to seek an order for forfeiture in the courts?
- What, in our view, is the likelihood of the court making a forfeiture order in respect of the donation if it were impermissible or unascertainable?

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