Judgments

Imperial Tobacco Ltd v Lord Advocate (Scotland)

Practice – Devolution issues – Scotland – Claimant tobacco company claiming that legislation restricting sale of tobacco products in Scotland outside legislative competence of Scottish Parliament – Whether legislation relating to specific reservations in list of matters reserved to UK Parliament – Whether legislation effectively amending law on reserved matters – Scotland Act 1998, s 28(1) – Tobacco and Primary Medical Services (Scotland) Act 2010

[**2012**] **UKSC 61**, (Transcript)

SUPREME COURT

LORDS, HOPE DP, WALKER, LADY HALE, LORDS, KERR, SUMPTION

12, 13 NOVEMBER, 12 DECEMBER 2012

12 DECEMBER 2012

R Keen QC and B J Gill for the Appellant

J Mure QC and A Poole QC for the Respondent

Lord Wallace of Tankerness QC, A Carmichael QC and J Swift QC for the Intervener

Pinsent Masons LLP; Scottish Government Legal Directorate Litigation Division; Office of the Advocate General for Scotland

LORD HOPE (DP) (with whom LORD WALKER, LADY HALE, LORDS, KERR and SUMPTION agree):

[1] The question in this appeal is whether ss 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 ("the 2010 Act") are outside the legislative competence of the Scottish Parliament. Section 28(1) of the Scotland Act 1998 ("the 1998 Act") provides that, subject to s 29, the Scottish Parliament may make laws, to be known as Acts of the Scottish Parliament. Section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

[2] Five of the various rules that affect the legislative competence of the Parliament are in point in this case. Section 29(2)(b) provides that a provision is outside that competence so far as it relates to reserved matters, details of which are set out in Sch 5. Section 29(2)(c) provides that a provision is outside competence if it is in breach of the restrictions in Sch 4. Paragraph 1 of Sch 4 to the 1998 Act provides that an Act of the Scottish Parliament cannot modify art 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as it relates to freedom of trade. Paragraph 2 of Sch 4 provides that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters. And s 29(4) provides that a provision which would otherwise not relate to reserved matters but makes modifications of Scots private law or Scots criminal law as it applies to reserved matters is to be treated as relating to reserved matters, unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

[3] According to its long title the 2010 Act makes provision, among other things, about the retailing of tobacco products. Chapter 1 of Pt 1 of the Act is headed "Display, sale and purchase of tobacco products". Sections 1 and 9 are included within that Chapter. Section 1 prohibits the display of tobacco products in a place where tobacco products are offered for sale. Section 9 prohibits vending machines for the sale of tobacco products. The Appellants, Imperial Tobacco Ltd, maintain that those sections are outside legislative competence because they relate to matters which are listed in Pt II of Sch 5 to the 1998 Act as reserved matters for the purposes of that Act, and that they should in any event be treated as relating to reserved matters as they make modifications to Scots criminal law as it applies to reserved matters. They further maintain that the sections modify the law on reserved matters, contrary to the prohibition in para 2 of Sch 4. They also maintained in the Court of Session that the sections are outside competence because they modify art 6 of the Acts of Union so far as they relate to freedom of trade. The bringing into force of the 2010 Act has been deferred until these challenges to the competence of these sections have been finally determined.

[4] On 30 September 2010 the Lord Ordinary, Lord Bracadale, held that none of the Appellants' challenges to the legislative competence of the Scottish Parliament to pass ss 1 and 9 of the 2010 Act were well founded, and he dismissed their petition for judicial review: [2010] CSOH 134, 2010 SLT 1203. On 2 February 2012 the First Division (Lord President Hamilton and Lords Reed and Brodie) dismissed the Appellants' reclaiming motion against the Lord Ordinary's interlocutor: [2012] CSIH 9, 2012 SC 297. The Appellants have now appealed to this court, but they departed from their challenge to the legislative competence of ss 1 and 9 under s 29(2)(c) of the 1998 Act read together with para 1 of Sch 4. Shortly before the hearing of the appeal they also departed from their challenge under s 29(4). The Advocate General did not appear in the Inner House, but he sought and was given permission to intervene in this appeal.

BACKGROUND

[5] Thirteen years have elapsed since the Parliament met to conduct business for the first time on 2 July

1999. There have been a number of challenges to the legislative competence of Acts of the Scottish Parliament during this period. For example, s 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, which was the first Act of the Parliament, was challenged unsuccessfully on the ground that its provisions were incompatible with art 5(1)(e) of the European Convention on Human Rights and thus outside competence under s 29(2)(d) of the 1998 Act: *A v Scottish Ministers* 2002 SC (PC) 63. Legislation prohibiting mounted foxhunting was challenged unsuccessfully on the ground that it was contrary to the petitioners' Convention rights in *Adams v Scottish Ministers* 2004 SC 665 and *Whaley v Lord Advocate* [2007] UKHL 53, 2008 SC (HL) 107, 2007 SLT 1209. An amendment to the Criminal Procedure (Scotland) Act 1995, which placed restrictions on the questioning of the complainer in trials of persons charged with sexual offences, was challenged unsuccessfully on the ground that the restrictions were incompatible with the right to a fair trial under art 6 of the Convention in *DS v HM Advocate* [2007] UKPC 36, 2007 SC (PC) 1. Since then there have been two cases where challenges have been made on the ground that provisions fell to be treated as relating to reserved matters as they made modifications to Scots criminal law as it applied to reserved matters: *Logan v Spiers* [2008] HCJAC 61, 2010 JC 1, 2008 SLT 1049; *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, 2010 SLT 412. In those cases too the challenges were rejected. In *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] AC 868, 2012 SC (UKSC) 122 one of the grounds of the unsuccessful challenge to the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was that its provisions were incompatible with the insurers' Convention rights under art 1 of the First Protocol. In *Sinclair Collis Ltd v Lord Advocate* [2012] CSIH 80 a challenge by a cigarette vending machine operator to s 9 of the 2010 Act on the ground that it was incompatible with its rights under that article and with art 34 of the Treaty on the Functioning of the European Union did not succeed either.

[6] But, remarkably, this is the first case in which provisions of an Act of the Scottish Parliament have been challenged on the ground that they relate to specific reservations listed in Pt II of Sch 5 as reserved matters for the purposes of the 1998 Act. The scheme that Sch 5 sets out lies at the heart of the devolution settlement. It contains a long and complicated list of reserved matters which, at first sight, might have been expected to give rise to frequent disputes which would require to be resolved by the courts. That this has not happened until now is due partly to the use of legislative consent motions passed by the Scottish Parliament to enable the UK Parliament to pass legislation on devolved issues relating to Scotland: see *Martin v Most*, para 4. But it is also due in no small measure to the care that is taken by officials within the Parliament to ensure that the provisions that the Scottish Parliament does enact are within competence.

[7] The Bill in which ss 1 and 9 appear was accompanied on its introduction by a statement by the Presiding Officer under s 31 of the 1998 Act that in his view its provisions would be within the legislative competence of the Parliament, and it was submitted for Royal Assent under s 32 of the Scotland Act 1998 as no question had been raised about its legislative competence under s 33 of the Act by any of the Law Officers. But there is no presumption of legislative competence from the fact that an objection to the competence of these sections has not been raised by the Presiding Officer or any of the Law Officers: *A v Scottish Ministers* [2001] UKPC D5, [2003] 2 AC 602,, 2002 SC (PC) 63, para 7. If an issue as to legislative competence is raised, it will be entirely a matter for the courts to determine.

[8] The subject matter of the provisions that are under scrutiny in this case is the control of smoking in the interests of public health. The Appellants have made it clear throughout that, while they do not accept the validity or correctness of the evidence relating to smoking and health that was before the Scottish Parliament, they do not seek to challenge that evidence in these proceedings. Nor is their challenge brought, as was done in *AXA General Insurance Ltd v Lord Advocate*, on the ground that the provisions in question are open to review on common law grounds as an unreasonable, irrational and arbitrary exercise of the Parliament's legislative authority. The only question is whether any of the particular rules that were laid down in the 1998 Act by which it is to be determined whether or not a provision is outside legislative competence have been breached.

[9] That is not to say that the question is easy to answer or unimportant. But the exercise that has to be

carried out is essentially one of statutory construction. The answer to the question is to be found by construing the words used by the 1998 Act and examining the provisions that are under challenge in the light of the meaning that is to be given to those words.

THE INTERPRETATION ISSUE

[10] Much of the discussion in the Court of Session was devoted to the question whether a different approach should be taken to the interpretation of the 1998 Act from that applicable to other statutes because it was said to be a constitutional instrument. I do not think that it is necessary to dwell on that issue at length at this stage. The Dean of Faculty accepted that the object was to arrive at the true meaning of the statute. Its content might influence the approach to be taken, but assertions about its constitutional nature were not in point. He acknowledged that the exercise to be undertaken was in essence no different from that which was applicable in the case of any other United Kingdom statute.

[11] Mr Mure QC for the Lord Advocate and the Advocate General were, however, not entirely at one as to the approach that should be adopted. For the Lord Advocate it was stressed that a construction should be avoided which would render the endowment of plenary law-making powers on the Scottish Parliament futile. The Advocate General, for his part, said that it would be wrong to favour an expansive approach to the meaning and application of the provisions about legislative competence. Asserting that the purpose of the 1998 Act was to devolve plenary legislative power on the Parliament did not assist in determining the actual scope of what it was designed to achieve. The Dean of Faculty said that the Appellants were content to align themselves with the views of the Advocate General.

[12] It is unsatisfactory that there should continue to be room for doubt on this matter. So it may be helpful to summarise, quite briefly, three principles that should be followed when undertaking the exercise of determining whether, according to the rules that the 1998 Act lays down, a provision of an Act of the Scottish Parliament is outside competence.

[13] First, the question of competence must be determined in each case according to the particular rules that have been set out in s 29 of and Schs 4 and 5 to the 1998 Act. It is not for the courts to say whether legislation on any particular issue is better made by the Scottish Parliament or by the Parliament of the United Kingdom at Westminster: *Martin v Most* [2010] UKSC 10, 2010 SC (UKSC) 40, para 5, 2010 SLT 412. How that issue is to be dealt with has been addressed and determined by the United Kingdom Parliament. As Lord Walker observed in *Martin*, para 44, its task was to define the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom. The statutory language was informed by principles that were applied to resolve questions that had arisen in federal systems, where the powers of various legislatures tend to overlap: see *Martin*, paras 11 – 15. But the intention was that it was to the 1998 Act itself, not to decisions as to how the problem was handled in other jurisdictions, that one should look for guidance. So it is to the rules that the 1998 Act lays down that the court must address its attention, bearing in mind that a provision may have a devolved purpose and yet be outside competence because it contravenes one of the rules. As Lord Atkin said in *Gallagher v Lynn* [1937] AC 863, 870, [1937] 3 All ER 598, 106 LJPC 161, an Act may have a perfectly lawful object but may seek to achieve that object by invalid methods.

[14] Second, those rules must be interpreted in the same way as any other rules that are found in a UK statute. The system that those rules laid down must, of course, be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable. This is a factor that it is proper to have in mind. But it is not a principle of construction that is peculiar to the 1998 Act. It is a factor that is common to any other statute that has been enacted by the legislature, whether at Westminster or at Holyrood. The best way of ensuring that a coherent, stable and

workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.

[15] Third, the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language. Its concern must be taken to have been that the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved. That purpose provides the context for any discussion about legislative competence. So it is proper to have regard to the purpose if help is needed as to what the words actually mean. The fact that s 29 provides a mechanism for determining whether a provision of an Act of the Scottish Parliament is outside, rather than inside, competence does not create a presumption in favour of competence. But it helps to show that one of the purposes of the 1998 Act was to enable the Parliament to make such laws within the powers given to it by s 28 as it thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority.

[16] It will, of course, be necessary to identify the purpose of the provision if the challenge is brought under s 29(2)(b) on the ground that it relates to a reserved matter, bearing in mind that the phrase "relates to" indicates something more than a loose or consequential connection: see Lord Walker in *Martin v Most*, para 49. As Lord Rodger said in that case at para 75, the clearest indication of its purpose may be found in a report that gave rise to the legislation or in a report from one of the committees of the Parliament. But it may also be clear from its context. As is the case when any other statute is being construed, the context will be relevant to understanding the meaning of the words used by the 1998 Act.

[17] This is a point of some importance in this case, as the Appellants have raised the issue as to what account, if any, could be taken of the headings and sidenotes in Pt II of Sch 5. It is proper to have regard to them if help is needed as to the meaning of any of the words in the list that it sets out. The headings and sidenotes were included in the Bill for guidance and ease of reference as its provisions were being debated. So they are part of the contextual scene of the statute: see *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141, paras 34 – 36.

[18] The first step in the analysis that must now be carried out is to examine the provisions whose legislative competence has been brought into question and to identify the purpose of the provisions according to the test that s 29(3) lays down. Then the rules that the 1998 Act sets out, so far as relevant, must be examined in more detail in order to identify the tests that have to be applied in order to determine whether the provisions are outside competence. This, the second stage, is of critical importance and it requires to be handled with great care. The final stage will be to draw these two exercises together to reach a conclusion as to whether or not the grounds of challenge are well-founded.

SECTIONS 1 AND 9 OF THE 2010 ACT

[19] Section 1 of the 2010 Act is headed "Prohibition of tobacco displays, etc". Subsections (1), (2) and (3) are in these terms:

> "(1) A person who in the course of business displays or causes to be displayed tobacco products or smoking related products in a place where tobacco products are offered for sale commits an offence.

(2) A person does not commit an offence under subsection (1) if the display –

(a) is in a specialist tobacconist,

(b) does not include cigarettes or hand-rolled tobacco, and

(c) complies with any prescribed requirements.

(3) A person does not commit an offence under subsection (1) if –

(a) the tobacco products or smoking related products are displayed in the course of a business involving the sale of tobacco products only to persons who carry on a tobacco business (or their employees), and

(b) the display complies with any prescribed requirements."

Subsection (4) enables the Scottish Ministers to provide in regulations that no offence is committed under sub-s (1) in relation to a display of tobacco products or smoking related products which complies with specified requirements. Subsection (5) provides that a person guilty of an offence under sub-s (1) is liable on summary conviction to a fine not exceeding level 4 on the standard scale. Subsection (6) provides that a website is not a place for the purposes of sub-s (1). Subsection (7) provides that "specialist tobacconist" has the meaning given by s 6(2) of the Tobacco Advertising and Promotion Act 2002.

[20] Section 9 is headed "Prohibition of vending machines for the sale of tobacco products". It is in these terms:

"(1) A person who has the management or control of premises on which a vending machine is available for use commits an offence.

(2) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(3) In this section 'vending machine' means an automatic machine for the sale of tobacco products (regardless of whether the machine also sells other products)."

[21] The Scottish Ministers have prepared draft regulations in relation to the display of tobacco or smoking related products in specialist tobacconists and other retail premises, and also in relation to the display or prices of tobacco products and smoking related products under powers given to them by s 3 of the 2010 Act. They are set out in the Sale of Tobacco (Display of Tobacco Products and Prices) (Scotland) Regulations 2012. These regulations have not yet been made or laid before the Scottish Parliament.

[22] The Appellants accept that ss 1 and 9 stand or fall together on the issue of legislative competence. They also accept that the reason why they were enacted by the Scottish Parliament could be described in the broadest terms as being to promote public health. Lord Reed said in the Inner House that the extrinsic

material indicated that the purpose of s 1 was to enable the Scottish Ministers to take steps which might render tobacco products less visible to potential consumers, and thereby achieve a reduction in sales and thus in smoking: 2012 SC 297, para 133. In the following paragraph he said that the extrinsic material indicated that the purpose of s 9 was to make cigarettes less readily available, particularly (but not only) to children and young people, with a view to reducing smoking. He also said that the legal effect and short term consequences were consistent with those purposes. The Dean of Faculty said that he concurred with these observations.

[23] It is common ground too that the protection of health is not a reserved matter. Head J in Pt II of Sch 5 deals with health and medicines. But the five sections which it contains deal with particular matters (abortion; xenotransplantation; embryology, surrogacy and genetics; the subject matters of various statutes; and regulations relating to medicines, medical supplies and poisons and welfare foods), not with the promotion of public health generally. The fact that the sections of the 2010 Act that are under challenge do not relate to any of the matters that are reserved by Head J does not, of course, mean that they are immune from challenge on other grounds.

THE RULES OF THE 1998 ACT

[24] The rules which provide the Appellants with their remaining grounds of challenge, in order of appearance in the 1998 Act, are as follows:

> "(a) Section 29(2)(b), which provides that a provision is outside competence if it 'relates to reserved matters'. That provision must be read together with section 29(3) which provides that, for the purposes of that section, the question whether a provision of an Act of the Scottish Parliament 'relates to' a reserved matter is to be determined 'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'.
>
> (b) Paragraph 2(1) of Schedule 4, which provides that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters. That rule must be read together with paragraph 2(3), which states that sub-paragraph (1) applies to a rule of Scots private law or Scots criminal law only to the extent that the rule in question is special to a reserved matter.
>
> (c) Section C7 in Head C – Trade and Industry in Part II of Schedule 5, which is headed 'Consumer protection' and includes
>
> Regulation of –
>
> (a) the sale and supply of goods and services to consumers.
>
> (d) Section C8 in Head C, which is headed 'Product standards, safety and liability' and includes
>
> 'Product safety and liability'."

[25] The Appellants have three grounds of challenge:

> "(1) that, on a proper construction of section 29(2)(b) and 29(3) read together with section

C7(a) of Head C in Schedule 5, sections 1 and 9 of the 2010 Act relate to 'the sale and supply of goods to consumers', which is a reserved matter;

(2) that, on a proper construction of those subsections read together with section C8 of Head C, sections 1 and 9 relate to 'product safety', which is a reserved matter; and

(3) that, on a proper construction of paragraph 2 of Schedule 4, sections 1 and 9 modify rules of Scots criminal law because they create new offences which can only be committed in the course of the sale and supply of goods to consumers."

[26] The first two grounds of challenge require one to understand the scope of the matters that are reserved by ss C7 and C8. Once one has an understanding of their subject matter, the question will be whether ss 1 and 9, by reference to their purpose (having regard among other things to their effect in all the circumstances), "relate[s] to" it. The third ground of challenge raises a different point. It depends on an understanding of the word "modify" in para 2 of Pt I of Sch 4. It is not in doubt that ss 1 and 9 create new offences. The question is whether they modify offences which are already part of Scots criminal law and, as their subject matter is a reserved matter, form part of the law on reserved matters for the purposes of that paragraph.

SECTION C7(A)

[27] The Appellants' argument is that, as the long title of the 2010 Act states in terms that one of its purposes is to make provision about the retailing of tobacco products and as the headnote to Ch 1 states that it is concerned with the display, sale and purchase of tobacco products, ss 1 and 9 must be taken to relate to the matters reserved by the words "the sale and supply of goods to consumers" in s C7(a). They say that these words must simply be given their ordinary and natural meaning. Where the words have a clear meaning, as they have here, it would be wrong to allow that meaning to be overridden by other aids to interpretation such as the heading to s C7. The words used do not give rise to any ambiguity. The reserved matter is the regulation, in any way and for any purpose, of the sale and supply of goods to consumers.

[28] It would be surprising if the words used in s C7(a) had such a wide reach. Responsibility for Scots private law, including the law of obligations arising from contract, belongs to the Scottish Parliament. This is made clear by s 29(4) which deals with modifications to Scots private law as it applies to reserved matters but leaves Scots private law otherwise untouched, and by the definition of what references to Scots private law are to be taken to mean in s 126(4). The sale and supply of goods is part of the law of obligations and, as such, is the responsibility of the Scottish Parliament. The Appellants' argument as to the reach of s C7(a) does not sit easily with this conclusion or with the way Scots private law is dealt with elsewhere in the 1998 Act. This makes it necessary to look more closely at the context in which the words of that section appear.

[29] As a starting point, there is the underlying purpose of Pt II of Sch 5 itself. It will be recalled that para 1 of Pt I of Sch 4 to the 1998 Act provides that an Act of the Scottish Parliament cannot modify art 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as it relates to freedom of trade: see para 2, above. Part II of Sch 5 contains eleven Heads and a total of 67 sections, within which there are numerous subsections and paragraphs. Their content ranges from fiscal, economic and monetary policy in Head A to outer space in Head J Sometimes the subject matter is described in broad terms; sometimes it is identified simply by the name and date of a statute. There is no common characteristic, but there is a common theme. It is that matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster. They include matters which are affected by its treaty obligations and matters that are designed to ensure that there is a single market within

the United Kingdom for the free movement of goods and services. As the purpose of Pt II of Sch 5 is to define the limits of the legislative competence of the Scottish Parliament, anything that does not fall within the matters listed there must be taken to be within competence. These considerations cannot be used to override the clear meaning of the words used in the Schedule. But they are part of the overall context. They set the scene for a closer look at the provisions within s C of Head C itself.

[30] Section C7 is headed "Consumer protection". It falls into three parts. First, there is a list of nine areas of consumer protection which are the subject of regulation. Two of them, mentioned in paras (d) and (e), are the subject of exceptions. The exception to para (e), which deals with misleading and comparative advertising, refers to regulation specifically in relation to food, tobacco and tobacco products. But this is because, at the time when the Bill was being debated, an agreement on a European basis was in prospect and it was intended that implementation of that type of agreement would be a devolved matter: HL Debates, 23 July 1998, col 1124. It offers no assistance on the point at issue in this case. Secondly, there follows as a separate item the safety of, and liability for, services supplied to consumers. Thirdly, there is the subject matter of eight areas of consumer protection which are defined by reference to the statutes or regulations by which they are regulated. There is one exception to the entire section. It is the subject matter of s 16 of the Food Safety Act 1990. As the Lord President explained in para 9 of his opinion, this is to be understood as having been inserted simply to make it clear that the power to make regulations under that section was to remain, as it had been before devolution, with the Scottish authorities. It does not cast any significant light on the meaning that is to be given to s C7(a).

[31] The relevant section of the Notes on Clauses that accompanied the Scotland Bill states that the titles of heads, sections, etc are merely signposts and that they do not form part of the definitions of the reserved matters. But, taken overall, the context of s C7 is as its heading indicates. It is concerned with consumer protection in all its various aspects, and the part of it within which para (a) appears is headed by the words "regulation of". The words "regulation", "protection" and "consumer" are important pointers to the section's subject matter.

[32] Cowan Ervine and D S J Templeton observe in their title on Consumer Protection in the *Stair Memorial Encyclopaedia Reissue*, para 1, that as a topic consumer protection is ill-defined. But the key concepts which serve as a guide to the meaning to be given to the words used in s C7(a) are those of regulation and protection. This is an area where the law intervenes on behalf of the consumer in the sale and supply of goods and services to address a significant inequality of bargaining power: *Butterworths Trading and Consumer Law,* para 2. It aims to address the imbalance that occurs where the seller or supplier overreaches himself to the disadvantage of the consumer. As Lord Brodie said in the Inner House, para 196, its purpose is to facilitate and encourage participation by the consumer by making the market operate more fairly and therefore more effectively: see also the Final Report of the Committee on Consumer Protection (1962, Cmnd 1781), para 1, in which the Committee rejected the notion that it should scrutinise the whole range of commercial life wherever it touched the consuming public.

[33] The Lord President set out in para 12 passages from Explanatory Notes dealing with s C7 that were prepared and published by the Scotland Office in 2004, some time after the 1998 Act was enacted. Among the points made by them, drawing on points made in the Notes on Clauses, is that the reservation in s C7(a) as to the sale and supply of goods and services to consumers covers the terms on which such goods and services are sold. The Lord President recognised that they did not have the interpretative value which they would have had if they had accompanied the Bill in its passage through Parliament. But in para 13 he said that the commentary did go some way, quantum valeat, to suggesting that s C7(a) is concerned essentially with the contractual aspects of the sale and supply of goods and services to consumers which was the interpretation which he would otherwise favour. It seems to me however, with respect, that it would be wrong to pay any regard to Explanatory Notes, as they do not form any part of the contextual scene of the statute. They are no doubt useful as they provide guidance, but unlike the Notes on Clauses they have no more weight than any other post-enactment commentary as to the meaning of the statute.

[34] I also think that the Lord President's description of the scope of s C7(a), which was based on his reading of them, was too narrow. The better view is that given by Lord Reed in para 96, with which Lord Brodie agreed. It encompasses all aspects of regulation of the sale and supply of goods and services to consumers within the field of consumer protection with which s C7 as a whole is concerned. The key words in this formulation are the words “regulation”, “protection” and “consumer”: see para 31, above. The word “protection” points away from the Appellants' argument that the reserved matter is the regulation, in any way and for any purpose, of the sale and supply of goods to consumers.

SECTION C8

[35] The Appellants' argument under this head of challenge is that ss 1 and 9 of the 2010 Act fell within the scope of s 11 of the Consumer Protection Act 1987 and that accordingly they relate to the matter reserved by that part of s C8 which refers to “product safety”. The Secretary of State is given power by s 11 to make such provision as he considers appropriate for the purpose of ensuring that goods to which it applies are safe; that goods which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or to persons of that description; and that appropriate information is, and inappropriate information is not, provided in relation to goods to which the section applies. In *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] QB 353, [1992] 1 All ER 212, [1991] 3 WLR 529 it was held that regulations banning oral snuff were within the powers of the Act, as its provisions applied both to defective goods and to goods which were intrinsically dangerous. Taylor LJ said at p 365 that there was no basis for confining the objects of the Act to safety risks or defects other than the inherent nature of tobacco and that, in the context of oral snuff, the Act was on any view apt to protect the consumer whether one called its purpose consumer protection or public health.

[36] Lord Reed noted in para 98 that s 11 of the Consumer Protection Act 1987 is not restricted to consumer goods or to the sale or supply of goods to consumers. This may explain why this matter does not appear in s C7 but in a separate section dealing with product standards, safety and liability. In para 100 he said that, having regard to the significance of product safety to the operation of a single market, and bearing in mind also that the Scottish Office was not responsible for the protection of Scottish consumers in relation to product safety prior to devolution, it was unlikely that Parliament intended to devolve a general legislative competence in relation to matters falling within the scope of s 11. He held that the matters with which that section deals fell within the scope of the expression “product safety”, giving those words their ordinary meaning, and that they are accordingly reserved by s C8. The Appellants accept his conclusions as to the meaning of these words.

PARAGRAPH 2 OF SCH 4

[37] The Appellants' challenge under this heading is presented under reference to two sets of regulations made in the exercise of the powers conferred by s 11 of the Consumer Protection Act 1987. They are the Tobacco for Oral Use (Safety) Regulations 1992 (SI 1992/3134) and the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 (SI 2002/3041). It is not necessary to set out the detailed content of these regulations, except to note that they each contain prohibitions in the field of product safety which is a reserved matter under s C8 of Head C of Sch 5, and that a contravention of their provisions constitutes an offence.

[38] The argument proceeds in these stages: first, that these regulations are to be treated as part of the law on reserved matters within the meaning of para 2(1) of Sch 4 to the 1998 Act as their subject matter is a reserved matter; second, that they both contain rules of Scots criminal law which are special to a reserved

matter, so the prohibition in that paragraph applies to them; third, that ss 1 and 9 of the 2010 Act modify the rules that each set of regulations contains which is contrary to that prohibition; and fourth, that they are outside competence under s 29(2)(c) because they are in breach of the restrictions in Sch 4. There is no dispute as to the first and second stages of this argument. The question is whether the third and fourth stages are well-founded, having regard to the purpose and effect of those sections.

DRAWING THESE POINTS TOGETHER

[39] The question whether ss 1 and 9 of the 2010 Act "relate to" the matters reserved by s C7(a) and s C8 in Head C of Sch 5 is to be determined by reference to the purpose of those provisions, having regard among other things to their effect in all the circumstances: s 29(3). The purpose of s 1 is to enable the Scottish Ministers to take steps which might render tobacco products less visible to potential consumers, and thereby achieve a reduction in sales. The purpose of s 9 is to make cigarettes less readily available, particularly to children and young people, with a view to reducing smoking: see para 22, above. Their legal effect and their short term consequences can be taken to be consistent with those purposes. As tobacco products will be less visible and less readily available, the result is likely to be a reduction in sales and a consequent reduction in smoking. The extent to which those aims will be realised in practice does not matter, as it is to the purpose of the provisions that s 29(3) directs attention in order to determine whether they are within competence. Can it be said that these provisions relate to the matters reserved by ss C7(a) and C8 or either of them?

[40] I take first s C7(a). I approach it on the assumption most favourable to the Appellants that it encompasses all aspects of regulation of the sale and supply of goods and services to consumers within the field of consumer protection: see para 34, above. But I do not see how, even on that assumption, it can be said that the purpose of ss 1 and 9 of the 2010 Act has anything to do with consumer protection in that sense. Their aim is to discourage or eliminate sales of tobacco products, not to regulate how any sales are to be conducted so as to protect the consumer from unfair trade practices. There will be nothing of that kind to regulate as far as the vending machines are concerned. The use of such machines will be prohibited, and there will be no sales from any of them.

[41] As for any sales that may be entered into in a place where tobacco products are offered for sale, the purpose of s 1 is to discourage transactions in such products by preventing them from being displayed and, by this means, their availability for sale from being advertised. The terms and conditions of any sale that may take place are unaffected, as are any other aspects of the transaction that may need to be regulated to ensure that the consumer is not exposed to a method of trading that is unfair. The area of activity with which the section deals is outside the scope of consumer protection, because it does not seek to regulate in any way any sales that may actually take place. For these reasons I would hold that this ground of challenge is misconceived and that it must be rejected.

[42] As for s C8, the scope of the expression "product safety" extends to matters falling within the scope of s 11 of the Consumer Protection Act 1987: see para 36, above. Here too there is a mismatch between what falls within the scope of that expression and the purpose of ss 1 and 9 of the 2010 Act. Their purposes have nothing to do with the standards of safety to be observed in the production and sale of tobacco products or smoking related products that are available for purchase in places where they are offered for sale or are sold by means of vending machines. The Secretary of State is empowered by s 11 of the Consumer Protection Act 1987 to make such provision as he considers appropriate to prohibit the supply of specific tobacco products either generally or to a particular class of persons: *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] QB 353, per Taylor LJ at p 365. But ss 1 and 9 do not prohibit the supply of these products either generally or to any particular class. Nor is it their purpose to do so. They are designed to promote public health by reducing their attractiveness and availability, not to prohibit in any way the sale of these products to those who wish and are old enough to purchase them. Promotion of public

health in Scotland is a responsibility of the Scottish Parliament under the devolution settlement. Taylor LJ's observation in *United States Tobacco* at p 365 that the 1987 Act is apt to protect the consumer for reasons of public health must not be taken out of context. The words “product safety” in C8 direct attention to matters that are of concern to the single market in the general area of trade and industry. It is not the purpose of ss 1 and 9 to disrupt or unbalance trading in tobacco products in that way at all. I would reject this ground of challenge also.

[43] I do not see this as a case which gives rise to the problem which may need to be dealt with if the provision in question has two or more purposes, one of which relates to a reserved matter. In such a situation the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence, unless the purpose can be regarded as consequential and thus of no real significance when regard is had to what the provision overall seeks to achieve: see para 16, above. In this case the purposes of ss 1 and 9 can be identified without difficulty. There is no question of those purposes relating in any way to a reserved matter. But if, contrary to the conclusion I have reached, it could be said that one of the purposes of ss 1 and 9 was to inhibit trading in tobacco products and smoking related products in Scotland in a way that was of concern to the single market, I would hold that that purpose is simply a consequence of the purpose to promote public health which is what these provisions are really about. It is a means to an end. It is not, as Lord Dunedin put it in *Kaye v Burrows* [1931] AC 446, 485, 29 LGR 279, 95 JP 115, a purpose and end in itself.

[44] The question whether ss 1 and 9 of the 2010 Act are in breach of the restrictions in Sch 4 because they modify the law on reserved matters must be dealt with in a different way. This is because s 29(3) applies only to questions of the kind that s 29(2)(b) gives rise to. Here the issue arises under s 29(2)(c), the question being simply whether any of the restrictions in Sch 4 have been breached. It must be approached in this case on the basis that the 1992 and 2002 Regulations, which were made under the powers conferred by s 11 of the Consumer Protection Act 1987, are part of the law on reserved matters for the purposes of para 2(1) of Sch 4. Sections 1 and 9 do not seek to amend or otherwise affect anything that is set out in those regulations. In that sense they cannot be said to modify them at all. As Lord Reed said in para 152, the regulations continue in force as before. But the Appellants say that they modify the law on reserved matters because they create new offences, in addition to those already provided for, which can only be committed in the course of the sale and supply of goods to consumers.

[45] I would reject that argument. The purpose of the offences that these sections create, as I have said, is to discourage or eliminate the sale or supply of tobacco products or smoking materials. If this purpose is realised, that will be their effect. This is plain in the case of the vending machines, because the effect of s 9 is that cigarettes will no longer be available to be sold by this means. The criminal law relating to any sales that may be made in a place where these products are available for sale will not be affected by s 1. It does not create any new offence in regard to any such sales, and the existing offences are not modified. It is not a provision of the kind referred to in s 11 of the Consumer Protection Act 1987, as it is not its purpose to secure that the products sold are safe, that products that are unsafe are not made available for sale or that appropriate information is provided and inappropriate information is not. I can see no connection between its purpose and effect and the law on reserved matters. There is no basis for holding that ss 1 and 9 are outside competence on this ground.

CONCLUSION

[46] For these reasons I would hold that none of the challenges are well-founded and that ss 1 and 9 of the 2010 Act are not outside the legislative competence of the Scottish Parliament. I would dismiss the appeal and affirm the First Division's interlocutor.

Appeal dismissed.