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## OUTER HOUSE, COURT OF SESSION

**[2010] CSOH 134**

OPINION OF LORD BRACADEL

in the Petition

IMPERIAL TOBACCO LIMITED

Petitioner;

For Judicial Review of sections 1 and 9 of  
the Tobacco and Primary Medical Services  
(Scotland) Act 2010

Petitioner: Jones Q.C., Gill, Advocate; McGrigors Solicitors LLP

Respondent: Mure Q.C., Poole; C Mullin

30 September 2010

## Introduction: The Tobacco & Primary Medical Services (Scotland) Act 2010

[1] On 27 January 2010 the Scottish Parliament passed the Tobacco & Primary Medical Services (Scotland) Act 2010 (the 2010 Act). The 2010 Act, which was introduced as an Executive bill on 25 February 2009, received the royal assent on 3 March 2010. Part I makes provision with respect to tobacco products and Part 2 to primary medical services. Included in Part 1 are provisions designed to prohibit the display of tobacco products at point of sale and the use of vending machines to sell tobacco products. Section 1, so far as material for present purposes, provides:

"(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."

Section 9, so far as material for present purposes, provides:

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

(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)."

No commencement order in respect of that part of the Act which includes sections 1 and 9 has yet been made. The United Kingdom government is introducing similar legislation in England and Wales; I was informed that the intention was to bring the provisions into force at the same time.

[2] The petitioner, which is engaged in the manufacture, marketing and sale of tobacco products, including well known brands of cigarettes, seeks (a) declarator that sections 1 and 9 of the 2010 Act are outside the legislative competence of the Scottish Parliament and therefore are not law; and (b) reduction of each of sections 1 and 9. The petition was served on the Lord Advocate and the Advocate General, each of whom lodged answers. At the beginning of the hearing the Advocate General withdrew from the process. I shall refer to the Lord Advocate as the respondent.

### **The Scotland Act 1998**

[3] The Scottish Parliament, which first met in 1999, was established by section 1 of the Scotland Act 1998 (the Scotland Act). The Scotland Act has been judicially recognised as a constitutional statute. In *R v HM Advocate* 2002 S.C.(P.C.) 21 at p 60, para 16, Lord Rodger of Earlsferry described it as "a major constitutional measure which altered the government of the United Kingdom"; and, later, at p 73, para 50, he referred to the Act as "a constitutional settlement of immense social and political significance for the whole of the United Kingdom". In *Sommerville v Scottish Ministers* 2007 S.C.140 at para 47 the Scotland Act was characterised by the Lord President as being a constitutional instrument. In *Thoburn v Sunderland City Council* 2003 Q.B.151 Laws L.J. included the Scotland Act in a list of examples of constitutional statutes and, at p 186, described constitutional statutes in the following manner:

"We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, over-arching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely

related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights".

In support of the contention that constitutional statutes should be interpreted generously and purposively, counsel for the respondent referred to *Robinson v The Secretary of State for Northern Ireland* 2002 NIR 390. At para 11 Lord Bingham, after noting that the Northern Ireland Act 1998 was in effect a constitution, went on to say:

"So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody".

I accept that the Scotland Act should be interpreted in this way. The court should endeavour to find in the Scotland Act a constitutional settlement which is coherent, stable and workable. This informs my approach to the issues raised in this petition. [4] Section 28 of the Scotland Act provides that the Scottish Parliament may make laws to be known as Acts of the Scottish Parliament. Provision is made for them to receive the royal assent. The power of the UK Parliament to make laws for Scotland is not affected by the provisions of the Scotland Act. Section 29 restricts the power of the Scottish Parliament to make laws. Section 29(1) provides:-

"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."

Subsection (2) provides the circumstances in which a provision is outside that competence. The relevant paragraphs in the subsection for present purposes are (b) and (c), which provide:-

- "(b) It relates to reserved matters,
- (c) It is in breach of the restrictions in schedule 4..."

Subsections (3) and (4) provide as follows:-

"(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(4) A provision which -

- (a) would otherwise not relate to reserved matters, but
- (b) 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."

[5] The scheme of the Scotland Act is to reserve certain matters to the UK Parliament, all other matters being devolved; no reference is made in the Act to "devolved matters". Section 30 provides that schedule 5 (which defines reserved matters) shall have effect. Schedule 4 prohibits modification of certain enactments and modification, in certain circumstances, of the law on reserved matters.

[6] It has been recognised that the scheme of devolution means that it is not possible for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap will be inevitable (*Martin v HM Advocate* [2010 SLT 412](#): Lord Hope of Craighead at para 11.)

[7] The Tobacco Advertising and Promotion Act 2002 (the 2002 Act), which currently applies to advertising and display of tobacco products, was extended to Scotland by the use of a legislative consent motion, or "Sewell" motion, by which the Scottish Parliament agreed that the UK Parliament would pass legislation on a devolved issue extending to Scotland. Counsel for the respondent explained that while it would have been open to the Scottish government, given that the UK Parliament was introducing similar legislation for England and Wales, to have used a Sewell motion on this occasion also, in the event, the Scottish government had chosen to introduce a bill which had, in due course, been passed by the Scottish Parliament.

## The Petitioner's challenges

[8] The petitioner mounted a number of challenges to the legislative competence of the Scottish Parliament to pass sections 1 and 9 of the 2010 Act: (a) in terms of section 29(2)(b) and (3) these provisions related to reserved matters; (b) if they did not otherwise relate to reserved matters they were deemed to do so by virtue of subsection (4) of section 29; (c) in terms of section 29(2)(c) and schedule 4 paragraph 2 they modified a rule of Scots criminal law special to a reserved matter; and (d) in terms of schedule 4 paragraph 1 they modified article VI of the Acts of Union 1706 and 1707 (the Acts of Union) so far as that article related to freedom of trade. It was accepted by the respondent that success for the petitioner on any one basis would result in the provisions being outside the legislative competence of the Scottish Parliament.

### The case of *Martin v HM Advocate*

[9] Some of the challenges mounted by the petitioner in this case were considered by the Supreme Court in *Martin v HM Advocate* [2010 SLT 412](#), where they gave rise to some difference of view. The question arose as to whether the increase in the sentencing power of a sheriff sitting summarily provided by section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (the 2007 Act) was outside the legislative competence of the Scottish Parliament. The justices of the Supreme Court were unanimous in holding that the purpose of the provision was not related to a reserved matter in terms of section 29(2)(b) and (3) of the Scotland Act. Although different views were expressed about the application of section 29 (4), the justices were unanimous in holding that section 45 of the 2007 Act was not deemed to be so related in terms of that subsection. A majority, Lords Rodger and Kerr dissenting, held that the provision did not modify a rule of Scots criminal law special to a reserved matter in terms of section 29(2)(c) and schedule 4 paragraph 2.

### The construction of section C7(a) of schedule 5 to the Scotland Act

#### *Introduction*

[10] Challenges (a) to (c) had a common factor in as much as the reserved matter which, it was claimed,

informed each of them was the reserved matter in section C7(a) of schedule 5 to the Scotland Act, namely, the regulation of the sale and supply of goods and services to consumers. It is appropriate, therefore, first to examine the nature and extent of that reserved matter.

[11] Part 1 of schedule 5 to the Scotland Act lists a number of general reservations, including the constitution, foreign affairs and defence. Part II deals with specific reserved matters. Paragraphs 1 to 3 of Part II of Schedule 5 provide as follows:

- "1. The matters to which any of the sections of this part apply are reserved matters for the purposes of this Act.
2. A section applies to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that section.
3. Any illustrations, exceptions or interpretation provisions in a section relate only to that section (so that an entry under the heading 'Exceptions' does not affect any other section)".

It is clear from these introductory paragraphs that regard must be had to the individual specific subject matters listed. The scheme of Part II of schedule 5 is to set out under headings a great many specific reserved matters. While consumer protection is not a specific reserved matter, certain aspects of the law on consumer protection are specifically reserved. There was no dispute that matters in relation to health, and matters involving children and young persons, are not reserved.

[12] The sections in schedule 5 are marshalled under Heads A - E. Head C is "Trade and Industry". Sections C7, C8 and C9 are of relevance in this case. C7 is entitled "Consumer Protection". Included in C7 is the regulation of a list of specific matters as follows:

#### **"C7. Consumer protection**

Regulation of-

- (a) the sale and supply of goods and services to consumers.
- (b) guarantees in relation to such goods and services,
- (c) hire-purchase, including the subject-matter of Part III of the Hire-Purchase Act 1964,
- (d) trade descriptions, except in relation to food,

- (e) misleading and comparative advertising, except regulation specifically in relation to food, tobacco and tobacco products,
- (f) price indications,
- (g) trading stamps,
- (h) auctions and mock auctions of goods and services, and
- (i) hallmarking and gun barrel proofing.

Safety of, and liability for, services supplied to consumers.

The subject-matter of-

- (a) the Hearing Aid Council Act 1968,
- (b) the Unsolicited Goods and Services Acts 1971 and 1975,
- (c) Parts I to III and XI of the Fair Trading Act 1973,
- (d) the Consumer Credit Act 1974,
- (e) the Estate Agents Act 1979,
- (f) the Timeshare Act 1992,
- (g) the Package Travel, Package Holidays and Package Tours Regulations 1992, and
- (h) the Commercial Agents (Council Directive) Regulations 1993.

*Exception* The subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)."

C8 relates to "Product standards, safety and liability" and includes specific matters such as product safety and liability and product labelling:

#### **"C8. Product standards, safety and liability**

Technical standards and requirements in relation to products in pursuance of an obligation under Community law.

The national accreditation body and the accreditation of bodies which certify or assess conformity to technical standards in relation to products or environmental management systems.

Product safety and liability.

Product labelling.

*Exceptions*

Food, agricultural and horticultural produce, fish and fish products, seeds, animal feeding stuffs, fertilisers and pesticides (including anything treated as if it were a pesticide by virtue of section 16(16) of the Food and Environment Protection Act 1985).

In relation to food safety, materials which come into contact with food."

C9 relates to weights and measures:

**"C9. Weights and measures**

Units and standards of weight and measurement.

Regulation of trade so far as involving weighing, measuring and quantities."

***Submissions for the petitioner: section C7(a)***

[13] Counsel for the petitioner submitted that section C7(a) should be given a wide construction. The court should read the words of C7(a) in their context, giving them their ordinary meaning. The regulation of the sale and supply of goods and services to consumers went beyond the regulation of contracts. If Parliament had intended to restrict the regulation in relation to the sale and supply of goods to the regulation of contracts, as the respondent contended, it could have said so. Given the scope of consumer protection measures generally, it would be surprising if Parliament intended this provision to be restricted in this way, and did not say so. Reserved matters C7(b) to (i) were all concerned with the protection of the economic interests of consumers. C7(a) was sufficiently wide to include health and safety. This was clear from an examination of the exception of the reservation of section 16 of the Food Safety Act 1990 in C7. If it were not for that express exception, section 16 would be reserved and the only reserved matter into which it could fit would be section C7(a); all the other reserved matters in section C7 had to do with measures for the protection of economic interests.

[14] In relation to the contention of the respondent that a narrow reading of "the sale and supply of goods and services" was supported by the explanatory notes to the Bill (production 6/19) counsel submitted that this was not a permissible use of the explanatory notes (*Regina (Westminster City Council) v National Asylum Support* [2002 1 WLR 2956](#), Lord Steyn at para 6). In addition, there was nothing in *R v Montila and others* 2004 1 W.L.R.3141 which vouched the proposition that the words in a statute could be added to, augmented or contradicted by, what was said in the explanatory notes. In any event, all that the explanatory notes said was that the reservation "covers" the terms on which goods and services are sold and supplied to consumers. The respondent was trying to read too much into the word "covers". If there were any inconsistency between the plain words of C7(a) and the explanatory notes, the interpretation

should be resolved in favour of C7(a).

***Submissions for the respondent: section C7(a)***

[15] Counsel for the respondent submitted that there was no general consumer protection reservation in Schedule 5, which proceeded by specific reservations. The approach was not to treat consumer protection in a general sense as being a reserved matter, but to identify a number of specific areas which were reserved. The specific reserved matter in C7(a) was the regulation of the sale and supply of goods and services to consumers. C8 related to product standards, safety and liability and included things such as product labelling. C9 related to weights and measures. The C7(a) reservation of the regulation of the sale and supply of goods and services to consumers should be understood as applying only to the regulation of the terms or contractual basis on which goods and services were sold to consumers; it did not cover the physical conditions in, or the means by which, sale or supply took place.

[16] The explanatory notes (production 6/19) supported a narrow construction of C7(a). The contention of counsel for the petitioner that it was not permissible to have regard to the explanatory notes in relation to C7(a) was misconceived. It was clear that Lord Steyn accepted that explanatory notes could be looked at. The situation contemplated in paragraph 6 of his speech in *R (Westminster City Council) v National Asylum Support Service* did not apply in the present case. There was no question of the Scottish Government seeking to act inconsistently. In any event they had not prepared the memorandum. In *R v Montila and others* it was noted that it had become common practice for their Lordships to ask to be shown the explanatory notes when issues were raised about the meaning of words used in an enactment.

[17] Regard should be had to the legislative context of C7(a). The reserved matter was the regulation of the sale and supply of goods and services. This would include examples such as a "cooling off" period. It did not mean anything that might have some impact on consumer protection. If a wide meaning was given to C7(a) then some of the other specific reservations would be pointless. On a wide interpretation guarantees and trade descriptions would be matters related to the sale and supply of goods but they were specifically reserved.

***Discussion: section C7(a)***

[18] It was common ground that certain aspects of consumer protection were specifically reserved. In terms of section C7(a) of schedule 5 to the Scotland Act the regulation of the sale and supply of goods and services to consumers is a reserved matter. It seems to me to follow from the approach of listing individual reserved matters that each of them should be given a narrow reading; otherwise the specific nature of the approach would not have been necessary. An individual reserved matter might be included in another reserved matter if the latter is widely construed. In my opinion, the respondent was well founded in submitting that, if a wide construction of section C7(a) was the correct approach, it would not have been necessary specifically to reserve some of the other matters in C7, C8 and C9. In particular, the regulation of price indications (C7(f)); trade descriptions (C7(d)); and misleading and comparative advertising (C7(e)), could, on a wide construction, be included in the regulation of the sale and supply of goods and services to consumers. I found the argument advanced by the petitioner that, had section 16 of the Food Safety Act not been excepted, its only home could have been section C7(a), to be strained. Section 16 is a consumer protection measure and it would be appropriate to include it under the heading of consumer protection. It does not require to be allocated to any of the specific reserved matters.

[19] I consider that the contention of the petitioner that it is impermissible in construing section C7(a) to have regard to the explanatory notes is misconceived. It is clear from *R v Montila and others (supra)* and *Regina (Westminster City Council) v National Asylum Support (supra)* that regard may be had to the explanatory notes. In *Montila* Lord Hope stated that it had become common practice for their Lordships to ask to be shown the explanatory notes when issues were raised about the meaning of words used in an enactment. The passage in the speech of Lord Steyn in *Westminster City Council* at para 6, founded on by the petitioner, is as follows:

"If, exceptionally, there is found in explanatory notes a clear assurance by the Executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the Executive in proceedings in which the Executive places a contrary contention before a Court. This reflects the actual

decision in *Pepper v Hart* 1993 A.C.593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed in the words enacted".

It did not seem to me that in seeking support in the explanatory notes for a narrow construction of section C7(a) the respondent was endeavouring to treat the wishes and desires of the UK Government about the scope of the statutory language as reflecting the will of Parliament. Rather, the respondent sought to use the notes to cast light on the contextual scene of the provision, which was a legitimate use identified by Lord Steyn earlier in his speech. Accordingly, in my opinion, it is legitimate to look at the explanatory note to section C7(a), which is in the following terms:

"The regulation of the following are reserved matters:

- (i) The sale and supply of goods and services to consumers. This covers the terms on which goods and services are sold and supplied to consumers. There are currently a number of pieces of legislation falling under this heading including the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The scope of most of this legislation goes beyond the reserved matter of protection of consumers. The reservation does not prevent the Scottish Parliament legislating about these wider matters;"

The ordinary meaning of the word "covers" in the sense that it is used in the explanatory note would indicate that the particular reserved matter in C7(a) is restricted to what is identified in the explanatory note.

[20] In my opinion, therefore, having regard to the context of the reserved matter in C7(a), assisted by reference to the explanatory notes, a narrow construction is to be favoured. The reserved matter is to be understood as being the regulation of the terms on which goods and services are sold and supplied to consumers.

**Challenge (a): do sections 1 and 9 of the 2010 Act relate to a reserved matter in terms of 29(2)(b)**

## **and (3) of the Scotland Act?**

### ***Introduction***

[21] At the heart of this challenge is the question whether, as the petitioner contends, the purpose of sections 1 and 9 of the 2010 Act was to create offences involving the display of tobacco products at point of sale and the use of vending machines to sell tobacco products, in order to regulate the sale and supply of goods to consumers for their protection, which, counsel submitted, was a reserved matter in terms of section C7(a) of schedule 5, or, as the respondent contends, their purpose was the improvement of public health, particularly in relation to children and young persons, which is not reserved.

### ***Submissions for the petitioner: section 29(2)(b) and (3) challenge***

[22] Counsel for the petitioner submitted that the provisions of sections 1 and 9 of the 2010 Act were properly to be regarded as measures directed to the regulation of the sale and supply of goods which was the reserved matter in section C7(a) of Part II of Schedule 5. Whether a provision related to a reserved matter was to be determined by reference to the purpose of the provision itself, not by reference to the stated purpose of the legislature. Purpose was to be discovered by an objective analysis of the provision under scrutiny and not by reference to what the Scottish Government or the Scottish Parliament thought that they were doing.

[23] In discovering the purpose of sections 1 and 9 of the 2010 Act the court should have regard to the long title of the Act, the words of the provisions, and their effect in all the circumstances. The long title of the 2010 Act was in the following terms:

"An Act of the Scottish Parliament to make provision about the retailing of tobacco products, including provision prohibiting the display of tobacco products and establishing a register of tobacco retailers..."

The long title usually contained a general indication of the legislative purpose (*Cross Statutory Interpretation* p 125). In the *Guidance on Public Bills*, issued by the Directorate of Clerking and Reporting of the Scottish Parliament, at pp 55 and 59, it was stated that the long title in an Act of the Scottish Parliament should set out the principal purposes of the Act. Parliamentary counsel would be

expected to state the executive's view and ensure that the long title did accurately reflect what was the purpose of the bill. There was no reference in the long title to discouraging young people from taking up smoking.

[24] The effect of section 1 of the 2010 Act was to regulate the sale and supply of tobacco products by creating an offence of displaying or causing to be displayed tobacco products in a place where they were offered for sale in the course of business. Section 9 had the effect of regulating the sale and supply of tobacco products by creating an offence of having management or control of premises in which a vending machine was available for use. The measures in sections 1 and 9 of the 2010 Act were not specific to children and young persons. They were wholly general in their terms. Counsel for the petitioner conceded that if they were specifically for the protection of children and young persons then they might not relate to reserved matters. Because they were measures which were for the protection of consumers in general, they came within the ambit of section C7(a).

[25] The position in *Martin* was different. There it was clear that the report produced by Sheriff Principal MacInnes focused the issue and it could be seen that what was being recommended was an administrative re-arrangement in the lower courts. Section 45 of the 2007 Act had the purpose which the Sheriff Principal recommended. Here there was no more than an expression of hope that the prohibition would in the fullness of time meet some wished for purpose. That was not what was meant by "purpose" in section 29.

[26] Further, a purpose which was legitimate could not be achieved by invalid methods. Counsel referred to *R (Hume) v The Londonderry Justices* 1972 NIRL 91 where it was held that the justices did not have the power to order the Armed Forces to carry out a function that would have been designed to maintain order. If it were considered that sections 1 and 9 of the 2010 Act were measures in furtherance of a lawful object, the method used to achieve that had been expressly forbidden because it related to the regulation of sale of tobacco to consumers.

[27] Both before and since the passage of the Scotland Act the UK Parliament had regarded public health legislation in relation to tobacco as falling within consumer protection purposes. Section 11 of the Consumer Protection Act 1987 (the 1987 Act) provided for the making of safety regulations. Regulations relating to tobacco products had been made under this section. The Tobacco Products Labeling (Safety) Regulations 1991 were made under this power. The 1991 regulations were superseded by the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002. These, in turn, were followed by the Tobacco Products (Manufacture, Presentation and Sale) (Safety) (Amendment) Regulations 2007. The UK Parliament had regarded the regulation of trade in tobacco with a public health motivation as a safety protection under the Consumer Protection Act. This included the creation of new criminal offences in the regulations. In the paper *People and Communities: Taking forward our National Conversation*, published by the Scottish Government in 2009, (production 6/18), at page 13 the Scottish Government itself had recognised that in a number of areas relating to tobacco it did not have the ability to legislate: in particular, it could not ban the sale of packs of ten cigarettes. This was because that was a consumer protection measure and was reserved.

***Submissions for the respondent: section 29(2)(b) and (3) challenge***

[28] The purpose of sections 1 and 9 of the 2010 Act was the improvement of public health which was not reserved. That purpose was clear from a consideration of all the relevant factors, including the text of the sections; the legislative intention; the situation which the provisions were designed to address; the effect of the provisions in all the circumstances; the legislative context; and other background circumstances. Reference was made to a number of documents which had preceded the legislation; the policy memorandum; and the Parliamentary debates. It was clear that all had as their premise that smoking was bad for health. The purpose was to reduce smoking among children and young people and to improve health. This was to be achieved by reducing the attractiveness and normalising effect of the display of cigarettes at the point of sale and limiting the availability of a known source of cigarettes to underage smokers. The purpose of these provisions was not to try to help people who already were consumers of tobacco but to prevent people from becoming smokers in the first place. The purpose was to reduce the number of people contracting to purchase tobacco products. Anyone who wanted to could

still buy cigarettes and the terms of the purchase contract did not change. The provisions bore no relation to consumer protection. Their clear purpose was health and not the regulation of consumer contracts.

[29] The long title was of peripheral value and offered limited assistance (see *Bennion on Statutory Interpretation*, fifth ed, at pps 727, 959 and 961; and *Craies on Legislation*, ninth ed, at pps 750 and 751). In *Gallagher v Lynn* 1937 AC 863 there was no reference to health in the long title of the Act under consideration but it was held that its purpose was to protect health. While the Health Act 2009 had no reference in its long title to the health aspect, it was plainly a measure related to health.

[30] Regulations relating to the control of tobacco had been made under a number of different headings. The selection of statutory instruments made by the petitioner was selective and unrepresentative. Secondary legislation had also been made under the heading of Health. The Tobacco Advertising and Promotion (Display) (England) Regulations 2010 were made under the Public Health heading as were the Tobacco Advertising and Promotion (Display of Prices) (England) Regulations 2010. The Tobacco Advertising and Promotion (Point of Sale) (Scotland) Regulations 2004 were made under the Tobacco Advertising and Promotion Act 2002 and were under the Public Health heading, as were the English provisions on the same point, the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004.

[31] In relation to vending machines section 18(2) of the Children and Young Persons (Scotland) Act 1937 created an offence in relation to the sale in a vending machine to persons under the age of 16. The Children and Young Persons (Protection from Tobacco) Act 1991 provided for an offence in relation to the sale of unpackaged cigarettes and the display of warning statements in retail premises and on vending machines in relation to age. The Protection from Tobacco (Sales from Vending Machines) (England) Regulations 2010 were made under the heading of Children and Young Persons. The Smoking, Health and Social Care (Scotland) Act 2005, which banned smoking in public places, was an Act with a health aspect. Regulations made under the 2005 Act such as the Smoking, Health and Social Care (Scotland) Act 2005 (Variation of Age Limit for Sale of Tobacco Etc and Consequential Modifications) Order 2007 was made under a Public Health heading. The explanatory notes to this Order made it clear that the

objective was to reduce the availability and consumption of cigarettes among older children and young teenagers and reduce the prevalence of smoking. Legislation similar to that in sections 1 and 9 of the 2010 Act were being introduced in England and Wales under the Health Act 2009.

[32] The subject matter of the 1991 and 2002 regulations to which counsel for the petitioner had referred, related to issues such as warnings on cigarette packets and information as to tar and nicotine yields. They were concerned with information about the products which were purchased. A consumer contract was entered into and these regulations were designed to protect the consumer of cigarettes. They dealt with subjects such as product safety and labelling which came under the C8 reservation or weights and measures which came under the C9 reservation.

[33] Headings in statutory instruments were of an administrative nature and were not definitive of legislative competence. The question as to whether the subject was a reserved matter depended on the specific provision and the specific reservation relied on.

***Discussion: section 29(2)(b) and (3) challenge***

[34] In examining whether sections 1 and 9 of the 2010 Act relate to a reserved matter it is necessary to have regard to subsection (3) of section 29 of the Scotland Act which provides:

"For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

This is a statutory formulation of the respectation doctrine developed in cases arising from the Commonwealth constitutions and the Government of Ireland Act 1920 (the 1920 Act) which gave power to the Northern Ireland Parliament to make laws for the "peace, order and good government of Northern Ireland". In *Gallagher v Lynn* 1937 AC 863 a question arose as to whether the Milk and Milk Products Act (Northern Ireland) 1934 (the 1934 Act), passed by the Parliament of Northern Ireland, was *ultra vires* as being an undue interference with trade and so in violation of the 1920 Act. The 1934 Act regulated the supply of milk in Northern Ireland and included a limitation with respect to trade with any place outside the jurisdiction of the Parliament. The House of Lords held that the 1934 Act was not an Act in respect of trade but was a law for the peace, order and good government of Northern Ireland in respect of precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. At p 870 Lord Atkin said:

"It is well established that you are to look at the true nature and character of the legislation...the pith and substance of the legislation...The true nature of this Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed in respect of trade, and is therefore not subject to attack on that ground."

A measure may have an effect on a reserved matter but may have another purpose. Sections 1 and 9 of the 2010 Act may have an indirect effect on reserved matters but that does not mean that they relate to reserved matters for the purpose of section 29(2) and (3) of the Scotland Act.

[35] Does the purpose of sections 1 and 9 of the 2010 Act determine that these provisions relate to the

reserved matter in section C7(a), namely, the regulation of the sale and supply of tobacco products? If not, what is the purpose of the measures? I have already explained the basis on which I have come to the view that C7(a) should be construed narrowly. I now test sections 1 and 9 of the 2010 Act in the light of that. Section 1 creates an offence of displaying tobacco products at the point of sale in the course of business. That offence does not prevent a sale being made nor does it affect the terms of sale between the business selling tobacco products and the consumer purchasing them. As was pointed out in the discussion before me, even if a sale is made in circumstances where, contrary to the prohibition, there is a display and an offence is thereby committed by the shopkeeper, the contract between the customer who made the purchase and the shopkeeper remains undisturbed. It is difficult to see how, on the reading of C7(a) which I have adopted, prohibiting the display at the point of sale can be said to relate to the regulation of the sale and supply of tobacco products to consumers. Section 9 creates an offence, committed by the person who has management or control of premises on which a vending machine is available for use. For similar reasons, I have difficulty in seeing how section 9 may be said to relate to the regulation of the sale and supply of tobacco products to consumers.

Any impact by these sections on the regulation of sale and supply of tobacco products is indirect.

[36] What, then, is the purpose of sections 1 and 9 of the 2010 Act? In terms of section 29(3) in determining the purpose regard is to be had, among other things, to the effect, in all the circumstances, of the provision. Guidance in relation to ascertaining the purpose of a provision in an Act of the Scottish Parliament is to be found in the judgments in *Martin*. At para 25 Lord Hope said:

"Section 29(3) of the Scotland Act provides that, when consideration is being given to the 'purpose' of the provision, regard is to be had to its effect 'in all the circumstances'. One of the circumstances to which it is proper to have regard is the situation before the provision was enacted, which it was designed to address. Reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, explanatory notes to the Bill, the policy memorandum that accompanies the Bill and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account in this assessment".

Lord Hope went on to refer to a number of sources, including: the Report to the Scottish Ministers of the

committee chaired by Sheriff Principal MacInnes; certain publications of the Scottish Executive; the explanatory notes to the Bill, the policy memorandum and parliamentary materials. Having considered these, he reached a conclusion at para 31 as to the purpose of section 45 of the 2007 Act.

[37] Adopting a similar approach, it is necessary to examine the relevant documents relating to the development of sections 1 and 9 of the 2010 Act. In 2004 the Scottish Executive published a document entitled *A Breath of Fresh Air for Scotland, Improving Scotland's Health: The Challenge: Tobacco Control Action Plan*. In the foreword the then Deputy Minister for Health and Community Care stated:

"This document is the first ever action plan on tobacco control designed specifically for Scotland. It builds upon and responds to an excellent report by NHS Health Scotland and ASH Scotland and offers a programme of action covering prevention and education, protection and controls and the expansion of high quality cessation services."

A raft of measures was proposed. At paragraph 13 reference was made to a desire to guide more effective enforcement of the Children and Young Persons (Protection from Tobacco) Act 1991. At paragraph 16 it was stated:

"We will establish, in partnership with the UK Government, appropriate arrangements to monitor the Tobacco Advertising and Promotion Act 2002 and act to close any loopholes which are identified. This will include monitoring of remaining marketing activity, including point of sale publicity, distribution strategies, pack design, new product development and corporate social responsibility campaigns."

[38] In the section headed "The Approach" at paragraph 2.1 it was noted that smoking had long been recognised as the most important preventable cause of ill health and premature death in Scotland. Among the categories in which action was proposed was legislative and other action to reduce the attractiveness and availability of cigarettes. In chapter 6, headed "Protection and Controls", it was stated:

"Measures to protect individuals and society from the impact of tobacco, through legislative and other forms of regulations/control, are a vital component of any tobacco control strategy. Some of the levers, such as laws governing the sale of tobacco products to under-sixteens, tobacco

advertising and action to address smoking in public places, are within the scope of the Scottish Parliament. Others, such as fiscal policy, tobacco smuggling and controls on the tobacco industry are reserved to Westminster."

At paragraph 6.2 reference is made to the problem of the availability of cigarettes to children under sixteen. At paragraph 6.3, having noted the ban on press, billboard and most internet advertising of tobacco products, the Executive went on to indicate that it intended, among other things, to introduce regulations to place restrictions on point of sale advertising.

[39] This was followed in 2006 by the publication of the report of the Smoking Prevention Working Group, *Towards a Future Without Tobacco*. The membership of the working group included a number of health professionals. In its introduction the report stated:

"Over the past fifty years, tobacco has been unmasked as a wolf in sheep's clothing: a lethal combination of a highly addictive drug and, when smoked, a host of toxic chemicals capable of causing a wide range of serious diseases."

Under the heading "The Aim of This Report" the group made a series of recommendations intended to protect and dissuade all young people in Scotland from starting to smoke and to deter adults, individually and collectively, from encouraging or enabling them to smoke. The group considered that full implementation of the recommendations should "take Scotland much further towards a future where smoking tobacco has become a thing of the past". Under the heading "Reducing Availability" a number of recommendations were made, aimed at substantially reducing the availability, affordability and attractiveness of cigarettes and other tobacco products to young people. These included measures relating to underage sales and, at paragraph 19, the prohibition of the display of cigarettes at the point of sale. At page 12, while recognising that it was necessary to permit continued legitimate access to cigarettes by existing adult smokers, the group noted that there was widespread agreement that all that could be done should be done to prevent and dissuade young people from starting to smoke. At page 30 under the heading "Sources, Availability and Marketing of Cigarettes to Young People" it was noted that surveys had found that 13 and 15 year olds had little difficulty buying cigarettes from a range of shops and from vending machines. At paragraph 3.33 it was noted that cigarettes were still prominently displayed in

supermarkets, newsagents, petrol stations and other points of sale. At paragraph 3.39 the working group recommended that the Scottish Executive prohibit the display of cigarettes at the point of sale, to be replaced by a simple list of the brands available and their prices.

[40] In 2007 NHS Health Scotland, together with other bodies, produced *An Atlas of Tobacco Smoking in Scotland: A report presenting estimated smoking prevalence and smoking attributable deaths within Scotland*. This included an estimate of the percentage of adult smokers in Scotland as being 27.2% of the population. An estimated 24% of all deaths were attributable to smoking. A smoking and tobacco statistics fact sheet produced by ASH Scotland, dated February 2010, indicates that Scotland had a bigger problem in terms of the percentage of the population smoking than the UK as a whole, or worldwide.

[41] In August 2008 the Centre for Tobacco Control Research published a document entitled *Point of Sale Display of Tobacco Products* (production 7/9). The report refers to clear evidence that point of sale display of tobacco products has a direct impact on the smoking habits of young people. They referred to evidence that banning point of sale display would protect children from tobacco promotion and reduce recruitment to smoking as well as helping current smokers to cut down and quit.

[42] In 2008, in response to the report of the working group, the Scottish Government published a document entitled *Scotland's Future is Smoke-Free: A Smoking Prevention Action Plan*. Chapter 4 recorded an intention to introduce legislative controls further to restrict the display of tobacco products at points of sale, and to work with retailers on the implementation of these measures. This was part of the aim of reducing the attractiveness of tobacco products. Reference was also made to consideration as to what further steps, including legislative steps, might be taken to reduce illegal sales of cigarettes from vending machines. In the introduction, after noting the serious health problems associated with smoking, the document recorded that there was still much to be done, particularly to stop young people from starting to smoke in the first place. It was stated that the document confirmed the Scottish Government's commitment to reducing the affordability, attractiveness and availability of tobacco products to children and young people. At paragraph 1.10 it was stated that the Smoking Prevention Action Plan formed a part

of the programme of comprehensive and targeted action to accelerate progress on health improvement. In chapter 2, headed "Smoking and Young People", at paragraph 2.8, one of the measures intended to influence behaviour is stated to be the countering of positive images of cigarettes in the media and at points of sale. Among the actions proposed was legislative control further to restrict the display of tobacco products at points of sale. In relation to the availability of cigarettes it was noted at paragraph 5.2 that young people had little difficulty in accessing cigarettes from vending machines. The government indicated at that stage that it intended to consider with relevant stakeholders, including at UK level, what further steps, including legislative steps, might be taken to reduce illegal sales of cigarettes from vending machines as part of a review of the controls on the sale of tobacco products.

[43] The Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS) National Report: *Smoking, Drinking and Drug Use Among 13 and 15 Year Olds in Scotland* was published in 2006 (production 7/5) and 2008 (production 7/6). These show that 13% of 13 year olds and 10% of 15 year olds purchased their cigarettes from vending machines. At paragraph 2.15 of the *Regulatory Impact Assessment of the Bill* (production 7/4), the SALSUS surveys are relied on. It is recorded that the UK figures indicated that vending machines account for only 1% of the overall market in sales. It therefore appeared that a disproportionate number of 13 and 15 year olds obtained cigarettes from vending machines. At paragraph 2.21 it was noted that while smoking was dangerous at any age, the younger people started, the more likely they were to smoke for longer and die early from smoking. At paragraph 2.34 it was noted that recent research showed that tobacco displays acted in a similar fashion to other forms of tobacco advertising. At paragraph 7.17 it was noted that the main impact of a ban on display of tobacco products at point of sale would be on children and young adolescents. At paragraph 8.2 it was asserted that the key health benefits from restricting the display would come from a long term reduction in adult smoking rates. It was noted that even relatively small changes in the smoking rate would yield health benefits both in terms of lives saved and reduced NHS costs. At paragraph 10.33, in relation to the ban on the sale of tobacco from vending machines, it was noted that the main benefits were likely to be in terms of a reduction in morbidity and mortality due to a reduction in smoking rates among young people. It was noted that the main population group likely to benefit were young people who currently used

vending machines as their preferred method of buying cigarettes. It was recommended at page 36 that the Scottish Government should ban tobacco vending machines in Scotland. It was estimated that this measure would save 395 lives per year.

[44] The Bill, which was initially to be called the Health (Scotland) Bill, was introduced as the Tobacco and Primary Medical Services (Scotland) Bill. The policy memorandum (Production 6/2), which is required, in terms of Rule 9.3.3(c) of the Standing Orders of the Scottish Parliament, to be prepared by the Scottish Government, asserted at paragraph 2 that the Bill would enable the Scottish Government to continue the drive to improve Scotland's health. It was stated at paragraph 7 that the policy objective of the measures contained in Part I of the Bill was that they were aimed at reducing smoking among children and young people through updated statutory controls on the display and sale of tobacco products in Scotland. In relation to the ban on display it was noted at paragraph 16 that just as children and young people had been found to be more susceptible than adults to advertising in general, there was evidence that young people were disproportionately influenced by displays of tobacco within shops. At paragraph 17 it was noted that in addition to having a powerful effect on young people, visible displays of tobacco within shops had been shown to act as cues to smoke, including among those not intending to buy cigarettes and those trying to avoid smoking. At paragraph 24 the figures in relation to the obtaining of cigarettes from vending machines by children were again noted. It was noted that by their very nature tobacco vending machines were self service which meant no routine age checks were carried out prior to purchase.

[45] The Bill was considered by the Health and Sport Committee of the Scottish Parliament at Stage 1. At Col 2089 of the Official Report of 10 June 2009 (production 6/7), the Minister for Public Health and Sport reminded members of the health risks associated with tobacco smoking. At Col 2103 she reiterated that the thrust of the Bill was to reduce the opportunities that young people had to get access to cigarettes and explained that that was the reason for banning vending machines. At Col 2108 she stated that the Bill was about reducing the attractiveness of cigarettes to young people and preventing them from smoking in the first place. It was not aimed at stopping adults going to the places where they always bought their

cigarettes. She repeated that the Bill was aimed at preventing young people from smoking, not at stopping adults going into their corner shop and buying cigarettes. The evidence was that adults would continue with their purchasing habits. The Committee produced its report (production 6/8). At paragraph 49 the report states that on balance the majority of Committee members considered that the display of cigarettes at the point of sale constituted advertisement and that a ban on such displays would have a positive impact over the long term. At paragraph 80 the report notes that the Committee understood that youth smoking was a great concern and that, as demonstrated by the SALSUS surveys, vending machines were a source of cigarettes for young people. Most of the Committee members were persuaded by the view that, in common with other age restricted dangerous products, it was not appropriate to sell tobacco in vending machines and the majority of members were, on balance, in favour of the prohibition of vending machines for the sale of tobacco products.

[46] The Stage 1 Parliamentary Debate took place on 24 September 2009. At Col 19992 of the Official Report (production 6/10) the minister again made reference to the health risks associated with tobacco smoking. She stated that she sensed that there was broad agreement within the Parliament for further action to reduce smoking among children and young people.

[47] On 27 January 2010 the Stage 3 debate was held. The Minister opening the debate said this:

"Too many young people still take up smoking each year, and smoking prevention must remain a top priority if Scotland's health is to be improved and inequalities are to be reduced...we all agree about the need for the Parliament to show leadership in protecting young Scots from the devastating impact of tobacco...the proposed reforms of the law relating to the sale and display of tobacco will help to protect future generations from smoking related harm."

(The official Report cols 23147-23149 (production 6/14)).

In the course of the debate in relation to vending machines, at col 23119, the Minister stated that they had concluded that a complete ban was the only way in which to be sure that "under eighteens" did not access cigarettes from that source.

[48] That review of the background materials, the surrounding documents and the parliamentary debates points very strongly towards identifying the purpose of sections 1 and 9 of the 2010 Act as being to reduce smoking of tobacco among children and young persons and thereby improve public health in the long term. That purpose would not relate to a reserved matter in terms of section 29(2)(b) of the Scotland Act.

[49] A review of the earlier tobacco related secondary legislation discloses that some measures have been classified under a consumer protection heading and others under a public health heading. Plainly, measures relating to packaging, and warnings about tar and nicotine levels, are consumer protection measures and relate to the reserved matters in sections C8 and C9 of schedule 5 to the Scotland Act. For this reason the Scottish Government has already recognised that it would be outwith its legislative competence to prohibit the sale of cigarettes in packs of ten. But nothing in a review of the earlier legislation diminishes the clear indication of purpose which emerges from the examination of the materials identified above.

[50] Although there is no mention of a health purpose in the long title to the Milk and Milk Products Act (Northern Ireland) 1934, it was held in *Gallagher v Lynn* to have a health purpose. Similarly, I do not consider that the absence of a reference to a health purpose in the long title of the 2010 Act undermines that purpose. I note also the observation at p750 in *Craies on Legislation*:

"But the occasions on which the long title will be decisive are certainly few and may become still fewer. The long title is drafted not with the aim of assisting the construction of an Act, as to which the draftsman relies only on the words used in the Act itself, but for purposes related to Parliamentary procedure and, sometimes and to some extent, wider presentational issues."

[51] I do not consider that sections 1 and 9 of the 2010 Act constitute an unlawful means of achieving a legitimate end. I have already concluded that these measures do not relate to the regulation of the sale of tobacco to consumers within the meaning of section C7(a) of schedule 5 to the Scotland Act.

[52] Accordingly, having reviewed all the arguments canvassed before me, I conclude that the purpose of sections 1 and 9 of the 2010 Act, within the meaning of section 29(2) and (3) of the Scotland Act, is a public health and children and young persons purpose and these provisions do not, therefore, relate to a reserved matter.

**The section 29(2)(b) and (4) challenge: are sections 1 and 9 of the 2010 Act deemed to be related to a reserved matter because they make modifications to Scots criminal law as it applies to reserved matters?**

**Submissions for the petitioner: 29(2)(b) and (4) challenge**

[53] Counsel for the petitioner submitted that if, contrary to the primary position of the petitioner, sections 1 and 9 of the 2010 Act did not otherwise relate to a reserved matter in terms of section 29(2)(b), they should be deemed so to relate because they made modifications to Scots criminal law as it applied to reserved matters. The test here was different from that in schedule 4 para 2. For the purposes of section 29(4) it was not necessary that there be modification of a rule which was special to a reserved matter, but simply a modification of Scots criminal law as it applied to a reserved matter. The provisions in sections 1 and 9 of the 2010 Act created new offences which could only be committed in the course of the sale of goods. They regulated the sale and supply of tobacco products for the protection of consumers. They must inevitably make a modification of the Scots criminal law as it applied to a reserved matter. The contention by the respondent that the reference here to Scots criminal law was to evidence, jurisdiction, procedure and the like, should be rejected. That ignored the provision of section 126 of the Scotland Act which defined Scots criminal law in broad terms.

[54] The second question, namely, whether the purpose of the measures was to make the law in question apply consistently to reserved matters and otherwise, did not arise as these offences applied only to a reserved matter.

**Submissions for the respondent: 29(2)(b) and (4) challenge**

[55] Counsel for the respondent submitted that sections 1 and 9 of the 2010 Act did not fall within subsection (4) of section 29. Subsection 4 was different from schedule 4 para 2. Subsection (4) did not involve a rule of Scots criminal law and was designed to catch something different from schedule 4 para

2. The words "as it applies" covered general rules of criminal law which applied to reserved matters as opposed to a modification of a reserved matter itself. Examples were rules of evidence and procedure which applied to a reserved matter. It did not cover a modification of the reserved matter itself (*Martin*; Lord Rodger, paras 114 and 116). Here there was no modification and no reserved matter was identified.

[56] *Esto* the conditions of subsection 4 were met, the modification was to make the law apply consistently to reserved matters and otherwise. Sections 1 and 9 had in contemplation issues relating to children and young persons, and health, which were not reserved matters. The criminal law on display of tobacco products at point of sale, and the use of vending machines, would apply consistently to both these devolved aspects as well as any reserved aspects.

**Discussion: 29(2)(b) and (4) challenge**

[57] Section 29(4) is in the following terms:

"A provision which -

- (a) would otherwise not relate to reserved matters, but
- (b) 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."

[58] The meaning of the phrase "Scots criminal law" is found in the interpretation section 126(5) which provides:-

"References in this Act to Scots criminal law include criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders."

Also in section 126 "modify" is defined as including "amend and repeal"

[59] In *Martin* Lord Walker noted a family resemblance between the tests in section 29(4) and schedule 4 para 2 (para 54). Lord Rodger noted that section 29(3) and (4) focused on the provision which was being

enacted, while para 2 of schedule 4 focused on the rule of law that was being modified (para 122). Lord Hope described section 29(4) as dealing with "a special category of overlap between reserved matters and matters which are not reserved". All were agreed that if section 45 of the 2007 Act did make modification of Scots criminal law as it applied to a reserved matter, it did so with the purpose of the making "the law in question apply consistently to reserved matters and otherwise." Lord Rodger considered that a narrower construction of section 29(4) was appropriate and expressed doubt as to whether subsection (4) applied. At paragraph 116 he said:

"I am very doubtful whether subs (4) applies in this case. The words of the subsection obviously cover a case where some general provision of Scots private or criminal law applies to reserved matters. For example, it would cover modifications to the general law on limitation as it applied to actions relating to some reserved matter; or modifications to, say, the general law of criminal procedure as it applied to an accused's trial, on summary complaint or on indictment, for some offence constituting a reserved matter. In such cases the provision modifies the law applying to the reserved matter; it does not modify the reserved matter itself. But Parliament provides that, subject to the "unless" clause, it is none the less to be treated as relating to the reserved matter."

He considered that section 45 of the 2007 Act actually modified the law on the reserved matter, rather than the law "as it applied" to a reserved matter. He went on in para 123 to note the distinction between the wording in section 29(4): "the law as it applies to reserved matters" and in schedule 4 paragraph 2: "the law on reserved matters":

"...This conclusion supports my earlier conclusion that these provisions are not provisions of Scots criminal law, 'as it applies to reserved matters' in terms of s 29(4)(b) . A provision cannot be both 'the law on a reserved matter' and the law 'as it applies to' the self same reserved matter.

It respectfully seems to me that that approach makes sense of the distinction between the provisions in section 29(4) and schedule 4 para 2.

[60] When I examine sections 1 and 9 of the 2010 Act in the light of that approach, I have difficulty in seeing that these provisions modify any general provision of Scots criminal law which applies to reserved matters. Even if it is accepted that by creating new offences sections 1 and 9 of the 2010 Act do make

modifications to the existing criminal law, they do not modify any general provision of Scots criminal law which applies to reserved matters. They simply modify the circumstances in which a sale may lawfully take place. Even if a broader interpretation of section 29(4) is adopted, the difficulty remains. As I have interpreted section C7(a), the reserved matter is the regulation of the sale and supply of goods to consumers, construed narrowly as covering the terms on which goods and services are sold. Senior counsel for the petitioner was driven to argue that sections 1 and 9 of the 2010 Act modified Scots criminal law because they related to a reserved matter. But, if that were so, they would already have been caught by section 29(2)(b) and (3). I conclude that section 29(4) has no application in this case.

**The schedule 4 paragraph 2 challenge: do sections 1 and 9 of the 2010 Act modify a rule of Scots criminal law which is special to a reserved matter**

***Submissions for the petitioner: Schedule 4 paragraph 2 challenge***

[61] Junior counsel, whose submissions were adopted by senior counsel, submitted that the rule of Scots criminal law being modified was the rule that set out the existing list of offences relating to the sale and supply of tobacco products. The rule was special to the regulation of sale and supply of goods to consumers for the protection of the consumers, which was a reserved matter in terms of section C7(a) of schedule 5 to the Scotland Act. Because the offences in the existing list of offences in the tobacco related regulations had been created by the UK Parliament, it was for the UK Parliament to add to that list of offences. Senior counsel submitted that the relevant rule of Scots criminal law was that it was an offence under regulation 14 of the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002, 2002/3041, (the 2002 Regulations) to supply tobacco products if they did not comply with any requirement of regulations 4 to 10 of the Regulations.

[62] In terms of section 126 of the Scotland Act "modify" includes "amend or repeal". The word modify must mean something more than just "amend or repeal". In *Martin* all the judges had considered that there was a modification to a rule made by the provision of section 45 of the 2007 Act but they differed in their identification of the modification. It was clear from the judgment in *Martin* that modification did not require express amendment or repeal. At paragraphs 106 and 110, Lord Rodger made reference to section 45 "prevailing over" and "superseding" penalties in the Road Traffic Offenders Act 1988. Sections 1 and 9 of the 2010 Act prevailed over the provisions of regulation 14 of the 2002 Regulations by adding a new offence. These measures added to the scope of offences and that amounted to modifying them.

***Submissions for the respondent: Schedule 4 paragraph 2 challenge***

[63] Counsel for the respondent submitted that Sections 1 and 9 of the 2010 Act did not modify the law on a reserved matter. The short answer was that the petitioner had failed to identify a rule of Scots criminal law to be modified. There was no rule of Scots criminal law being modified for the purposes of schedule 4, paragraph 2. It was difficult to see how the creation of a new offence could modify an

existing rule of criminal law in the present case. If there had not been any rule before a new offence was created, the new offence would not modify anything. It would not be a modification of an existing rule of Scots criminal law. There was no rule of criminal law that set out a list of offences in respect of the sale and supply of tobacco products. A list was a bundle of separate rules. Each offence would be a rule of Scots criminal law. Before the passing of the 2010 Act freedom to have tobacco products on display and use vending machines could not be attributed to the fact that something else was prohibited. What the petitioner was endeavouring to do was to bundle together disparate offences to give a consumer protection aspect and argue that that was the rule being modified. The scope of existing offences remained unchanged and two new ones had been added. This was to be contrasted with the different situation in *Martin* where a specific existing rule was identified and the question of modification was considered. Here there was no textual amendment or repeal and there was no interpretive gloss placed on existing offences.

***Discussion: Schedule 4 paragraph 2 challenge***

[64] Paragraph 2 of Schedule 4 to the Scotland Act prohibits modification in certain circumstances of the law on reserved matters. So far as material for present purposes, it provides:

"(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.

(2) In this paragraph, "the law on reserved matters" means-

- (a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and
- (b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter,

and in this sub-paragraph "Act of Parliament" does not include this Act.

(3) Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law (whether or not contained in an enactment) only to the extent that the rule in question is special to a reserved matter..."

[65] It was common ground that the appropriate approach was to follow that of Lord Hope in *Martin* at para 34 where he stated that, in order to address the question whether a rule of Scots criminal law that was being modified was special to a reserved matter, it was necessary first to identify the rule of law being modified and then to ask whether it was special to a reserved matter. He described identifying the rule as a "crucial step". It clearly follows that, if no rule of Scots criminal law is modified by the new provision, the question as to whether it is special to a reserved matter does not arise.

[66] It is clear from section 126 that a rule of Scots criminal law would include a criminal offence. The creation of a new offence could modify an existing offence by amending it, or repealing it, or superseding it in some way. It seemed to me that counsel for the petitioner had some difficulty in identifying what was the rule of Scots criminal law being modified. According to junior counsel the rule of Scots criminal law being modified was the rule that set out the existing list of offences relating to the sale and supply of

tobacco products. Senior counsel made a rather different submission. He submitted that the relevant rule of Scots criminal law was that it was an offence under regulation 14 of the 2002 Regulations to supply tobacco products if they did not comply with any requirement of regulations 4 to 10 of the Regulations. The difference between the submissions of junior and senior counsel in this regard immediately raises a doubt as to whether sections 1 and 9 of the 2010 Act do modify a rule of Scots criminal law at all. In relation to the submission advanced by junior counsel, I find it very difficult to envisage how a collection of offences, each of which comprised a rule of Scots criminal law, could be said to be a rule of Scots criminal law. Before the passage of the 2010 Act there was no rule of Scots criminal law which regulated the display of tobacco products at point of sale. Merchants were free to display tobacco products as part of their freedom to display any product in an attractive manner in their shops. Tobacco products could be sold from vending machines because owners and managers of premises were free to do so. It seems to me that the creation of the new offences in sections 1 and 9 simply create new, additional offences which fall to be added to the existing list of offences relating to the sale of tobacco products.

[67] In relation to the submission of senior counsel that the rule of Scots criminal law being modified was regulation 14 of the 2002 Regulations it is necessary to examine these regulations a little more closely.

The 2002 Regulations are made under section 11 of the Consumer Protection Act 1987. Section 11 provides for the making of "safety regulations" for the purpose of: securing that goods are safe; that unsafe goods are not made available to persons generally or to persons of a particular description; and that appropriate information is, and inappropriate information is not, provided in relation to goods.

Included in the specific provisions which safety regulations may include is a prohibition on supplying or offering to supply goods to which the section applies. Regulation 14 of the 2002 Regulations provides:

"(1) No person shall supply any tobacco product in respect of which the producer has not complied with any requirement of regulations 4 to 10 which relates to that product".

Regulation 4 requires a producer of cigarettes to ensure that each packet of cigarettes carries a statement of the tar, nicotine and carbon monoxide yields of the cigarettes contained in it. Regulations 5 and 6 relate to the testing by the Secretary of State of cigarettes for the purpose of establishing their tar, nicotine and carbon monoxide yields. Regulations 7 and 8 relate to the requirement for health warnings to be

placed on tobacco products. Regulation 9 provides for the size of the notices in terms of regulations 4 and 7. Regulation 10 requires tobacco products to carry a code showing their provenance. A review of these regulations leads to the conclusion that they relate to product safety and labelling, which are reserved matters in terms of section C8 of schedule 5 to the Scotland Act. In my opinion, sections 1 and 9 of the 2010 Act have no bearing on the issues raised in regulations 4 to 10 of the 2002 Regulations. They do not modify the rule of Scots criminal law set out in regulation 14. That leads me to the conclusion that the petitioner has failed to identify a rule of law being modified by sections 1 and 9 of the 2010 Act. It has failed to make the first crucial step described by Lord Hope in *Martin*. In the light of that conclusion the question as to whether the rule of Scots criminal law being modified is "special to a reserved matter" does not arise and the difficulties which gave rise to the division of views in *Martin* do not require to be addressed.

### **The schedule 4 paragraph 1 challenge: do sections 1 and 9 of the 2010 Act modify article VI of the Acts of Union?**

#### ***Introduction***

[68] The provisions of para 1 of schedule 4 to the Scotland Act are designed to protect particular enactments from modification. So far as material for present purposes, para 1 provides:

- "(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, any of the following provisions.
- (2) The provisions are -

(a) Articles IV and VI of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as they relate to freedom of trade..."

Article IV is in the following terms:

"That all the subjects of the United Kingdom of Great Britain shall from and after the Union have full freedom and intercourse of trade and navigation to and from any port or place within the said United Kingdom and the dominions and plantations thereunto belonging and there shall be a communication of all other rights, privileges and advantages which do or may belong to the subjects of either Kingdom except where it is otherwise expressly agreed in these Articles".

Article VI is in the following terms:

"That all parts of the United Kingdom forever from and after the Union shall have the same allowances, encouragements and drawbacks and be under the same prohibitions, restrictions and regulations of trade and lyable to the same customs and duties on import and export and that the allowances, encouragements and drawbacks, prohibitions, restrictions and regulations of trade and the customs and duties on import and export settled in England when the Union commences shall from and after the Union take place through the whole United Kingdom".

***Submissions for petitioner: schedule 4 paragraph 1 challenge***

[69] Counsel for the petitioner submitted that sections 1 and 9 of the 2010 Act modified Article VI of the Acts of Union so far as it related to freedom of trade. Each of sections 1 and 9 constituted prohibitions, restrictions and regulations of trade within the meaning of Article VI. The language used in Article VI should be examined closely according to the ordinary rules of statutory interpretation. The court should reject the submission of the respondent seeking to distinguish between "freedom of trade" and "freedom to trade". Freedom to trade was as much a part of the elimination of barriers as freedom of trade. The concept of freedom of trade embraced not only freedom of trade between England and Wales and Scotland, it also involved the concept of harmonisation of markets so that there was a level playing field. Counsel referred to the approach of the European Union in relation to the sale of tobacco products in member states. The preamble to Directive 2001/37/EC drew attention to the substantial differences which continued to exist between the laws, regulations and administrative provisions of member states on the manufacture, presentation, and sale of tobacco products. The Directive sought to eliminate such barriers. Sections 1 and 9 of the 2010 Act were likely to constitute barriers to trade. [70] The Calman Commission Report: *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century*, June 2009, noted at para 5.131 that the different rules in respect of food standards and labelling in Scotland and England and Wales may impinge on the functioning of the UK as a single market. The report recommended the re-reservation of these matters. Even if Article VI was construed as relating to freedom of trade in the sense for which the respondent contended, the effect of sections 1 and 9 of the 2010 Act was to create different rules in Scotland which would apply to whoever sought to trade in Scotland. The petitioner was registered in England and had a cross-border dimension.

***Submissions for the respondent: schedule 4 paragraph 1 challenge***

[71] Counsel for the respondent submitted that sections 1 and 9 of the 2010 Act were not outwith the legislative competence of the Scottish Parliament by being in breach of the restrictions in schedule 4 to the Scotland Act, paragraph 1. There was no modification of Article VI of the Acts of Union so far as it related to freedom of trade. "Modify" was defined in section 126 of the Scotland Act as including "amend" or "repeal" but it was not limited to these. Some change was required to qualify as a modification. The words "amend" or "repeal" implied change or placing a gloss on the existing provision. Sections 1 and 9 did not seek to amend, repeal or place a gloss on Articles IV or VI.

[72] The reservation in schedule 4 paragraph 1 represented a concern to preserve the customs union and the common trade market between Scotland and England. Freedom of trade was the only aspect protected. This had been made clear by the Secretary of State in the parliamentary debate on the Scotland Act. An examination of the historical context in which the Acts of Union had been passed demonstrated the importance, from the Scottish point of view in 1706, of access of merchants to markets. Article VI was designed to ensure that traders had access to markets. The natural meaning of the phrase "freedom of trade" confirmed that. Not every indirect restriction or regulation of trade was covered by Article VI. Sections 1 and 9 of the 2010 Act did not in any way prevent access to any retail markets within the United Kingdom. They did not modify Article VI in a way that restricted English traders having access to tobacco markets in Scotland. All were still free to sell cigarettes and trade within the United Kingdom.

[73] If any matter with an indirect effect on trade would be outwith the legislative competence of the Scottish Parliament because it modified article VI of the Acts of Union, then many measures which had been passed by the Scottish Parliament since its establishment would be open to challenge

***Discussion: schedule 4 paragraph 1 challenge***

[74] I note, first, that the prohibition on modification of articles IV and VI provided in para 1 of schedule 4 to the Scotland Act is very specific. It is restricted by the words "so far as they [articles IV and VI] relate to freedom of trade". In order to understand whether the contention of the petitioner that sections 1

and 9 of the 2010 Act modify article VI is well founded, it is necessary to examine what is meant by the words "so far as they relate to freedom of trade" where they appear in paragraph 1 of schedule 4 to the Scotland Act.

[75] In *Lord Gray's Motion* [2000 SC \(HL\) 46](#), where an issue arose before the Committee for Privileges as to whether the measure to abolish the right of hereditary peers, with limited exception, to sit in the House of Lords might be contrary to article XXII of the Acts of Union, Lord Hope examined the issue in the historical context in which the Treaty of Union was reached. I consider that a similar approach is necessary here.

[76] As was noted by Lord Hope in *Lord Gray's Motion* at pp 55-56, under reference to T C Smout, *A History of the Scottish People 1560-1830* (Collins, 1969), p 215, the Union Agreement contributed to the creation of an Anglo-Scottish common market that was the biggest customs-free zone in Europe and gave Scotland access to one of the largest empires in the world. Lord Hope went on to record:

"Following the so-called Union of the Crowns in 1603 Scotland and England had remained separate states in international law. When James VI of Scotland acceded to the throne as James I of England a personal union of the crowns took place. But this was a temporary association rather than a permanent union, as the laws of each kingdom remained unaltered and the succession to the crown of each kingdom continued to depend upon the law of each kingdom: see Lord Murray's article, "The Anglo-Scottish Union", 1961 SLT (News) 161. A century later, following the accession to the thrones of both Scotland and England of Queen Anne, England expressed the wish to enter into a full union with Scotland. It appears that the primary motive for this was to avoid dangerous disputes over the succession to the throne when Queen Anne died: T C Smout, *op cit*, p 216. A majority in Scotland would probably have preferred a federal union, but the English wish was for an incorporating Union of Parliaments. Faced with a choice between separation and incorporation, the Scottish Parliament decided in favour of a mutual incorporation of both England and Scotland into a new state to be known as Great Britain."

A similar analysis is found in Professor T M Devine, *The Scottish Nation* (Allen Lane 1999; Penguin Books 2000). Professor Devine notes that the Union created the biggest free-trade zone in Europe at the time and gave Scottish merchants the liberty to trade legally in such profitable American commodities as

tobacco, sugar, indigo and rum: p 54 (Penguin ed). Prior to the Union, Scottish merchants had for years sought access to the market in England and its colonies. At p 12 Professor Devine observes:

"The English commissioners who helped to draft a treaty with Scottish representatives were mainly concerned with the vital issues of security and incorporating union. To help ensure that these essentials were agreed in the Edinburgh parliament, they were willing to concede ground elsewhere.... even more significantly, the Scots were granted free trade with England and her colonies, a concession which they had craved for some years but which the English had always been stubbornly unwilling to concede."

It is clear then, that freedom of trade in the sense of the formation of a common market was a key element in the formation of the Union and informed the Treaty. In his speech to the Scottish Parliament on 3 October 1706 in support of the Union, the Earl of Seafield, Lord High Chancellor of Scotland, urged:

"...that it must be of great advantage to have this whole island united under one government and conjoined entirely in interest and affection, having equality of all rights and privileges, *with a free communication and intercourse of trade*, which must certainly establish our security, augment our strength and increase our trade and riches." (*The Records of the Scottish Parliament to 1707*, K M Brown *et al* eds (St Andrews, 2007-2010) (emphasis added).

[77] An examination of the historical context in which articles IV and VI of the Acts of Union were introduced points to the paramount concern on the Scottish side of gaining entrance to the common market of England and her colonies. The historical context is an indicator pointing towards a construction of "freedom of trade" in the sense of a common market.

[78] Further support is to be found in the parliamentary debate on this aspect of schedule 4 to the Scotland Act. In Hansard, 12 May 1998, col 259, the Secretary of State for Scotland, Mr Dewar, is recorded as saying:

"This is a belt and braces provision which means exactly what it says. The amendments in schedule 4 entrench the provisions of the Acts of Union between England and Scotland which relate to freedom of trade. There might be a semi-respectable argument for saying that that is

hardly necessary because the matter is reserved...This is not a subject for contention, because there is one thing which unites everyone in the house; whatever final settlement is reached, it is clear that Scotland and England will always need access to each other's markets. Free trade will be a *sine qua non*. The amendment makes that clear."

[79] The Oxford English Dictionary gives two meanings for "free trade":

- "1. An open and unrestricted trade; and
2. Trade or commerce left to follow its natural course, i.e. without the interference of customs duties designed to restrict imports or of bounties intended to foster home production. Also, the legislative establishment or maintenance of this state of things, and the principles of those who advocate it; opposed to protection."

The definition notes that Adam Smith in *Wealth of Nations*, 1776, used "freedom of trade" in the second sense.

[80] The prohibition on modification of article VI contained in para 1 of schedule 4 to the Scotland Act is in any event restricted to modification of article VI so far as it relates to freedom of trade. The review of the historical context of the Acts of Union, the ordinary meaning of the phrase "freedom of trade" and what was said by the Secretary of State in the parliamentary debates on the Scotland Act, all taken together, lead me to conclude that the prohibition on modification of article VI of the Acts of Union contained in para 1 of schedule 4 to the Scotland Act is restricted to interference with the common market created by the Union. Understood in this way, the prohibitions and restrictions introduced by sections 1 and 9 of the 2010 Act do not interfere with the common market created by article VI of the Acts of Union. I did not find consideration of the Directive 2001/37/EC to be of assistance. In any event, the removal of barriers contemplated by it leaves open the possibility of member states introducing, under certain conditions, such requirements as they consider necessary in order to guarantee the protection of the health of individuals.

## **Decision**

[81] For the reasons set out above I conclude that none of the challenges mounted by the petitioner on the legislative competence of the Scottish Parliament to pass sections 1 and 9 of the 2010 Act is well

founded. Accordingly, the petition must be dismissed.

### **Postscript**

[82] I cannot depart from the matter without noting the careful and thorough submissions advanced by each counsel in this case. Their efforts eased the burden of my task, for which I am grateful.

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