FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Reed
Lord Brodie

[2012] CSIH 9
P326/10

OPINION OF THE LORD PRESIDENT

in Reclaiming Motion

by

IMPERIAL TOBACCO LTD

Petitioner and Reclaimer;

against

THE LORD ADVOCATE,
AS REPRESENTING
THE SCOTTISH MINISTERS

First Respondent:

_____

Act: Jones, Q.C., Gill; McGrigors LLP
Alt: Mure, Q.C., Poole; Scottish Government Legal Directorate

2 February 2012

The issue

[1] The issue for resolution in this reclaiming motion is whether sections 1(1) and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 are outside the legislative competence of the Scottish Parliament and accordingly not law (Scotland Act 1998, section 29(1)). The reclaimer maintains that each of these provisions is outside such competence, the challenge being advanced on a number of distinct bases. In the discussion before us it was not suggested on either hand that different answers might be given in respect of the two provisions of the 2010 Act; they stand or fall together. These provisions are:

"1(1) A person who in the course of a 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.

...

9(1) A person who has the management or control of premises on which a vending machine is available for use commits an offence.

...".

By section 9(3) a "vending machine" is defined as meaning an automatic machine for the sale of tobacco products (regardless of whether the machine also sells other products). "Tobacco product" and "smoking related products" are defined respectively by sections 35(1) and 35(2) of the Act.

The Scotland Act

[2] Section 29 of the Scotland Act further provides:

"(2) A provision is outside that competence so far as any of the following paragraphs apply -

...

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

...

(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."

[3] The restrictions in Schedule 4 include the following:

"1(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 4 and 6 of the Union with Scotland Act 1706 and the Union with England Act 1707 so far as they relate to freedom of trade,

...

2(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,

...

(3) Subparagraph (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 ...".

[4] Section 30(1) of the Scotland Act provides that Schedule 5 (which defines reserved matters) shall have effect. The structure of Schedule 5 is to list under Parts, Heads and Sections what are reserved matters. There is no parallel list of devolved matters. What is not reserved is devolved.

Part II of Schedule 5 is concerned with specific reservations, paragraph 1 of that Part providing that the matters to which any of the Sections of that Part apply are reserved matters for the purposes of the Act. Head C is headed "**Trade and Industry**". Within it are two Sections of potential relevance. **Section C7** (headed "**C.7 Consumer protection**") is in the following terms:

"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)."

[5] **Section C8** (headed "**C.8 Product standards, safety and liability**") is in the following terms:

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

Product safety and liability.

Product labelling.

Exceptions

Food, agricultural and horticultural produce, fish and fish products, seeds, animal feeding stuffs, fertilisers and pesticides.

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

The statutory objectives

[6] The objectives (immediate and ultimate) of sections 1(1) and 9 of the 2010 Act are not in doubt. Section 1(1) is designed, by imposing a criminal sanction, to prevent, subject to a limited exception (section 1(2)), the display of tobacco products or smoking related products in a place where tobacco products are offered for sale. Such display is conceived to encourage the purchase of such products. As the consumption, particularly by smoking, of such products is believed to be adverse to health, section 1(1) is designed to inhibit, without prohibiting, their purchase. Section 9 is concerned with a different but related problem - the ready access by children and young persons to tobacco products by way of automatic vending machines. Such ready access is conceived to be harmful, as it facilitates the acquisition and ultimate smoking, by children and young persons, of tobacco products. Section 9 is designed, again by a criminal sanction, to prevent children and young people, as well as other persons, from having such ready access to

tobacco products. The risk which the smoking of tobacco products is perceived to present is to health, primarily of the smokers as consumers but also of those non-smokers who may be exposed to a smoke-filled environment and, by "passive smoking", suffer adverse affection.

Schedule 5 - construction

[7] Mr Jones for the reclaimer submitted that the "natural home" for the provisions of the 2010 Act was in **Section C7**, and in particular **Section C7**(a) of Schedule 5 to the Scotland Act. **Section C7** can be described as falling into four parts: first, the regulation of certain matters, identified under the letters (a) to (i), second, "Safety of, and liability for, services supplied to consumers"; third, the subject-matter of certain statutes identified under letters (a) to (h) and, fourth, the stated exception - "The subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)".

[8] The expression "Regulation of ... the sale and supply of goods and services to consumers" is open to interpretation. It could apply simply to the regulation of such matters in so far as they concern the contractual (or economic) interests of purchasers or acquirers or, on the other hand, it could extend to the safety consequences for consumers of goods and services sold or supplied. That the extended sense cannot be correct is, in my view, plain from the terms of the second part of **Section C7**. That provides expressly for the safety of services supplied to consumers. That provision, which pointedly relates only to services, would have been unnecessary if "Regulation of ... the sale and supply of goods and services to consumers" had been intended to encompass the safety of consumers to whom goods were sold or services supplied. Moreover, the first part of **Section C7** itself, in my view, points to contractual (or economic) interests being the focus. The co-location of "the sale and supply of goods and services ..." with "guarantees in relation to ... goods and services", "hire-purchase", price indication (the subject matter of Part III of the Consumer Protection Act 1987), etc tends to suggest that contractual (or economic) interests are being addressed. The same is (largely, if not wholly) true of the statutory provisions mentioned

in the third part of the **Section**. The canon of construction *noscitur a sociis* would appear to be in point. While, in the nature of the provisions in Schedule 5 a wholly logical taxonomy may be more than can be expected, the presumption must be for an orderly arrangement. In these circumstances I am unable to accept that Section C7(a) encompasses the safety of goods.

[9] I am not persuaded that the exception at the end of **Section C7** points to a different conclusion. We were informed that the background to this provision was that, pre-devolution, the regulation-making power under section 16 of the 1990 Act, although entrusted collectively to "the Ministers", had been exercised separately in relation to Scotland by the Secretary of State and that it was intended under the devolution settlement to maintain that separation. Such separation is indeed what one would expect from the terms of the statute itself: by section 4(1) "the Ministers" means -

> "(a) In relation to England and Wales, the following Ministers acting jointly, namely, the Minister of Agriculture, Fisheries and Food and the Secretaries of State respectively concerned with health in England and food and health in Wales;
>
> (b) In relation to Scotland, the Secretary of State."

So, in so far as section 16 is concerned, one would have expected that, in relation to Scotland, regulations would be made pre-devolution by the Secretary of State - with that power being devolved in due course to the Scottish Ministers. However, I do not accept that the exception of that subject-matter at the end of**Section C7** means that it must be assumed that the subject-matter would otherwise have been reserved under a specific earlier provision of that **Section**. Section 16 of the 1990 Act is side-noted "Food safety and consumer protection" and might accordingly be thought to come within the general heading of the**Section**, viz. "**Consumer protection**". The specific exception can be understood as having been inserted simply to make clear that, in relation to Scotland, the power to make regulations under section 16 was to remain with the Scottish authorities.

[10] It is of some importance to the analysis of Schedule 5 to understand how, pre-devolution, matters in relation to consumer protection were legislatively organised. The Consumer Protection Act 1987, which is not among the statutes specifically listed in the third part of **Section C7** or elsewhere in the Schedule, is divided into five Parts. Part I (headed "Product Liability") sought to transpose into British law, subject to certain limitations, the Product Liability Directive (85/374/EEC). The background concern of that Directive was that existing divergences among the laws of Member States might "distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property" (Preamble to the Directive). Part I of the statute, which extends throughout Great Britain (section 49) imposes on producers, "own-branders" and importers (section 2(2) a civil liability for damage arising from a defect in a "product" - defined as meaning "any goods or electricity ..." (section 1(2)). There is a "defect" in a product if, in certain respects, its safety is compromised (section 3). "Damage" means death or personal injury or any loss or damage to any property (including land) but compensatable damage to property is restricted to property "(a) of a description of property ordinarily intended for private use, occupation or consumption; and (b) intended by the person suffering the loss and damage mainly for his own private use, occupation or consumption" (section 5).

[11] Part II of the 1987 Act (headed "Consumer Safety") is primarily a consolidation of earlier domestic legislation (the Consumer Safety Act 1978, as amended by the Consumer Safety (Amendment) Act 1986), with certain further amendments. It imposes a general safety requirement in respect of consumer goods (section 10, now superseded) and, like the earlier legislation, empowers the Secretary of State to make safety regulations in relation to goods more generally (section 11). An obligation imposed by safety regulations is also made a duty owed to any person who might be affected by a contravention, the latter being civilly actionable accordingly (section 41). Part II extends to Scotland and to Northern Ireland (section 49). Various regulations have been made by the Secretary of State under section 11 in single

instruments applicable throughout the United Kingdom. These include, in relation to tobacco products, the Tobacco Products Labelling (Safety) Regulations 1991 (1991 S.I. 1530) ("the 1991 Regulations"), the Tobacco for Oral Use (Safety) Regulations 1992 (1992 S.I. 3134) ("the 1992 Regulations") and, subsequent to the enactment of the Scotland Act, the Tobacco Products (Manufacture, Presentation and Sale (Safety)) Regulations 2002 (2002 S.I. 3041) ("the 2002 Regulations"), which revoked the 1991 Regulations. It would be unsurprising in these circumstances if the making of regulations under section 11 of the 1987 Act was made by the Scotland Act a reserved matter. But the home for that function is, in my view, more naturally in **Section C8**. That**Section** is entitled "**Product standards, safety and liability**" and includes "Product safety and liability". That clearly encompasses the subject-matter of Part I of the 1987 Act (headed "Product Liability") and appropriately does so, that part being the implementation of the United Kingdom's obligations in respect of the Directive. **Section C8** is also, in my view, the provision whereby the subject-matter of Part II is reserved. That Part is concerned with the safety of "goods", which is (by section 11(7) as read with section 45(1)) defined comprehensively - with certain limited exceptions - and would, subject to such exceptions, include any "product" - see, for example, the definition for the purposes of Part I of that term in section 1(2); see also the comprehensive definitions of "goods" and of "substance" in section 45(1). Both Parts I and II are essentially concerned with the safety of goods in the interests of consumers and one would naturally expect them to be dealt with similarly for the purposes of the devolution settlement. Part II was, subsequent to devolution, amended by a statutory instrument (The General Product Safety Regulations 2005 (S.I. No.1803)) made by a minister in the Department of Trade and Industry.

[12] In relation to the interpretation of Schedule 5 I should add this. Some time after the enactment of the Scotland Act the Scotland Office prepared and issued "Explanatory Notes" on that statute. Under reference to Section C7 (at pages 236-7) it is stated:

"**Purpose and effect**

This Section reserves various consumer protection and related matters, subject to certain exceptions.

General

This reservation is designed to ensure the reservation of a common United Kingdom system for the regulation of consumer protection and related matters in order to preserve a level playing field for consumers and business.

The DTI is responsible throughout the United Kingdom for consumer protection matters such as the sale and supply of goods and services to consumers, and related matters, which may not be restricted to consumers, such as trade descriptions, misleading advertising, price indications etc. So that the interests of consumers across the whole UK market can best be protected, the current UK-wide arrangements will be maintained. The Scottish Office was formally consulted on a non-statutory basis in connection with the relevant work programme proposals and various other matters to do with Scottish consumer bodies, which receive funding from, and in some cases are appointed by, the DTI, e.g. Scottish Consumer Council and Citizens Advice Scotland.

The Scottish Consumer Council, National Consumer Council and the Scottish Association of Citizens Advice Bureaux have been specified as cross-border public authorities.

The Scottish Parliament has legislative power in this area in respect of food safety, because this is integral to the policy areas of agriculture and food which are not reserved, and in respect of advertising which is specific to tobacco and tobacco products in view of its similar linkage to health.

...

There are three main groups of reserved matters: the regulation of various matters, the safety of consumer services, and the subject-matter of various enactments.

(a) First Group

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 Contract 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 from legislating about these wider matters;

...

(b) Second Group

Matters relating to the safety of, and liability for, services to consumers are reserved. This covers any matters related to the supply of services which reflect similar provisions as those relating to product safety and liability in Section C8."

Under reference to Section C8, the Notes refer to that reservation covering "the regulation and control of the standards of products which are put on the market or into service so as to observe and implement the relevant EC law, notably the European Single Market Harmonisation Directives which have as their purpose the smooth functioning of the single market by removing potential barriers to trade. Also reserved under this heading are product safety and liability and product labelling. These matters too are reserved in order to ensure that a single market is maintained within the UK."

[13] Mr Mure for the respondent submitted that these Notes assisted his submission that **Section C7**(a) was concerned solely with contractual aspects of the sale and supply of goods and services. But, in my view, the value of these Notes for the purposes of interpretation of the statute is very limited. They were prepared and published in 2004 some time after the enactment

of the Scotland Act. They accordingly do not have the interpretative value which Explanatory Notes which accompany a Bill in its passage through Parliament can have because the latter can provide an objective setting or contextual scene for the statute or contain a clear assurance by the executive in Parliament about the meaning of the provision (*R (Westminster City Council)* v *National Asylum Service* [2002] 1 WLR 2956, per Lord Steyn at paras 4-6; see also *R* v *Montila* [2004] 1 WLR 3141, per Lord Hope of Craighead at para 35). The present Explanatory Notes can be regarded merely as a commentary on the provisions - albeit from an official source. That commentary does, *quantum valeat*, go some way to suggesting that **Section C7**(a) is concerned essentially with the contractual aspects of the sale and supply of goods and services to consumers and not with the matter of the safety of goods. The commentary is accordingly consistent with the interpretation of that section which I otherwise favour.

The Scotland Act - construction

[14] The leading authority to date on section 29 of and Schedule 5 to the Scotland Act is *Martin* v *Most* 2010 SC (UKSC) 40 but the judgments in that case do not give comprehensive guidance on the proper interpretative approach to Schedule 5. Parties before us were in agreement that the court should favour constructions which render the constitutional settlement coherent, stable and workable. I agree. Mr Mure further argued that the statutory provisions should be read in a "generous and purposive manner". Reference was made to *Robinson* v *Secretary of State for Northern Ireland* [2002] UKHL 32 - in particular to the speech of Lord Bingham of Cornhill at paras 10-11. But in that case a clear background purpose (implementation of the Belfast Agreement) could be discerned. Here the purpose (discernible from the statute itself) is the division of functions between the Scottish Parliament and the United Kingdom Parliament. There is nothing in the statute or in its background which suggests that one should read the provisions of Schedule 5, or of any of the other provisions of the statute,

expansively or restrictively. One must simply interpret them having regard to any relevant legislative background - such as the Consumer Protection Act 1987.

Section 29(2)(c), as read with Schedule 4 para 2

[15] With these preliminary conclusions it is next necessary to address the interpretation and application of section 29(2)(b) and (c). Although in the Outer House the reclaimer relied primarily on section 29(2)(b), before us the primary emphasis was laid on section 29(2)(c), as read with paragraph 2 of Schedule 4. Mr Jones's submission was that the 1992 Regulations and the 2002 Regulations, both made under section 11 of the 1987 Act and in force when the 2010 Act was enacted, regulated the sale and supply of tobacco and tobacco products. By adding to the restrictions on the sale and supply of tobacco and tobacco products to consumers, sections 1(1) and 9 of the 2010 Act "[modified] the law on reserved matters" within the meaning of Schedule 4 paragraph 2 and were thus *ultra vires*the Scottish Parliament.

[16] I accept that the subject-matter of regulations duly made under section 11 of the 1987 Act is a reserved matter - because it concerns "product safety" within the meaning of **Section C8**. I accordingly accept that the 1992 Regulations and the 2002 Regulations are each an enactment, the subject-matter of which is a reserved matter and which is comprised in subordinate legislation under an Act of Parliament (Schedule 4, para 2(2)(a)). However, I do not accept that the 2010 provisions "modify the law on reserved matters". The subject-matter of each of the 1992 Regulations and the 2002 Regulations is specific (safety) regulations in relation to tobacco and tobacco products. Neither is, nor purports to be, a comprehensive legislative instrument in relation to the safety of tobacco or tobacco products. The 2010 Act provisions do not alter in any way the requirements of either of these sets of regulations albeit they may add to the restrictions in this field and are designed to do so for "safety reasons".

[17] Reliance was placed by Mr Jones on para [110] of *Martin* v *Most*, where Lord Rodger of Earlsferry, discussing the effect of section 45 of the Criminal Proceedings Etc. (Scotland) Act 2007 on Schedule 2 to the Road Traffic Offenders Act 1988 said:

> "If sec 45 was within the competence of the Scottish Parliament in this regard, sec 45(1) prevails over the schedule and provides that the maximum term of imprisonment for someone convicted on summary complaint of a contravention of sec 103(1)(b) of the RTA is 12 months. Therefore, even if sec 45 does not technically amend the figure in col 4 of the schedule, it certainly purports to supersede, and thereby modify, the law comprising sec 33 of the RTOA and the relevant entry in the schedule. Similarly, it purports to supersede and modify all the other comparable penalty provisions which prescribe the maximum term of imprisonment that can be imposed, on summary conviction, for either-way offences in statutes dealing with reserved matters."

These observations are uncontroversial. But there is a clear distinction, in my view, between a provision which, expressly or implicitly, alters another provision and one which adds a further specific restriction or restrictions to existing specific restrictions, albeit in the same field of law. The latter do not modify an existing enactment, even when account is taken of section 126 of the Scotland Act which provides that "modify" includes "amend or repeal".

[18] Reliance was also placed on an observation by Lord Hope in *Martin* v *Most* at para [35]. His Lordship was there addressing subparagraph (3) of paragraph 2 of Schedule 4 (which restricts the ambit of subparagraph (1) to the extent that the rule in question is "special" to a reserved matter). He said:

> "I think that it is clear that any modification of the maximum punishment that can be imposed for the offences that the road traffic legislation has created must be held to be a matter for the UK Parliament at Westminster. The rule of Scots law as to the maximum term of imprisonment that can be imposed would fall to be treated as a rule that was

special to a reserved matter. So would any other limits on the extent of the penalties or as to the scope of offences that the Road Traffic legislation lays down. ...".

But his Lordship there had in mind, I would understand, the scope of offences that the road traffic legislation in fact lays down - that is, existing not prospective provisions. In any event, the road traffic legislation is comprehensive in nature, not specific, piecemeal regulation (such as the 1992 and 2002 Regulations). Even if it were to be suggested that the reserved matter is not just the existing regulations made under section 11 but the whole potential for safety regulations which might be made under that section, the subject-matter of sections 1(1) and 9 of the 2010 Act could not, as I explain later, have been enacted by regulations made under section 11. It may be noted that for England and Wales and for Northern Ireland new primary legislation was used for this purpose (Health Act 2009, sections 21 and 22 and, for Northern Ireland, section 23). A challenge to sections 22-3, on different grounds, has so far been unsuccessful (*R (Sinclair Collis Ltd)* v*Secretary of State for Health* [2011] EWCA Civ 437). See also *Sinclair Collis Ltd* v *Lord Advocate* [2011] CSOH 80.

[19] Further, the restriction in paragraph 2(1) applies "only to the extent that the rule in question is special to a reserved matter" (para 2(3)). Even if the 2010 Act provisions encompass a reserved matter, namely, product safety - as to which see below - they are not special to that matter. They clearly also bear on the devolved matter of health.

[20] In my view the restriction in paragraph (2) of Schedule 4 is not breached.

Section 29(2)(b)

[21] The reclaimer next relies on section 29(2)(b) of the Scotland Act. Do the 2010 Act provisions "relate to product safety"? The expression "relate to" is to be determined "subject to subsection (4) by reference to the purpose of the provision having regard (amongst other things) to its effect in all the circumstances" (section 29(3)). One of the circumstances to which it is proper to have regard in this context is the situation before the provisions were enacted, which

they were designed to address (*Martin* v *Most*, per Lord Hope at para [25]). That is not difficult to discern here. As I have said, the immediate purpose of section 1(1) is to inhibit the sale of tobacco products and smoking related products by removing the attractiveness which a display of them may have for potential purchasers; the immediate purpose of section 9 is to eliminate the sale of tobacco products by automatic vending machine. These provisions, if valid and brought into force, are likely to achieve these ends; that would be their likely effect. The underlying or ultimate purpose of each of these provisions is to reduce the risk of damage to health caused by the consumption of tobacco products - in the case of section 9 with particular reference to the health of children and young persons. Taking that wider purpose as, in my view, one may (see, for a practical example, *Martin* v *Most*, especially per Lord Hope at para [31], per Lord Rodger at para [113] and per Lord Kerr of Tonaghmore at para [169]), do the provisions yet "relate to" the reserved matter "product safety" identified in Section C8?

[22] As I have earlier concluded, the subject-matter "product safety" includes the making under section 11(1) of the Consumer Protection Act 1987 of regulations for securing, among other things, "(b) 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, as the case may be, to persons of that description". The 1992 Regulations secure that in respect of tobacco taken orally. The hypothesis is that tobacco for oral use is unsafe - and is so because it presents a risk to the health of such as so take it. The 2002 Regulations again proceed on the basis that cigarettes with yield in excess of certain maxima for tar, nicotine or carbon monoxide are unsafe because they present a risk to health. The manufacture or supply of cigarettes exceeding any of these maxima is unlawful (Regulation 3) and various regulations are made to ensure compliance (Regulations 4-6).

[23] These regulations thus proceed on the basis that tobacco taken by a particular mode and tobacco products with certain noxious constituents above certain limits present risks to health and accordingly should not be made available for consumption by the public. The ultimate

objective may be inferred to be to protect the health of consumers; by the regulations this is secured by proscribing goods which are unsafe because they present a risk to that health.
In *Reg.* v *Health Secretary, Ex p. US Tobacco Co* [1992] 1 QB 353, Taylor LJ at pages 364-5 rejected a distinction sought to be made, in the context of an argument about safety regulations made under the 1987 Act, between consumer protection and safety on the one hand and public health on the other. The two overlap. The function of making such regulations is, as I have held, a reserved matter. It is so reserved, it may be inferred, because safety regulations in relation to goods may affect the "common market" between Scotland and other parts of the United Kingdom. Traders in one part should not be put to a disadvantage as against traders in another. The outlawing of the sale or supply of products in one jurisdiction but not in another may create such disadvantage.
[24] There is, however, an important difference between the power to make regulations under section 11 of the 1987 Act and the 2010 Act provisions. The latter do not prohibit the sale or supply of tobacco products or smoking related products but, by section 1(1), seek to remove their attractiveness to potential purchasers and, by section 9, seek to prevent sale or supply of tobacco products by a particular sales method - albeit a perceived risk to the health of the public, including that of children and young persons, is the underlying rationale. The power to make regulations under section 11(1)(b) is to secure that goods "are not made available" (that is, at all) generally or to persons of a particular description. Accordingly, what was done by sections 1(1) and 9 of the 2010 Act could not, in my view, have been effected by the exercise of the regulatory power under section 11 of the 1987 Act.
[25] It remains, however, to consider whether what is sought to be effected by the 2010 Act provisions otherwise "relates to" the reserved matter "product safety". On one view the question does not arise. If the expression "Product safety and liability" refers exclusively to the provisions of Parts II and I respectively of the Consumer Protection Act 1987 (and any re-enactment of the same) - albeit the statutory provisions are not expressly referred to - then there is no residual

content for the expression. The headings to Parts I and II ("Product Liability" and "Consumer Safety" respectively) may support that view. But Parliament had chosen to use the descriptive expression rather than, say, "The subject-matter of Parts I and II of the Consumer Protection Act 1987". So, it may be that the expression has a wider compass. It could include any aspect, existing or potential, of product safety. I assume for the purposes of discussion that it does have that wider compass. It should, however, be borne in mind that **Section C8** falls within **Head C** ("**Trade and Industry**"). It is in so far as a provision with respect to product safety has a potential to affect trade and industry (in particular that between Scotland and other parts of the United Kingdom) that it may impinge on a reserved matter.

[26] Issues concerning the competence of legislation are not new to common law jurisprudence. The North America Act 1867 (subsequently named the Constitution Act) has given rise to much jurisprudence not only in Canada but also in the Privy Council. Likewise, the Commonwealth of Australia Constitution Act1900 has given rise to much jurisprudence in the High Court of Australia (and to a lesser extent in the Privy Council). No doubt the framers of the Scotland Act had the principles developed in these Canadian and Australian cases in mind in devising the provisions for Scotland. The role which appears to have had particular prominence in Parliament was the "pith and substance" rule developed in the Canadian cases and deployed in the construction and application in Northern Irelandof the Government of Ireland Act 1920 (see *Gallagher* v *Lynn* [1937] AC 863). At the Committee stage in the House of Lords of the Scotland Bill Lord Sewel for the Government explained:

> "It is intended that the courts should rely upon the respection doctrine which they developed in dealing with the cases arising from the Commonwealth constitutions and the Government of Ireland Act 1920. The classic statement is found in the words of Lord Atkin in *Gallagher* v *Lynn* in 1937 ... In other words, it is intended that any question as to whether a provision in an Act of the Scottish Parliament "relates to" a reserved matter should be determined by reference to its 'pith and substance' or its purpose and if its

> purpose is a devolved one then it is not outside the legislative competence merely because 'incidentally it affects' a reserved matter. A degree of trespass into reserved areas is inevitable because reserved and other areas are not divided into neat watertight compartments.
>
> (Hansard HL debates (21 July 1998, Vol. 592, cols.818ff, noted by Lord Hope at para 14 in *Martin* v *Most*).

Quantum valeat, the Explanatory Notes to section 29(3) state that:

> "The courts are ... required by statute to determine whether a provision 'relates to' a reserved matter by reference to 'the purpose of the provision'. In determining its purpose, the courts are to have regard, amongst other things, to its effect in all the circumstances. It may be that it is thought that a provision might have two or more purposes but section 29(3) does not say that the courts are to determine what is the dominant purpose. It requires the courts to determine what is 'the' purpose of the provision or, in other words, what the provision is about, what is its 'true nature', its 'pith and substance'."

[27] We heard an interesting debate on the jurisprudence in other jurisdictions. The Australian cases (which are largely directed to the interpretation and application of section 51 of the Commonwealth of Australia Constitution Act 1900) are concerned with the powers of the Commonwealth Parliament, which was constituted later than the legislatures of the several States. So, while it has the apparent advantage of being, like the Scotland Act, concerned with a single list (of matters competent to the Commonwealth Parliament) it has the disadvantage that, unlike in the United Kingdom, it is the central legislature whose powers are circumscribed. Moreover, the various legislatures were established against a different historical background and even a cursory perusal of the case law reveals that, over a period of more than 100 years, a variety of doctrines have been developed and in some instances discarded. The Canadian model on the other hand suffers, for comparative purposes, from the disadvantage that the 1867 Act provides two lists (one of matters competent to the Dominion Parliament and another of matters

competent to the Provincial legislatures) with a result that the courts had to struggle, where the legislation under scrutiny arguably fell into both lists, to determine where competency lay. Accordingly, despite the Government spokesman in the Lords having referred to the "pith and substance" doctrine, one must approach the Canadian case law with some care.

[28] The fact of the matter is that the framers of the Scotland Act have adopted different language, against a novel devolution settlement, from that adopted elsewhere. As Lord Hope said in *Martin* v *Most* at para [15]:

> "While the phrase 'pith and substance' was used while these provisions were being debated, it does not appear in any of them. The idea has informed the statutory language, and the rules to which the court must give effect are those laid down by the statute. As to what they mean, the Scotland Act provides its own dictionary."

Lord Walker, having referred at para [45] to the situation in Northern Ireland and to an Australian case, continued at para [46]:

> "These background matters must have been in the mind of those who undertook the drafting of the Scotland Act (and in particular the provisions directly relevant to these appeals). But in the Scotland Act Parliament has gone further, and has used more finely modulated language, in trying to explain its legislative purpose as regards 'reserved matters'."

[29] As the division of opinion in the Supreme Court in *Martin* v *Most* serves to demonstrate, the interpretation and application of that modulated language may not always be easy. The question whether a challenged provision relates to a reserved matter is to be determined by its purpose, having regard (amongst other things) to its effect in all the circumstances (Scotland Act section 29(3)). This purpose and effect criterion may be contrasted with the "with respect to" criterion applicable under section 51 of the Commonwealth of Australia Constitution Act 1900; as regards the latter it has been observed that "it has often been decided that the motives of Parliament, and, as a general rule, the objects which Parliament seeks to achieve are not relevant

to questions of constitutional validity"(*Bank of NSW* v *The Commonwealth* (1948) 76 CLR 1, per Latham CJ at page 186), As to "pith and substance" Latham LJ observed at page 185:

> "Nor ... am I of opinion that the phrase 'pith and substance', in spite of its frequent use by high authorities, solves any difficulties. It lends itself to emphatic asseveration, but it provides little illumination ... The case of *Prafulla Kumar Mukerjee* v *Bank of Commerce* [(1947) LR 74 Ind. App. 23] shows that there is no difference between asking: 'What is the pith and substance of a statute?' and asking: 'What is its true nature and character?'."

[30] There are, accordingly, significant differences between the Australian jurisprudence and that of Canada (and India), in the latter of which the expression "pith and substance" has a long history going back to Lord Watson's observations in *Union Colliery Co of British Columbia Ltd* v *Bryden* [1899] AC 580, at page 587.

[31] On the other hand, the Canadian jurisprudence (and its reliance on "pith and substance") has, as I have said, to be approached with some care, despite Lord Sewel's endorsement of it in the House of Lords. The alternative expression "true nature and character of the legislation" had been used in *Russell* v *The Queen*(1882) 7 App. Cas. 829, at pages 839-40. It may be, as Latham CJ noted in *Bank of NSW* v *The Commonwealth*, that there is no real difference between these two expressions.

[32] Rather closer to home might be thought to be the experience in Northern Ireland. Section 4 of the Government of Ireland Act 1920 provided that "the Parliament of Northern Ireland shall ... have power to make laws for the peace, order and good government of ... Northern Ireland with the following limitations, namely, that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction or some part thereof, and (without prejudice to that general limitation) that they shall not have power to makes laws in respect of the following matters in particular, namely ..." [various matters were then enumerated including trade with any place out of Northern Ireland].

[33] The validity of the Milk and Milk Products (Northern Ireland) Act 1934 arose for consideration in *Gallagher* v *Lynn*, where the leading speech was delivered by Lord Atkin. He said at pages 869-70:

> "... the short answer to [the challenge to validity] is that this Milk Act is not a law 'in respect of' trade; but is 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. These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the 'true nature and character of the legislation': *Russell* v*The Queen* 'the pith and substance of the legislation'. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field."

Lord Atkin there adopted and applied the Canadian concepts of "pith and substance" and "true nature and character" to section 4 of the Government of Ireland Act 1920. On one view there was in that statute a dual list *viz*., laws for the peace, order and good government of Northern Ireland and laws in respect of the excepted matters. However, power to make "laws for the peace, order and good government" of a territory subject to exceptions is in effect a devolution of all law making power subject to reservations and thus not unlike the constitutional arrangements made under the Scotland Act. In these circumstances, although the critical phrase under discussion in *Gallagher* v *Lynn* was "in respect of ", Lord Atkin's observations may be of some assistance for present purposes. It should be noted, however, that it has been academically observed that "the 'pith and substance' doctrine would seem to be superfluous to Northern

Ireland's needs" (Calvert -*Constitutional Law in Northern Ireland* (1968) at page 189 - see also pages 194-6).

[34] In seeking to interpret and apply section 29(1)(b) (as read with section 29(3)) of the Scotland Act to a provision passed by the Scottish Parliament it is appropriate, in my view, to ask what is the true nature and character of that provision, reference, of course, being made to its purpose and regard being had (amongst other things) to its effect in all the circumstances. In that connection it is important to bear in mind that **Section C8** falls within the **Head** "**Trade and Industry**" and that "**Product safety**" should accordingly be construed as concerned with ensuring that the common economic market of the United Kingdom is preserved. Although not central to the matter of construction and application, it is not, in my view, without significance to note that the United Kingdom Parliament has (by the amendment effected by section 29 of the Health Act 2009 and by regulations made pursuant to sections 22 and 23 of the 2009 Act) already made equivalent measures for England and Wales and Northern Ireland. The 2010 Act, if valid, will accordingly restore rather than adversely affect that common market.

[35] However that may be, the purpose, in the sense of the ultimate objective, of each of sections 1(1) and 9 of the 2010 Act is to advance the general wellbeing of members of the community; paragraph 8 of the Scottish Government Policy Memorandum in relation to the Bill emphasises the risks of illness and premature death presented by smoking and the substantial cost to the community of hospital care for treating smoking related illnesses and of lost productivity. Neither of these measures, however, seeks to proscribe smoking; each is much less radical. Section 1(1) proceeds upon the assumption that the sale of tobacco products and smoking related products on premises licensed for the purpose remains lawful. What it in effect does is to prohibit certain displays in such premises. Its true nature and character is to control or regulate the promotion of such products at the point of sale with a view to inhibiting their purchase. It is in substance much closer to regulatory provisions, such as may be found, for the sale of alcohol, in the Licensing (Scotland) Act 2005, than it is to a provision designed to impact

on a common market in the United Kingdom. No one suggests that statutory provisions regulating the sale of alcohol are outwith the legislative competency of the Scottish Parliament (see *Citizens Insurance Company of Canada* v *Parsons* (1881) VII App. Cas. (JC) 96 at page 113). It is also analogous to the control of smoking in no-smoking premises enacted by the Scottish Parliament in Part 1 of the Smoking, Health and Social Care (Scotland) Act 2005. It is further closely related to the regulation of misleading and comparative advertising, in relation to tobacco and tobacco products, devolved by the exception in **Section C7**(e).

[36] As to section 9, its true nature and character is that of protection of children and young persons. It might have been legislated for by an amendment to the Children and Young Persons (Scotland) Act 1937, a matter clearly within the competence of the Scottish Parliament - see section 9 of the Smoking, Health and Social Care (Scotland) Act 2005, which empowers Scottish Ministers by order to raise the age at which tobacco may lawfully be sold to young persons. Section 9, in so far as it touches on "product safety", does so only remotely. It is no more than a "loose or consequential connection" (see Lord Walker in *Martin* v*Most* at para [49]).

[37] In all these circumstances neither of the 2010 Act provisions, in my view, "relates to ... product safety" within the meaning of the Scotland Act. The challenge under section 29(3)(b) accordingly fails.

[38] I should add this. If I am wrong in my earlier conclusion that, for the reasons there given, the scope of **Section C7**(a) is narrower than the reclaimer contends, its challenge based on section 29(1)(b) fails for a different reason. I see force in the reasoning of Lord Reed and Lord Brodie that neither of the 2010 Act provisions relate to "consumer protection". Accordingly, if I am wrong on the matter of construction of the Schedule, I accept and adopt their reasons for rejecting this ground of challenge.

Section 29(4)

[39] As to section 29(4), the hypothesis is that the provisions in question "would otherwise not

relate to reserved matters". On that hypothesis the relevant question is whether they make "modifications ... of Scots criminal law as it applies to reserved matters". If "Scots criminal law" is to be understood, as it appears it should, as the corpus of that law, sections 1(1) and 9 do make modifications to that law. They create criminal offences and thus add to and so alter that corpus. If, however, the 2010 Act provisions do not relate to product safety (**Section C8**), which on the relevant hypothesis they do not, nor to regulation of the sale and supply of goods and services to consumers (**Section C7**(a)), which I have earlier concluded that they do not, it is difficult to see how these provisions make modifications of Scots law "as it applies to reserved matters". The apparent aim of section 29(4) is to being within the scope of incompetent measures modifications of a general character in so far as they apply to reserved matters. That is far from the situation here.

Section 29(2)(b) as read with Schedule 4 para 1

[40] Lastly, the reclaimer relies on section 29(1)(c), as read with paragraph 1 of Schedule 4 and Article 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 "so far as they relate to freedom of trade" (Schedule 4, para 1(2)(a)). It is appropriate to set out both Article IV and Article VI. They are in the following terms:

> "IV 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 thereto belonging And that there 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 otherwayes expressly agreed in these Articles.
>
> VI 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 throughout the whole United Kingdom ...".

Schedule 4 paragraph 1(2)(a) bears to restrict the protected provisions to "so far as they relate to freedom of trade". Only Article IV expressly refers to freedom of trade: "... a full Freedom and Intercourse of Trade and Navigation ...". But Article VI addresses regulations and other governmental provisions which may affect the carrying on of trade: "... be made under the same Prohibitions Restrictions and Regulations of Trade ...". These Articles are expressed in wide terms, as might be expected in a constitutional statute of the early eighteenth century. Wide terms in a constitutional statute have to be read in their historical context - in this case against the political objective, of particular importance to Scotland, to allow merchants from each of the parts of what was then to become Great Britain access on equal terms to the markets of the other (see the historical works referred to by the Lord Ordinary). But, as was pointed out in *Citizens Insurance Company of Canada* v *Parsons* at pages 112-3, Article VI has never been understood as preventing Parliament from passing separate and different laws bearing on trade in the constituent parts of Great Britain. Acts regulating the sale of intoxicating liquors and bankruptcy statutes were given as illustrations. Cautionary obligations, other than possibly in relation to consumer contracts, are another field impinging on trade in which the law, statutory and otherwise, may diverge as between the two jurisdictions. Until 1893 the Scots law of sale of goods was very different from that of England and Wales; some important differences, at least as regards non-consumer contracts, remain. The preservation of Scots law as a distinct and living corpus of jurisprudence depends on the continuation of separate treatment. What appears to be ruled out by Article VI is any preference being given in trading conditions merely because the trader comes from one or other of the constituent parts of Great Britain - that is, free access to markets.

[41] The 2010 Act provisions do not seek to give any such preference. The circumstance that an English trader in Scotland, like a Scottish trader here, might, for example, be unable to sell tobacco products through vending machines while, hypothetically, each might be able to do so in England does not amount to a discriminatory access to markets. The provisions are not, in my view, outside the competence of the Scottish Parliament by reason of contravention of section 29(2)(c), as read with paragraph 1(2)(a) of Schedule 4.

Disposal

[42] For these reasons I would refuse the reclaiming motion.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Reed
Lord Brodie

[2012] CSIH 9
P326/10

OPINION OF LORD REED

in the Reclaiming Motion

by

IMPERIAL TOBACCO LIMITED

Petitioners and Reclaimers;

against

THE LORD ADVOCATE,
AS REPRESENTING
THE SCOTTISH MINISTERS

Respondent:

_____

Act: Jones, Q.C., Gill; McGrigors LLP
Alt: Mure, Q.C., et Poole; Scottish Government Legal Directorate

2 February 2012

Introduction

[43] In this application for judicial review the petitioners ask the court to declare that sections 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 and therefore not law. They

contend that those provisions relate to matters which are reserved to the United Kingdom Parliament under the Scotland Act 1998, or alternatively that they purport to modify provisions which are protected from modification by that Act. The application raises questions of interpretation of the Scotland Act which are of considerable importance.

The legislative competence rules

[44] The legislative powers of the Scottish Parliament are governed by sections 28 and 29 of the Scotland Act, as amended. Section 28(1) provides that, subject to section 29, the Scottish Parliament may make laws. Section 29, so far as material to the present case, provides:

> "**29.-**(1) 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) A provision is outside that competence so far as any of the following paragraphs apply-
>
> ...
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4 ...
>
> (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."

[45] In relation to section 29(2)(b), reserved matters are defined by Schedule 5, to which effect is given by section 30(1). Part I of Schedule 5 sets out a number of general reservations which are not relevant to the present case. Part II sets out a large number of specific reservations. They are prefaced by provisions of a preliminary nature:

> "1. The matters to which any of the Sections in 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)."

[46] The Sections which it is necessary to consider in the present case are Sections C7 and C8, which both form part of Head C, entitled "Trade and Industry". They are in the following terms:

"**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. Product standards, safety and liability

Technical standards and requirements in relation to products in pursuance of an obligation under EU 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."

[47] In relation to section 29(2)(c), the restrictions in Schedule 4 which it is necessary to consider are as follows:

"1.-(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 4 and 6 of the Union with Scotland Act 1706 and of the Union with England Act 1707 so far as they relate to freedom of trade...

2.-(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...

3.-(1) Paragraph 2 does not apply to modifications which-

(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and

(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision."

The 2010 Act

[48] It is convenient next to explain the scheme of the 2010 Act and to set out the relevant provisions. The long title is:

"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; to amend the criteria for eligibility to provide primary medical services under the National Health Service (Scotland) Act 1978; and for connected purposes".

[49] The Act is divided into three Parts. Part 1 is headed "Tobacco products Etc", and is divided into four Chapters. Chapter 1 is headed "Display, Sale and Purchase of Tobacco Products". The first group of sections in Chapter 1, comprising sections 1 to 3, is headed "Display of tobacco products etc". Section 1 provides:

"1 Prohibition of tobacco displays etc.

(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-rolling 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.

(4) The Scottish Ministers may provide in regulations that no offence is committed under subsection (1) in relation to a display of tobacco products or smoking related products which complies with requirements specified in the regulations.

(5) 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.

(6) For the purposes of subsection (1), a website is not a place.

(7) In subsection (2), "specialist tobacconist" has the meaning given by section 6(2) of the Tobacco Advertising and Promotion Act 2002 (c.36)".

Section 2 is ancillary to section 1. It provides:

"2. **Displays which are also advertisements**

The Scottish Ministers may by regulations provide that a display of tobacco products or smoking related products which also amounts to an advertisement is to be treated for the purposes of offences under this Act and the Tobacco Advertising and Promotion Act 2002 -

(a) as an advertisement and not as a display, or
(b) as a display and not as an advertisement".

Section 3 is concerned with the display of prices of tobacco products or smoking related products, and empowers the Scottish Ministers to make regulations imposing requirements in relation to such displays. It is made an offence to display prices in breach of a requirement contained in such regulations.

[50] The next group of sections, comprising sections 4 to 6, is headed "Sale and purchase of tobacco products". Put shortly, section 4 makes it an offence to sell a tobacco product or cigarette papers to a person under 18, section 5 makes it an offence for a person under 18 to buy or attempt to buy such articles, and section 6 makes it an offence for another person knowingly to buy or attempt to buy such articles on behalf of a person under 18.

[51] The next group of sections, comprising sections 7 to 9, is headed "Miscellaneous". Section 7 authorises the confiscation of tobacco products from persons under 18. Section 8 makes it an offence to carry on a tobacco business without displaying a notice stating that it is illegal to sell tobacco products to anyone under 18. Section 9 provides:

> **"9 Prohibition of vending machines for the sale of tobacco products**
>
> (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)".

[52] The remaining provisions of Part 1 can be described more briefly. Chapter 2 provides for the establishment of a register of tobacco retailers, with provision for removal from the register and the making of orders banning persons from carrying on

a tobacco business, and provisions creating related criminal offences. Chapter 3 is concerned with enforcement, and makes provision in relation to such matters as powers of entry. Chapter 4 contains a variety of supplementary provisions.

[53] Part 2 of the Act is concerned with the provision of primary medical services, and is immaterial for present purposes. Part 3 of the Act contains some general provisions. In particular, section 41 gives effect to Schedule 2 to the Act, which is concerned with modifications to existing legislation, and provides (so far as material) that specified provisions in the Children and Young Persons (Scotland) Act 1937, the Children and Young Persons (Protection from Tobacco) Act 1991 and the Tobacco Advertising and Promotion Act 2002 are amended or repealed.

[54] The provisions of Part 3 of the Act came into force on 3 March 2010. Part 1 was subsequently brought into force by commencement order, with the exception of sections 1 to 3 and section 9, none of which has yet been brought into force. In relation to section 9, a question was raised in other proceedings as to whether that provision was unenforceable because it had not been notified to the Commission of the European Union under Directive No 98/34/EC, the Technical Standards Directive: see *Sinclair Collis Ltd* v *Lord Advocate* 2011 SLT 620. The Scottish Ministers then notified the terms of section 9 under the directive. The court was informed in the present proceedings that an order is to be made under section 2(2) of the European Communities Act 1972 repealing section 9 and inserting into the 2010 Act a new provision in identical terms to the present section 9. The issue raised in the present

proceedings in respect of section 9 will be equally germane to the new provision, and is therefore not of merely academic significance.

The grounds of challenge

[55] The grounds on which it is argued that sections 1 and 9 of the 2010 Act are outside the legislative competence of the Scottish Parliament can be summarised as follows:

1. The provisions relate to a reserved matter, namely regulation of the sale and supply of goods to consumers, within the meaning of Schedule 5, Section C7, paragraph (a), with the consequence that section 29(2)(b) applies.
2. If the provisions would otherwise not relate to a reserved matter, they make modifications of Scots criminal law as it applies to a reserved matter, namely regulation of the sale and supply of goods to consumers, and are therefore to be treated as relating to a reserved matter, by virtue of section 29(4). Section 29(2)(b) therefore applies.
3. The provisions modify the law on a reserved matter, namely regulation of the sale and supply of goods to consumers. That is in breach of the restriction in Schedule 4, paragraph 2, with the consequence that section 29(2)(c) applies.
4. The provisions modify article 6 of the Union with England Act 1707 so far as it relates to freedom of trade, and are therefore in breach of the restriction in Schedule 4, paragraph 1(2)(a). Section 29(2)(c) therefore applies.

Preliminary issues

[56] The grounds of challenge raise a number of questions as to the interpretation and application of the relevant provisions of the Scotland Act. Before considering these matters in detail, however, I can first address some issues of a more general nature concerning the approach which the court ought to adopt.

The interpretation of Acts of the Scottish Parliament

[57] Counsel for the respondent emphasised that Acts of the Scottish Parliament are passed by a representative, democratically elected Parliament following procedures which require legislative competence to be scrutinised, and clarified when appropriate, in accordance with sections 31 and 33 of the Scotland Act. The court should therefore prefer constructions finding Acts of the Scottish Parliament to be within legislative competence. It was not explained how that might affect the interpretation of the 2010 Act: in reality, the thrust of the submission appeared to be directed not at the construction of Acts of the Scottish Parliament but rather at establishing a presumption in favour of their validity.

[58] In so far as this submission invited the court to adopt an approach to the interpretation of Acts of the Scottish Parliament which is different from that applicable to other legislation, and different from that authorised by section 101 of the Scotland Act, I am unable to accept it. The democratic legitimacy of the Scottish

Parliament does not in itself warrant a different approach to interpretation from that applicable to Acts of Parliament: statutes which are, of course, also passed by a representative and democratically elected Parliament. Nor does it impinge upon the fact that the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it. As Lord Bridge of Harwich observed in *X Ltd* v *Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48:

> "The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law".

[59] The procedure laid down in section 31 of the Scotland Act forms an important element in the legislative procedure of the Scottish Parliament, but it has no bearing on the court's decision as to whether legislation passed by the Parliament lies within its competence. Section 31(1) requires that a member of the Scottish Executive in charge of a Bill shall, on or before the introduction of the Bill in the Scottish Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament. Section 31(2) requires the Presiding Officer to decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and to state his decision. These statements

cannot influence the court's decision of a question of law: the court must reach its decision independently of the Scottish Executive or the Presiding Officer. As Lord Hope of Craighead explained in *A* v *Scottish Ministers* 2003 SC (PC) 63 at para 7, statements made in accordance with section 31 are "no more than statements of opinion which do not bind the judiciary".

[60] Section 33 of the Scotland Act is equally immaterial in the present context. That section enables the Advocate General for Scotland, the Lord Advocate or the Attorney General to refer the question of whether a Bill or any provision of a Bill would be within the Parliament's legislative competence to the Supreme Court for its decision. Since the Law Officers have a discretion whether to make such a reference, it cannot be inferred from their failure to make a reference that the Bill was considered to be within the legislative competence of the Parliament. Even if such an inference could be drawn, the view of a Law Officer would have no bearing on the decision of an independent judiciary. As Lord Hope explained in *A* v *Scottish Ministers*, para 7, when a question whether a provision is outside the Parliament's legislative competence is brought before the court, "the fact that the Law Officers decided not to test the matter in this way is of no consequence".

[61] Counsel for the respondent also submitted that, in the light of the democratic nature of the Scottish Parliament and the procedures just discussed, there was a presumption of law in favour of the validity of Acts of the Scottish Parliament. In so

far as this submission sought to argue that the court's approach should be influenced by sections 31 and 33 of the Act, I am again unable to accept it.

[62] Counsel for the respondent also sought to rely on Australian case law in support of this submission, citing a passage from the judgment of Murphy J in*Commonwealth* v *Tasmania* (1983) 158 CLR 1 at pp 161-167. The argument was not however developed in any detail. The basis of the presumption in Australian law, as explained by Murphy J at p 161, is that an Act of Parliament is the authentic expression of the will of the people through their elected representatives. In the context of the Scotland Act, however, it is necessary to bear in mind that the Act of Parliament setting limits to devolved competence is itself "the authentic expression of the will of the people", and that respect for their will as so expressed requires those limits to be enforced. I also note that there is no support for the existence of any such presumption in the extensive case law concerning section 29(2)(d).

[63] Counsel for the respondent also drew attention to the fact that, in the present case, the Secretary of State had not made an order under section 35 of the Scotland Act, prohibiting the Presiding Officer of the Parliament from submitting the Bill for Royal Assent; nor had the UK Government entered the present proceedings. Counsel invited the court to infer that there was agreement between the UK Government and the Scottish Executive that the 2010 Act was within the legislative competence of the Parliament.

[64] This again has no bearing on the court's performance of its function. In the first place, the failure of the Secretary of State to intervene under section 35, or of the UK Government to participate in these proceedings, does not entail that there is any agreement that the relevant provisions of the 2010 Act are within the legislative competence of the Parliament. The Secretary of State is under no obligation to intervene under section 35 in the circumstances in which that provision applies, and in the exercise of his discretion whether to intervene he may properly take account of other considerations besides the question of law which is now before the court. The same is true of the Government's decision whether to take part in these proceedings. More importantly, however, even if the Government considered that the 2010 Act was within the legislative competence of the Parliament, its opinion would not affect the determination by an independent judiciary of the question of law raised by the petitioners.

[65] The only special rule of interpretation applicable to Acts of the Scottish Parliament is that laid down by section 101 of the Scotland Act, which applies to any provision of an Act of the Scottish Parliament which could be read in such a way as to be outside competence, and requires the court to interpret such a provision as narrowly as is required for it to be within competence, if such a reading is possible. As Lord Hope explained in *DS* v *HM Advocate* 2007 SC (PC) 1, para 23, any attempt by the Scottish Parliament to widen the scope of its legislative competence as defined in Schedules 4 and 5 will therefore be met by the requirement that any provision which

could be read in such a way as to be outside competence must be read as narrowly as is required for it to be within competence. In the present case, however, it was not suggested by either party that, if the relevant provisions of the 2010 Act are otherwise outside the competence of the Scottish Parliament, there is any scope for the application of section 101.

The interpretation of the Scotland Act

[66] Counsel for the respondent also submitted that the court should adopt a different approach to the interpretation of the Scotland Act from that applicable to other statutes. As a constitutional instrument, it should be interpreted in accordance with the principles applicable to such instruments, as explained by Lord Wilberforce in *Minister of Home Affairs* v *Fisher* [1980] AC 319, 328. Counsel also sought to rely on an observation made by Lord Bingham of Cornhill in*Robinson* v *Secretary of State for Northern Ireland* [2002] NI 390, para 11, in relation to provisions of the Northern Ireland Act 1998:

> "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".

The distinction between constitutional and statutory interpretation was not however explored in detail; nor was it made apparent how the "generous" approach to interpretation which was urged upon the court affected the interpretation of the particular provisions with which we are concerned.

[67] Counsel for the respondent also contended that the restrictions placed upon the Scottish Parliament by Schedules 4 and 5 of the Scotland Act should be given a "limited" construction: otherwise, it was submitted, Parliament's intention to create a parliament with plenary legislative powers, as they were described in *Axa General Insurance Ltd* v *Lord Advocate* [2011] 3 WLR 871, para 147, would be frustrated. So far as that point is concerned, in the passage cited from the case of *Axa* I expressed the view that "it must have been Parliament's intention, when it established the Scottish Parliament, that that institution should have plenary powers within the limits upon its legislative competence which were created by section 29(2)". The amplitude of the powers conferred, within the limits imposed by section 29(2), does not however imply that those limits should themselves be given a narrow construction.

[68] The analogy sought to be drawn between the present case and *Minister of Home Affairs* v *Fisher* is far from exact. That case concerned a specific question of interpretation: whether the word "child", when used in the Constitution of Bermuda, included children born outside marriage. Lord Wilberforce noted that Chapter 1 of the Constitution, in which the provision in question appeared, was "drafted in a broad and ample style which lays down principles of width and generality", and was "greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms". It was in that context that his Lordship stated at p 328:

> "These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".

It was in a similar context that de Smith, the author of the phrase quoted by Lord Wilberforce, originally drew a contrast between guarantees of general purport in the Constitution of Jamaica, such as the right to life, and "the austerity of tabulated legalism" (*The New Commonwealth and Its Constitutions* (1964), p 194). It does not follow that the same approach to interpretation should be applied to every provision contained in a constitution, or in a statute of constitutional significance, regardless of its subject-matter or the form in which it is expressed.

[69] This was made clear in *Boyce* v *The Queen* [2005] 1 AC 400, a case which concerned the Constitution of Barbados. As Lord Hoffmann, giving the judgment of the majority of the Board of the Privy Council, explained at para 28, the object of the interpretation of a constitutional provision is to arrive at its true meaning. That may call for a generous interpretation, or it may not, depending on the terms of the provision and the context which is relevant to the interpretation of its terms. The same can be said of the interpretation of statutory provisions, which in modern practice is based upon a purposive approach and the construction of statutes as "always speaking" (see e.g. *R (Quintavalle)* v *Secretary of State for Health* [2003] 2 AC 687).

[70] Lord Bingham's remarks in the case of *Robinson* are not inconsistent with this approach. In order to interpret a provision purposively, it is necessary first to identify the relevant purpose. Once that has been done, it may (as in *Robinson*) or may not be necessary to adopt a generous construction so as not to defeat the purpose. As Lord

Bingham noted, such a construction must in any event be consistent with the language used.

[71] The Scotland Act is not a constitution, but an Act of Parliament. There are material differences. The context of the devolution of legislative and executive power within the United Kingdom is evidently different from that of establishing a constitution for an independent state such as Jamaica or Barbados, or a British overseas territory such as Bermuda. In form, the Scotland Act does not resemble the fundamental rights provisions of a constitution: its provisions are dense and detailed. The Scotland Act can also be amended more easily than a constitution: a factor which is relevant, since the difficulty of amending a constitution is often a reason for concluding that it was intended to be given a flexible interpretation. Although the UK Government's stated policy on legislation concerning devolved matters (currently embodied in the *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, Cm 7864, 2010, para 14), known colloquially as the Sewel Convention, may impose a political restriction upon Parliament's ability to amend the Scotland Act unilaterally, there have nevertheless been many amendments made to the Act. They include amendments to Schedules 4 and 5, which can be effected under section 30 by Order in Council. A Bill designed to effect more substantial amendments is currently in the course of its passage through Parliament.

[72] A factor which appears to me to be of greater significance to the interpretation of the Scotland Act is that it established new constitutional arrangements which were intended to be stable and workable. The provisions defining the legislative competence of the Scottish Parliament, in particular, must have been intended, as Lord Walker observed in *Martin* v *Most* 2010 SC (UKSC) 40 at para 52, to create a rational and coherent scheme. In construing the provisions in issue in the present case, I have proceeded with these aims in mind. Beyond that, however, the interpretation of any specific provision will depend upon the language used, and the context which is relevant to understanding the meaning of that language.

[73] Counsel for the respondent also founded upon a reference by Mason J in the *Tasmania* case at p 149 to "the principle that a legislative power conferred by the Constitution should be liberally construed", and to an observation by Brennan J at p 220 that it is "erroneous to construe the several grants of legislative power narrowly". As Brennan J made clear at p 221, however, he was there concerned with the scope of the positive grants of power to the Commonwealth legislature under the Australian Constitution, and with the practical necessity under the conditions of modern life to bring an expanding range of activities into the sphere of Commonwealth legislative competence: in particular, in the field of foreign affairs. As he made clear, the canon of construction which he described reflected the history of the Federation, and the relationship between the growth of Commonwealth power and the growth of national

sentiment and the need for national laws. This does not appear to me to have any direct relevance to the construction and application of the Scotland Act.

The first ground of challenge

[74] I turn now to the first ground of challenge: that the provisions in question relate to a reserved matter, namely regulation of the sale and supply of goods to consumers, within the meaning of Schedule 5, Section C7, paragraph (a), with the consequence that section 29(2)(b) of the Scotland Act applies.

[75] I have set out the terms of sections 1 and 9 of the 2010 Act. In broad terms, section 1 prohibits the display of tobacco or smoking related products in a place where tobacco products are offered for sale, subject to a limited exception in respect of specialist tobacconists whose display complies with any prescribed requirements, a general exception in respect of wholesalers whose display complies with any prescribed requirements, and a power in the Scottish Ministers to permit displays which comply with prescribed requirements. Section 9 prohibits persons from making vending machines for the sale of tobacco products available on premises which they manage or control. At first sight, one might question whether either section should be ascribed to the category of consumer protection, with which Section C7 bears to be concerned. One might also question whether the provisions are concerned to "regulate" sales to consumers, rather than to inhibit or discourage such sales. Both before the Lord Ordinary and before this court, however, relatively little attention was

paid in argument to these aspects. It was however acknowledged by counsel for the petitioners that "consumer protection" was the overall context within which paragraph (a) must be construed, and that consumer protection, as the subject-matter of legislation, could be distinguished from other subjects, such as public order or children and young persons.

[76] In concluding that sections 1 and 9 of the 2010 Act did not relate to regulation of the sale of goods to consumers, the Lord Ordinary accepted two arguments advanced on behalf of the respondent, which were repeated before this court: first, that paragraph (a) of Section C7 reserves to Westminster only the regulation of the contractual terms on which goods and services are sold and supplied to consumers, and not the regulation of any other aspect of their sale and supply; and secondly, that the provisions in question do not in any event "relate to" regulation of the sale of goods to consumers, since their primary purpose is to reduce smoking, particularly among children and young persons, and thereby improve public health. In order to address these arguments, it is necessary first to consider the meaning of paragraph (a) of Section C7, and then to consider the meaning of section 29(3).

Paragraph (a) of Section C7

[77] Counsel for the respondent advanced four arguments in support of his construction of paragraph (a) of Section C7. First, the provision reserved the "regulation" of the sale and supply of goods and services to consumers. "Thus", as it

was put in the written note of argument, "it covers regulatory matters relating to sale and supply of goods and services to consumers, i.e. the regulation of the terms and conditions on which they are sold". Secondly, it was evident that paragraph (a) of Section C7 did not cover all matters relating to regulation of the sale and supply of goods and services to consumers: otherwise, some of the other matters listed in Section C7, such as guarantees (paragraph (b)), misleading and comparative advertising (paragraph (e)) and price indications (paragraph (f)), need not have been mentioned. Equally, the provision made in Section C8 for product safety and labelling, and in Section C9 for weights and measures, pointed towards a restricted scope for paragraph (a) of Section C7. Thirdly, the court was entitled to have regard to the Explanatory Notes to Acts as an aid to their construction: *R* v*Montila* [2004] 1 WLR 3141. The Explanatory Notes to the Scotland Act explained the reservation in paragraph (a) in the following terms:

> "This covers the terms on which goods and services are sold and supplied to consumers."

Fourthly, a wide interpretation of paragraph (a) would have consequences which could not have been intended, such as a reservation to Westminster of the power to legislate in relation to the licensing of premises selling alcohol, regulation of the provision of education, and aspects of Scots private law.

[78] Counsel for the petitioners on the other hand submitted that paragraph (a) should be construed in the light of a general intention to preserve the integrity of theUK single market. Section C7 gave effect to that intention in relation to consumer

protection, as its heading indicated. Within the field of consumer protection, paragraph (a) reserved the regulation of the sale and supply of goods and services to consumers. In accordance with paragraph 2 of Part II of Schedule 5, thematters described or referred to in Section C7 had to be read with the exception for which it provided, namely "the subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)". That exception implied that paragraph (a) was not confined to the terms on which goods and services were sold and supplied: unless paragraph (a) were wide enough to cover the subject-matter of section 16 of the Food Safety Act, the exception would be otiose, there being no other provision in Section C7 which could cover that subject-matter. The exception reflected the fact that, prior to the coming into force of the Scotland Act, regulations under section 16 of the Food Safety Act and its legislative predecessors were made separately for Scotland and for England and Wales. Subject to that exception, however, the sale and supply of goods and services to consumers were regulated by UK legislation, including the Consumer Protection Act 1987. That Act, including the power to make safety regulations under section 11, applied to tobacco, but not to food. Regulations extending to the whole of the UK continued to be made under section 11, and were not confined to the terms on which goods and services were sold and supplied. They included regulations in respect of the sale and supply of tobacco products to consumers. The Explanatory Notes to the Scotland Act correctly identified the purpose of Section C7:

> "This reservation is designed to ensure the reservation of a common United Kingdom system for the regulation of consumer protection and related matters in order to preserve a level playing field for consumers and business."

The statement that paragraph (a) "covers the terms on which goods and services are sold and supplied to consumers" was correct. If, however, it was read as meaning that paragraph (a) was restricted to regulation of the terms on which goods and services were sold and supplied to consumers, that would fail to give effect to the general intention of Section C7. That should therefore not be taken to be the intended meaning.

[79] The title of Section C7 indicates that the Section as a whole is concerned with consumer protection. The title can be taken into account as an aid to the interpretation of the Section. It is at least as significant as a heading or sidenote of the kind considered in the case of *Montila.* The titles of the Sections in Part II of Schedule 5 are distinct from the sidenotes, and from the italic headings by which the Schedule is divided. Counsel were unable to inform us whether the titles of the Sections had been capable of amendment during the passage of the Act, but I note that the title has been treated as forming part of the Section in the context of subsequent amendment: see the Scotland Act 1998 (Modifications of Schedule 5) Order 2000 (SI 2000/3252), article 2. It is however necessary to bear in mind that the title is merely a brief guide to the subject-matter of the Section, and may not be precisely accurate. It is therefore of limited assistance as an aid to interpretation. Nevertheless, insofar as there may be uncertainty as to the intended scope of the matters listed in a Section, the title may be of some assistance.

[80] It is readily understandable that consumer protection should generally be reserved to Parliament at Westminster, since a consistent approach to that subject is necessary to the maintenance of a single market throughout the United Kingdom. The

need for such consistency prior to devolution was reflected in the fact that consumer protection fell within the area of responsibility of the Department of Trade and Industry rather than the Scottish Office. One would not expect that to change as a consequence of devolution, given the intention to maintain the economic unity of the United Kingdom.

[81] That conclusion is consistent with the terms of the White Paper which preceded the Scotland Act, *Scotland's Parliament* (Cm 3658, 1997). It stated the Government's intention to create "a Scottish Parliament which will extend democratic control over the widespread responsibilities currently exercised by the Scottish Office and other Scottish Departments" (para 2.1). The powers of the Scottish Parliament were also to include "some matters not currently discharged by the Scottish Office" (para 2.2). The integrity of the UK was to be preserved (paras 3.2 and 3.4), so as to secure for its people, amongst other things, "participation in an economic unit which benefits business and provides access to wider markets and investment and increases prosperity for all" (para 3.2). The matters which the Government proposed to reserve therefore included:

> "Common markets for UK goods and services at home and abroad including the law on ... consumer protection" (para 3.3)."

[82] Paragraph (a) of Section C7, construed according to the ordinary meaning of the words used, is consistent with that background. So construed, the regulation of the sale and supply of goods and services to consumers, within the general context of

consumer protection which is provided by the title of the section, is a reserved matter. I shall return to the question of what is meant by "consumer protection".

[83] As I have explained, counsel for the respondent did not accept that the words used had that meaning, but argued that they referred specifically to "the regulation of the contractual terms of sale and supply of goods and services to consumers". The first argument advanced in support of that construction, based on the use of the word "regulation", appears to me to be a non sequitur: the concept of regulation is not inherently restricted to the regulation of contractual terms; and the subject being regulated is "the sale and supply of goods and services to consumers", not "the terms of contracts for the sale and supply of goods and services to consumers".

[84] Secondly, it was argued that some of the other paragraphs in Section C7 would be unnecessary if paragraph (a) were construed in accordance with the ordinary meaning of the words used. In particular, it was argued (and the Lord Ordinary accepted) that the regulation of trade descriptions (paragraph (d)), misleading and comparative advertising (paragraph (e)) and price indications (paragraph (f)) would all be subsumed by what was described as a "wide" construction of paragraph (a).

[85] I do not find this argument persuasive. In the first place, I am not convinced that all the reserved matters described in Section C7, or elsewhere in Schedule 5, are intended to be clearly demarcated from each other. It is difficult, if not impossible, to provide descriptions of the subject-matter of legislation which form watertight compartments: there is no impermeable boundary between one policy area and those

related to it, and the descriptions are correspondingly porous. Furthermore, the manner in which Schedule 5 is drafted does not suggest that the creation of watertight compartments was the draftsman's objective. There are a number of examples of a reserved matter described at a high level of generality being followed by other, more specific, matters which might be thought to fall within, or overlap with, the scope of the first matter. For example, in Part I, paragraph 9(1), "(a) the defence of the realm" is followed by "(b) the naval, military or air forces of the Crown". In Part II, Section B8, "National security" is followed by "The interception of communications" and the subject-matter of the Official Secrets Acts. In Section D2, "(a) ... exploration for ... oil and natural gas" is followed in paragraph (b) by the subject-matter of a particular statutory provision "so far as relating to exploration for oil and gas", and in paragraph (g) by the subject-matter of another provision "so far as relating to oil and gas exploration". This suggests that, in relation to some subjects, a style of drafting has been used which begins by identifying the relevant matter at a high level of generality and then lists more specific matters falling wholly or partly within that area. As I shall explain, the first group of matters in Section C7 follows a broadly similar pattern, with a matter described at a high level of generality (the sale and supply of goods and services to consumers) followed by more specific matters regulated by specific bodies of law. More generally, the style of drafting in Schedule 5, particularly in Part II, does not appear to reflect any consistent approach to taxonomy. In Section C7, for example, some matters are described by reference to the subject-

matter of a particular section of a particular statute (e.g. section 16 of the Food Safety Act 1990); others are described by reference to the subject-matter dealt with by an entire statute (e.g. the Consumer Credit Act 1974); and others are described more generally, without mentioning any specific legislation (e.g. safety of, and liability for, services supplied to consumers). In the absence of any consistent approach, I would hesitate to infer, from a reference to a matter in one part of a Section, that general language used elsewhere in the Section must be construed in a narrower sense than it would ordinarily bear. Section C7, in particular, has the appearance of a list of matters which the DTI had identified as falling within its responsibility in the general field of consumer protection, without attempting to demarcate strictly between the boundaries of one subject-matter and another, possibly because the primary objective was to ensure that all relevant matters were covered.

[86] Considering specifically the argument that paragraphs (d), (e) and (f) of Section C7 would be subsumed by paragraph (a), if the latter were to be construedaccording to the ordinary meaning of the words used, I note in the first place that the scope of these paragraphs is not restricted to sales or supplies to consumers. They are not therefore subsumed by paragraph (a), although they may overlap with it. Those paragraphs also concern matters which are regulated by specific statutory schemes. Trade descriptions are regulated principally under the Trade Descriptions Act 1968, which is not restricted to the protection of consumers. Misleading and comparative advertising was regulated at the time of the enactment of the Scotland

Act principally by the Control of Misleading Advertisements Regulations 1988 (SI 1988/915), whose scope was not confined to the protection of consumers. It is now regulated, in relation to consumers, by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). Price indications were regulated at the time of enactment principally by Part III of the Consumer Protection Act 1987. If, then, Section C7 begins with a matter described at a high level of generality and then lists more specific matters falling broadly, but not precisely, within its scope, it resembles in that respect the other Sections mentioned earlier. Finally, in relation to this argument, it appears to me that even if one were to infer that Parliament must have intended to exclude from the scope of the general words used in paragraph (a) the specific matters listed in the subsequent paragraphs, that would not lead to the conclusion that paragraph (a) was concerned only with contractual terms and conditions, there being many other aspects of the sale and supply of goods and services to consumers, besides contractual terms and conditions and the matters listed in paragraphs (b) to (i), which would then be left out of account.

[87] It was also argued, as I have explained, that the provision made in Section C8 for product safety and labelling, and in Section C9 for weights and measures, pointed towards a restricted scope for paragraph (a) of Section C7. I observe again that it may be unrealistic to expect the different Sections in Schedule 5 to comprise pigeon-holes into only one of which every area of legislative activity which is intended to be a reserved matter can be neatly slotted. Equally, given the idiosyncratic style in which

Schedule 5 has been drafted, I would be cautious in applying conventional canons of statutory construction. That said, however, it is clear that a decision was taken to allocate separate Sections to product standards, safety and liability, and to weights and measures, even though those matters might be considered, in their application to consumer products, to be aspects of consumer protection (depending upon how that expression is understood). I accept that it can therefore be inferred that Section C7 is not intended to cover matters falling within the scope of those Sections. That does not however entail that the scope of paragraph (a) of Section C7 is restricted to regulation of the terms upon which goods and services are sold and supplied.

[88] A further argument advanced by counsel for the respondent, which the Lord Ordinary found persuasive, was based on the Explanatory Notes. In that regard, it is important in the first place to understand that these are not Explanatory Notes of the kind considered in *R* v *Montila* and other cases: that is to say, the Explanatory Notes which since the end of 1998 have accompanied a Bill on its introduction and are updated during the Parliamentary process. The Scotland Bill pre-dated the introduction of that procedure, and was instead accompanied by Notes on Clauses, in accordance with the previous practice. The Explanatory Notes on which counsel for the respondent relied are a commentary on the Scotland Act, prepared (as we were informed) by the Scotland Office and first published in 2004. They were never before Parliament. As a commentary, the notes may be of assistance to a reader of the Act, but they are not admissible as an aid to its construction by the courts. That said, the

Notes on Clauses relating to Section C7, to which reference was made during the course of the hearing, are in generally similar terms.

[89] In relation to paragraph (a) in particular, they state:

> "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 1994. The scope of most of this legislation goes beyond the reserved matter of protection of consumers. The reservation will not prevent the Scottish Parliament from legislating about these wider matters."

It was on the first sentence in that passage that the argument was based. That sentence does not however appear to me (contrary to the view of the Lord Ordinary) to "cast light on the objective setting or contextual sense of the statute", in the words used by Lord Steyn in *R (Westminster City Council)* v *National Asylum Support Service* [2002] 1 WLR 2956, para 5, and cited by Lord Hope in the case of *Montila*. Nor does the sentence cast light on any mischief at which the statute was aimed. Nor does the present case raise a situation, of the kind discussed by Lord Steyn, in which an assurance given by the executive to Parliament about the meaning of a clause may be admitted against the executive in proceedings in which the executive places a contrary construction before the court. In these circumstances, even on the assumption that the Notes on Clauses are in principle an admissible aid to construction, it appears to me that that sentence cannot be regarded as any kind of authoritative guide to the meaning of the statutory provision. As Lord Steyn observed at para 6:

> "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 by the words enacted."

The focus must therefore be on the words of the provision itself.

[90] Furthermore, if the first sentence in the passage quoted from the Notes on Clauses were read as referring only to the terms of contract and as being an exhaustive account of the scope of paragraph (a), as counsel for the respondent maintained, the provision would fail to reflect the ordinary meaning of the language used. Why not say, "the terms of contracts for the sale and supply of goods and services to consumers", if that was what was intended? More fundamentally, if paragraph (a) were so construed, Section C7 would fail to achieve its apparent objective: namely, to maintain the UK-wide arrangements for consumer protection matters, such as the sale and supply of goods and services to consumers, for which the DTI was responsible throughout the UK prior to the enactment of the Scotland Act, in order to preserve a level playing field for consumers and business. In the circumstances, whether or not the author of the Notes meant to convey such a restricted meaning, I do not in any event consider that that meaning would reflect Parliament's intention.

[91] A further argument advanced against construing paragraph (a) in accordance with the ordinary meaning of the words used was that the reservation would then encompass matters which were intended to be devolved, such as liquor licensing, education and aspects of Scots private law. This argument is in my view mistaken, but

in an illuminating way. It might indeed be argued that liquor licensing relates to regulation of the sale and supply of goods to consumers, and that education, as the subject-matter of legislation, falls within the scope of regulation of the sale and supply of services to consumers. The reason why these matters are not reserved by Section C7 is not that they might not fall within the scope of paragraph (a), if that paragraph were considered in isolation: it is because they are not matters of consumer protection, and therefore fall outside the intended scope of Section C7 as a whole. Liquor licensing and education have long been understood to be distinct from consumer protection, both as the subject-matter of legislation (as is reflected, for example, in the taxonomy used in the *Index to the Statutes*) and as areas of governmental responsibility (falling, prior to devolution, within the area of responsibility of the Scottish Office rather than the DTI). They therefore lie outside the field covered by Section C7. I discuss this matter in greater detail at paras 135-138 below. I accept, on the other hand, that aspects of private law fall within the scope of Section C7: the Section expressly refers to legislation such as Part III of the Hire-Purchase Act 1964 (which deals with title to motor vehicles which are disposed of while subject to hire purchase agreements) and the Consumer Credit Act 1974, and it may well be that other legislation bearing on private law relationships, such as some of the provisions contained in the Sale of Goods Act 1979, also falls within its scope. If such legislation falls within the scope of Section C7 then it is a reserved matter,

even if it also falls within the scope of the expression "Scots private law" as defined in section 126 of the Scotland Act (as to which I need express no opinion).

[92] It is also necessary to consider the argument advanced on behalf of the petitioners based on the exception, in Section C7, of the subject-matter of section 16 of the Food Safety Act. That exception is relevant because of the provision, in paragraph 2 of Part II of Schedule 5 to the Scotland Act, that a Section applies to any matter described or referred to in it "when read with any ... exceptions ... in that Section". As I have explained, it was argued on behalf of the petitioners that, since the implication of the exception was that the subject-matter of section 16 would otherwise be reserved by virtue of Section C7, and the subject-matter of section 16 was not so reserved if paragraph (a) were construed in the manner for which the respondent contended, it therefore followed that paragraph (a) must be given a wider construction. On the other hand, it was argued on behalf of the respondent that tobacco might be considered to be food within the meaning of section 16, with the consequence that its regulation in accordance with section 16 would not be reserved: a contention which appears to me to be manifestly untenable.

[93] Section 16 (as in force on 1 July 1999: cf. paragraph 5 of Part III of Schedule 5 to the Scotland Act) makes provision for wide-ranging powers relating to food safety and consumer protection. Subsection (1) provides:

> "(1) The Ministers may by regulations make -
>
> > (a) provision for requiring, prohibiting or regulating the presence in food or food sources of any specified substance, or any substance of any specified class, and generally for regulating the composition of food;

(b) provision for securing that food is fit for human consumption and meets such microbiological standards (whether going to the fitness of the food or otherwise) as may be specified by or under the regulations;
(c) provision for requiring, prohibiting or regulating the use of any process or treatment in the preparation of food;
(d) provision for securing the observance of hygienic conditions and practices in connection with the carrying out of commercial operations with respect to food or food sources;
(e) provision for imposing requirements or prohibitions as to, or otherwise regulating, the labelling, marking, presenting or advertising of food, and the descriptions which may be applied to food; and
(f) such other provision with respect to food or food sources, including in particular provision for prohibiting or regulating the carrying out of commercial operations with respect to food or food sources, as appears to them to be necessary or expedient -

(i) for the purpose of securing that food complies with food safety requirements or in the interests of the public health; or
(ii) for the purpose of protecting or promoting the interests of consumers."

Subsection (2) provides similar powers in relation to materials which are intended to come into contact with food intended for human consumption.

[94] It is apparent that these provisions are wider in scope than consumer protection legislation: indeed, section 16(1)(f) expressly encompasses food safety and public health as well as "protecting or promoting the interests of consumers".

Section 16(1)(a), for example, would enable regulation to be made of the composition of food sold to wholesalers. Section 16(1)(b) would encompass hygiene requirements in respect of creameries or slaughterhouses. The width of section 16 is further extended by Schedule 1 (to which effect is given by section 16(3)), which enables regulations made under section 16(1) to encompass such matters as the disposal of

food which is unfit for human consumption (paragraph 3(1)) and the training of persons involved in food businesses (paragraph 5(3)). Accordingly, although the exception contained in Section C7 is not restricted to particular aspects of section 16, it cannot be inferred that all aspects of that section would otherwise be reserved by virtue of Section C7. It is also apparent that paragraph (a) is not the only provision in Section C7 which, but for the exception, might reserve matters falling within the scope of section 16. For example, the category of "safety of ... services supplied to consumers" would cover the safety of meals provided to consumers in restaurants and hotels, a matter also falling within the scope of section 16(1). In these circumstances, it appears to me that the exception to Section C7 does not support the inference which counsel for the petitioners sought to draw.

[95] Over and above these considerations arising from the text, however, there is a more fundamental reason for rejecting the respondent's construction of paragraph (a). It is necessary, as I have explained, to construe the provisions defining the legislative competence of the Scottish Parliament with regard to their purpose, and in particular with regard to the intention to create a rational and coherent scheme. The purpose of Section C7, as it appears to me, is to maintain a UK-wide system of consumer protection, reflecting the general need for consistency throughout a single market, as the White Paper had proposed. There are, no doubt, particular areas of the market, such as food safety, where it makes sense for responsibility for consumer protection to be devolved, for example because of coherence with other devolved

responsibilities. As a generality, however, a common approach to consumer protection has to be maintained if a common market throughout the UK is to continue. Counsel for the respondent advanced no explanation as to why Parliament would wish to reserve to itself the power to legislate in respect of regulation of the terms of contracts for the sale and supply of goods and services to consumers, and the other specific matters listed in Section C7, but at the same time devolve to the Scottish Parliament a general power to regulate other aspects of the sale and supply of goods and services to consumers (such as the standard of the services, or the qualifications of the persons by whom particular goods and services can be supplied, or - as in the present case - the means by which particular goods and services can be supplied), with the potential to affect the functioning of the UK as a single market. I can see no rational purpose in its doing so.

[96] For all these reasons, I conclude that paragraph (a) of Section C7 encompasses all aspects of regulation of the sale and supply of goods and services to consumers, within the field of consumer protection with which Section C7 as a whole is concerned, other than those aspects (such as product standards, safety and liability, and weights and measures) which fall within the scope of other Sections.

Section C8

[97] Section C8 came under consideration in the course of the hearing as a result of the contention by counsel for the petitioners that the subject-matter of the provisions

under challenge fell within the scope of section 11 of the Consumer Protection Act 1987. Counsel for the petitioners argued that the subject-matter of section 11 fell within the scope of paragraph (a) of Section C7, but counsel for the respondent contended that it fell within the scope of section C8, as an aspect of product safety.

[98] The Consumer Protection Act is in five parts. Part I is headed "Product Liability", and is intended to implement the Product Liability Directive (85/374/EEC). In broad terms, it imposes liability on producers for damage to persons and property caused by defective products. Its scope is wider than the protection of consumers. Part II is headed "Consumer Safety". Section 10, which was in force when the Scotland Act was enacted, made it an offence to supply any consumer goods which were not reasonably safe, or to offer or agree to supply any such goods, or to expose or possess any such goods for supply. Section 10 was repealed by the General Product Safety Regulations 2005 (SI 2005/1803), which transposed Directive 2001/95/EC on general product safety into UK law. Section 11 is headed "Safety regulations", and (as amended) provides:

> "(1) The Secretary of State may by regulations under this section ('safety regulations') make such provision as he considers appropriate for the purpose of securing -
>
> (a) that goods to which this section applies are safe;
>
> (b) that goods to which this section applies which are unsafe, or would be unsafe in the hands of persons of a particular description, are not made available to persons generally or, as the case may be, to persons of that description; and
>
> (c) that appropriate information is, and inappropriate information is not, provided in relation to goods to which this section applies.
>
> (2) Without prejudice to the generality of subsection (1) above, safety regulations may contain provision -

> ...
> (j) for prohibiting persons from supplying, or from offering to supply, agreeing to supply, exposing for supply or possessing for supply, goods to which this section applies ...".

Section 11 is not restricted to consumer goods, or to the sale or supply of goods to consumers.

[99] Both prior to devolution and since then, numerous regulations have been made under section 11. Virtually all such regulations have been made by UKministers and have extended to Scotland. The only examples of regulations made by the Scottish Ministers appear to concern matters related to fireworks and food safety, both of which were the subject of orders transferring powers to Scottish Ministers under section 63 of the Scotland Act (the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2004 (SI 2004/2030) and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2005 (SI 2005/849) respectively).

[100] Having regard to the significance of legislation concerning 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 (other than in specific fields such as food safety), it is unlikely that Parliament intended to devolve a general legislative competence in relation to matters falling within the scope of section 11 of the Consumer Protection Act. I did not understand that to be disputed by counsel for the respondent. As a generality, such

matters appear to me to fall within the scope of the expression "product safety", giving those words their ordinary meaning, and are therefore reserved by Section C8. I shall return to the question whether the relevant provisions of the 2010 Act fall within the scope of that Section.

[101] Having considered in general terms the meaning of paragraph (a) of Section C7, and Section C8, it is necessary next to consider how one determines whether the relevant provisions of the 2010 Act relate to those reserved matters.

Identification of the subject-matter of legislation: the background

[102] In any situation where a legislature has a limited authority, it is necessary to have criteria for determining whether legislation falls outside the scope of that authority. In the Scotland Act, the relevant criteria are contained in a number of provisions. In relation to the first ground of challenge, in particular, the relevant criteria are set out in section 29(2)(b) and (3). Before examining those provisions, however, it is necessary to say something about the principles which have been developed in relation to some other jurisdictions in which legislatures with limited authority were created. That is so for two reasons. First, as Lord Hope explained in *Martin* v *Most* at paras 11-15, the case law relating to federal systems such as those of Canada and Australia, and to the devolved system established in 1920 for Northern Ireland, provides the background to the scheme found in the Scotland Act. Secondly, each of the parties to the present case relied upon principles developed in the case law

relating to those systems. Counsel for the respondent, in particular, relied upon certain of the principles developed in relation to the Canadian and Australian constitutions (some of which I have already discussed), and counsel for the petitioners also founded upon a principle developed in the Australian case law. It is necessary therefore to place those principles in their context, in order to consider the extent to which they may be apposite in the context of the Scotland Act.

[103] During the passage of the Scotland Act, it was said by Lord Sewel that it was intended that "the courts should rely on the respection doctrine which theydeveloped in dealing with cases arising from the Commonwealth constitutions and the Government of Ireland Act 1920". The "classic statement" of the doctrine was said to be found in the words of Lord Atkin in *Gallagher* v *Lynn* [1937] AC 863. In other words, it was said, "any question as to whether a provision in an Act of the Scottish Parliament 'relates to' a reserved matter should be determined by reference to its 'pith and substance' or its purpose and if its purpose is a devolved one then it is not outside legislative competence merely because 'incidentally it affects' a reserved matter" (*Hansard,* HL vol 592, cols 818 *et seq,* 21 July 1998). Lord Sewel's statement was referred to by Lord Hope in *Martin* v *Most* at para 14, and was also founded upon by counsel for the respondent in the present case.

[104] The Minister was not, of course, giving an exposition of the law. In the present case, however, counsel examined case law arising

from Canada, Australia andNorthern Ireland. The law of other jurisdictions,

including India and South Africa, was also touched upon. One conclusion which emerges from that examination is that there is not a single "respection doctrine". Not only have different approaches been developed in different jurisdictions, but even within a single jurisdiction, such as Australia, the approach adopted has evolved significantly over time. A further conclusion which can be drawn is that the expression "pith and substance" has not always been used in the same way. In the present case, for example, counsel for the respondent sought to use the expression in the way in which it was used in the Canadian cases in which it was first employed, as a means of describing, when legislation could properly be said to have more than one subject-matter, the aspect which should be regarded as predominant. It has however also been used in a different way, as a means of describing the true nature and character of legislation as distinct from its incidental effects. It was in that context that the expression was employed by Lord Atkin in *Gallagher* v *Lynn*, as Lord Sewel noted. A third conclusion which can be drawn is that "pith and substance" is not synonymous with "purpose": rather, the purpose of legislation has been regarded in some jurisdictions (but not all) as one of the factors to be taken into account in determining its "pith and substance" or its true nature and character.

[105] In these circumstances, Lord Sewel's statement does not appear to me to provide much assistance in construing the provisions of the Scotland Act. Equally, as it appears to me, the Imperial, Commonwealth and Northern Irish case law is of limited assistance. Great care must be taken when considering, in relation to the Scotland Act,

approaches which have been developed in respect of constitutions which not only employ different language and different legal structures, but which are rooted in a different historical and political context. That is not to say that some of the discussion in that case law may not be relevant and illuminating; but it cannot be applied indiscriminately. As Lord Hope observed in *Martin* v *Most* at para 15, although the case law relating to systems such as those of Canada, Australia and Northern Ireland provides the background to the scheme found in the Scotland Act, the rules to which the court must give effect are those laid down by that Act; and, as to what they mean, the Act provides its own dictionary.

[106] In considering the Canadian case law, in particular, it is important to understand that the British North America Act 1867, now called the Constitution Act, created a federal system in which the Dominion Parliament and the provincial legislatures each had exclusive competence over a particular range of subjects. The method adopted for dividing legislative competence between them was to list the matters falling within the competence of each. Section 91, dealing with the powers of the Dominion Parliament, began by conferring upon it a residual power "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces". It also conferred on the Dominion Parliament, "for greater certainty, but not so as to restrict the terms of this section", exclusive legislative authority over "all matters coming within the classes of subjects" listed in that section. Section 92 conferred on the

provincial legislatures exclusive authority to make laws "in relation to matters coming within the classes of subjects" listed in that section. As was said in one of the many cases which came before the Judicial Committee of the Privy Council, the Act "makes an elaborate distribution of the whole field of legislative authority between two legislative bodies" (*Bank of Toronto* v *Lambe* (1887) 12 App Cas 575, 587).

[107] For the purpose of deciding whether a provision was within the legislative competence of either legislature, it was decided that purely incidental effects of legislation upon a matter appearing in one list could be disregarded if the true nature and character of the legislation were such that it belonged in the other list. Thus in *Russell* v *The Queen* (1881-82) 7 App Cas 829 the issue was whether a law passed by the Dominion Parliament which prohibited the sale of alcohol fell within the scope of its exclusive power under section 91 to make laws for the peace, order and good government of Canada, or within the scope of the provincial legislatures' exclusive power under section 92 to make laws in relation to "property and civil rights in the province". Sir Montague Smith, delivering the judgment of the Board, said at pp 839-840:

> "It was said in the course of the judgment of this Board in the case of the *Citizens Insurance Company of Canada* v *Parsons* [(1881-82) 7 App Cas 96, 109], that the two sections (91 and 92) must be read together, and the language of one interpreted , and, where necessary, modified by that of the other. Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature

> and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs."

[108] The approach adopted in *Russell*, and in later cases concerned with incidental effects such as *Attorney-General for Ontario* v *Attorney-General for the Dominion* [1896] AC 348, is readily understandable. In any system where legislative powers are divided, the effects of legislation are liable to spill across whatever boundaries may have been set to a legislature's competence. If a court were to strike down all legislation affecting matters outside the legislature's competence, however slight, indirect or remote the effects might be, the competence of the legislature would in practice be more severely circumscribed than was intended. It is unsurprising to find that an analogous approach has been adopted in the case law relating to Australia and Northern Ireland, as I shall explain, although the division of powers there was not based upon a double enumeration.

[109] There are however liable to be situations, in a system based upon a double enumeration, where a potential conflict between the two lists cannot be avoided by disregarding incidental effects. Such a situation arose in the case of *Union Colliery Co of British Columbia* v *Bryden* [1899] AC 580. The provincial legislature had enacted legislation which prohibited Chinese workers from employment in underground coal workings. The classes listed in section 91 included "naturalization and aliens"; those listed in section 92 included provincial undertakings, and property and civil rights in the province. Lord Watson, delivering the judgment of the Board, observed at p 587

that the provisions were "capable of being viewed in two different aspects": they might be regarded as regulating the working of underground coal mines, and therefore as falling within the subjects exclusively assigned to the provincial parliament by section 92, or as regulating the rights of aliens or naturalised subjects, and therefore as falling within the subjects exclusively assigned to the Dominion Parliament by section 91. The Board concluded (*ibid*) that "the whole pith and substance of the enactments" consisted in establishing a statutory prohibition which affected aliens or naturalised subjects, and that the provisions therefore fell within the exclusive authority of the Dominion Parliament.

[110] The problem which arose in the *Union Colliery* case could not be resolved by disregarding the incidental effects of the legislation: the effects of the legislation in question upon the working of underground coal mines were not merely incidental. Rather, as Lord Watson put it, the provisions were "capable of being viewed in two different aspects". The court had to decide which aspect was predominant, in order to avoid a potential conflict between the two lists. The expression "pith and substance" was used to describe the predominant aspect. Once it had been identified, the court could then assign the legislation to one rather than another of the listed classes to which it related.

[111] In the case of *Attorney-General for Alberta* v *Attorney-General for Canada* [1939] AC 117 Lord Maugham LC emphasised at pp 130-131 the

importance, when determining the predominant character of legislation for the purpose of applying sections 91 and 92, of its effect and its purpose:

> "The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Co of British Columbia, Ld* v *Bryden*. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. ...
>
> A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of s. 92(2), 'Direct taxation within the province "*in order to the raising of a revenue* for provincial purposes"' is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other: *Attorney-General for Ontario* v *Reciprocal Insurers* [1924] AC 328, 342; *In re The Insurance Act of Canada* [1932] AC 41. Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the Legislature, and, generally speaking, the speeches of individuals would have little evidential weight."

[112] These matters have been considered further in the subsequent case law of the Supreme Court of Canada. It has been said that the classification of a law involves first identifying its true nature and character or "pith and substance" for the purpose of identifying the matter to which it essentially relates, and then assigning that matter to one of the classes of subjects listed in sections 91 and 92. There is no single test for a law's pith and substance, but both the purpose of the enacting body and the legal effect of the law are always relevant considerations. To identify the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble, and

extrinsic evidence, such as *Hansard*. In doing so, they seek to ascertain the true purpose of the legislation, as opposed to its stated or apparent purpose. Evidence of the actual or predicted practical effects of the legislation may also assist in some circumstances in establishing the true purpose of the legislation (see e.g. *R* v *Morgentaler* [1993] 3 SCR 463; *Canadian Western Bank* v *Alberta* [2007] 2 SCR 3).

[113] The Canadian scheme for the division of power can be contrasted with that adopted in Australia. The Australian Constitution, like the Scotland Act, adopts a single enumeration method of defining legislative competence.

The Commonwealth of Australia Constitution Act 1900 established a constitution under which state legislative powers are unlisted, whereas the Commonwealth Parliament can only legislate with respect to matters which are expressly listed, mostly in section 51.

[114] As has been noted in the Australian case law, the techniques developed in the Canadian cases in order to avoid a conflict between the two lists of legislative powers reflect that particular context. As I have explained, those techniques are, first, the interpretation of the two lists together, and secondly, the identification of a single, predominant, aspect of legislation. In relation to the first of these matters, in *Huddart Parker Ltd* v *Commonwealth* (1931) 44 CLR 492, 527 Evatt J noted that the British North America Act vested mutually exclusive powers in the Dominion Parliament and the provincial legislatures. In consequence:

> "It was necessary to visualize and recognize both powers at the same moment. Consequently the 'aspect' of any questioned legislation often became of supreme importance. In such cases, the double enumeration of exclusive powers of Dominion and Province respectively in secs. 91 and 92 made the problem one of classifying disputed legislation under two already given heads of power ...The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine those duly granted to the Commonwealth."

As Isaacs J observed in *R* v *Barger* (1908) 6 CLR 41, 84:

> "It is contrary to reason to shorten the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residue."

[115] In relation to the Canadian approach to legislation with a number of "aspects", Latham CJ observed in *South Australia* v *Commonwealth* (1942) 65 CLR 373, 425-426:

> "The relevant Canadian cases generally deal with the difficulties arising from the grant of exclusive powers to both Dominion and Provinces. ... When the areas of such competing powers overlap, and the challenged law is, for example, both a law relating to insurance (Provincial power) and to crime (Dominion power), a court must make a choice as to the category to which the law should be assigned ... The Commonwealth Constitution does not confer any exclusive powers upon the States. Subject to the Constitution the States are left with powers not given exclusively to the Commonwealth or withdrawn from the States ... Thus the difficulties of choosing between two heads of power, stated to be exclusive, but in fact overlapping, do not arise in Australia."

[116] It follows that if a provision is made with respect to a matter listed as falling within the scope of the Commonwealth Parliament, it will be of no consequence if the

provision also relates to other matters which are not so listed. As Deane J stated in *Commonwealth* v *Tasmania* at p 270:

> "In determining validity, the task is not to single out the paramount character. It suffices that the law 'fairly answers the description of a law "with respect to" one given subject matter appearing in s. 51' regardless of whether it is, at the same time, more obviously or equally a law with respect to other subject matter."

[117] The Australian case law also contains discussion of how to ascertain whether legislation is made "with respect to" a matter falling within the competence of the legislature which enacted it. As in Canada, incidental effects are generally disregarded (see e.g. *Fairfax* v *Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 per Kitto J). In determining the true nature and character of legislation, the courts have focused primarily upon its legal operation. Latham CJ observed in *South Australia* v *Commonwealth* at p 424:

> "Questions of motive and object are irrelevant to the question of the true nature of a law ... The true nature of a law is to be ascertained by examining its terms and, speaking generally, ascertaining what it does in relation to duties, rights or powers which it creates, abolishes or regulates."

Latham CJ added however at p 426 that "when a power is defined by reference to purpose, other considerations arise". The distinction between purposive and other powers has been developed in the subsequent case law (e.g. *Cunliffe* v *Commonwealth* (1994) 182 CLR 272). It has also been accepted that it may be necessary to consider the practical operation of the legislation in question in

order to ensure that limitations upon power are not circumvented (see e.g. *Ha* v *New South Wales* (1997) 189 CLR 465, 498).

[118] Finally, in relation to the background, it is appropriate also to consider the Government of Ireland Act 1920, which adopted a single enumeration model: section 4 conferred on the Northern Ireland Parliament a general power to make laws for the peace, order and good government of Northern Ireland, subject to the limitation that it had no power to make laws "in respect of" certain specified matters. The Act was considered in the case of *Gallagher* v *Lynn*, which concerned legislation which prohibited the sale of milk without a licence and permitted Ministry officials to inspect the land or possessions occupied by any licence-holder. The validity of the legislation was challenged on the basis that it was in respect of "trade with any place out of [Northern Ireland]", contrary to section 4. This argument proceeded on the basis that farmers in County Donegal were unable to obtain licences, since their premises lay outside the jurisdiction of the Ministry. Unsurprisingly, the argument was rejected on the basis that, although the legislation might incidentally affect trade with County Donegal, it was not "in respect of" such trade. Lord Atkin, in whose speech the other members of the House concurred, referred to the range of authority which had largely arisen in discussion of the powers of Canadian Parliaments, and summarised the effect of those authorities at p 870:

> "It is well established that you are to look at the 'true nature and character of the legislation': *Russell* v *The Queen* 'the pith and substance of the legislation'. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must

> not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country."

Section 29 of the Scotland Act

[119] As Lord Walker observed in *Martin* v *Most* at paras 44 and 46, in relation to the task of defining the legislative competence of the Scottish Parliament:

> "That task is different from defining the division of legislative power between one federal legislature and several provincial or state legislatures (as in Canada or Australia, whose constitutional difficulties the Judicial Committee of the Privy Council used to wrestle with, often to the dissatisfaction of those dominions) ... These background matters must have been in the mind of those who undertook the drafting of the Scotland Act (and in particular the provisions directly relevant to these appeals). But in the Scotland Act Parliament has gone further, and has used more finely modulated language, in trying to explain its legislative purpose as regards 'reserved matters'."

[120] The relevant rules are contained in a number of provisions of the Scotland Act, including subsections (2), (3) and (4) of section 29, and paragraphs 1, 2 and 3 of Schedule 4. It is necessary at this point to consider section 29(2)(b) and (3).

[108] As I have explained, section 29(2)(b) states that a provision is outside the competence of the Scottish Parliament if it "relates to" reserved matters.

In *Martin*v *Most*, Lord Walker observed at para 49, in relation to the words "relates to":

> "That is an expression which is familiar in this sort of context, indicating more than a loose or consequential connection, and the language of section 29(3), referring to a provision's purpose and effect, reinforces that."

I respectfully agree. In ordinary English, "relates to" does not mean the same as "affects"; and, although it is a wide expression, it cannot be intended to be given such a wide construction as to invalidate all legislation affecting matters listed in Schedule 5, however slight, indirect or remote the effect may be. The practical considerations which led to that conclusion in the case law relating to Canada, Australia and Northern Ireland are equally cogent in the context of the Scotland Act.

[121] Deciding whether legislation relates to a reserved matter involves two stages: first, determining the meaning of the words defining the reserved matter, and secondly, determining whether the legislation relates to that matter. At the first stage, it is to be noted that the Scotland Act does not adopt a double enumerationmodel, but defines the Scottish Parliament's powers, by implication, as what remains once reserved matters have been excluded. It follows that, unlike the position in Canada, the interpretation of the reserved matters should not reflect any assumption as to the extent of the matters which are not reserved: as Isaacs J commented in the *Barger* case, in a passage cited earlier, one might as well ascertain the meaning of a bequest by assuming the extent of the residue. Accordingly, to the extent that counsel for the respondent sought to argue from the premise that "health", as a category, was a devolved matter, that was in my view a mistaken approach.

[122] In determining whether a provision of an Act of the Scottish Parliament relates to a reserved matter, the court must apply section 29(3):

> "[T]he 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."

The court must therefore ascertain the purpose of the provision in question, and then determine, by reference to that purpose, having regard (among other things) to the provision's effect in all the circumstances, whether the provision relates to any of the reserved matters. The focus is therefore primarily upon why the provision has been enacted rather than upon what it does, although the latter is also relevant. The submission of counsel for the petitioners, based upon Australian authorities, that neither the motive nor the policy of the legislature in enacting the measure is a relevant consideration, must therefore be rejected.

[123] Schedule 5 lists reserved "matters", not purposes. Since the question whether a provision relates to a reserved matter is to be determined (read short) by reference to its purpose, it appears that the purpose of a provision is to be treated as a pointer to the "matter" to which it relates. Once the purpose of a provision has been identified, therefore, the remaining question is whether the "matter" to which it points is within the scope of the reserved matters listed in Schedule 5. That question may be straightforward or it may be more complex, depending on the circumstances.

[124] In particular, although section 29(3) refers to "the purpose of the provision", in the singular, in real life legislation may be enacted in order to achieve a number of objectives. In such a situation, it may be unrealistic to regard a provision as relating only to a single matter; and it is possible that, in such a situation, one of the matters to which it relates may be reserved, and another may not be. For instance, to borrow a hypothetical example given by Lord Rodger in *Martin* v *Most* at para 86, a provision might be intended to change the system of accommodation of homeless persons in Scotland (a devolved matter), and simultaneously to alter the treatment of asylum seekers (a reserved matter). In such a situation, one might expect to find that the provision related to a reserved matter, and was therefore beyond devolved competence, even though it also related to a matter which was not reserved. Unlike the position in Canada, where legislation must be characterised as relating to only one, predominant, matter in order to avoid a conflict between the two lists, it may be arguable that the court is not driven by the logic of the Scotland Act to follow that approach. I would therefore wish to reserve my opinion as to the correctness of the argument of counsel for the respondent that, even if the provisions in issue relate (in a more than merely incidental or indirect manner) to the regulation of the sale of goods to consumers, they are nevertheless within devolved competence because their predominant purpose is the protection of health. This issue was not fully explored in argument, and it is unnecessary for the decision of the present case to express any concluded opinion on the point.

[125] As Lord Rodger observed in *Martin* v *Most* at para 75, the purpose of a provision will often be clear from its context in the Act in question. The court can also consider extrinsic material which is relevant to ascertaining the purposes which the provision was enacted to achieve, as Lord Hope indicated at para 25. The court is also expressly required to have regard to the effect of the provision.

Sections 1 and 9 of the 2010 Act

[126] It is necessary now to decide how these general considerations apply specifically to sections 1 and 9 of the 2010 Act.

[127] On behalf of the petitioners, it was submitted that the purpose of section 1, and its effect, was to prevent the exposure of tobacco products in places where they were offered for sale. The purpose of section 9, and its effect, was to prevent the sale of such products from vending machines. On that basis, both provisions related to regulation of the sale of goods to consumers, which was a reserved matter. The Lord Ordinary had erred in approaching the matter on the basis that the court had to decide whether the provisions related to a reserved matter, namely consumer protection, or a devolved matter, namely health. The question was not whether the provisions related to a devolved matter, but whether they related to a reserved matter. A provision might relate to both. In *R* v *Secretary of State for Health, Ex parte United States Tobacco International Inc* [1992] QB 353, where the argument had been that regulations banning oral snuff were made for the purpose of protecting health and therefore fell

outside the scope of enabling legislation concerned with consumer protection, Taylor LJ had responded (at p 365) that the legislation was "apt to protect the consumer whether one calls its purpose consumer protection or public health". Another way of looking at the matter was by reference to Lord Atkin's dictum in *Gallagher* v *Lynn* that both the object of legislation and the method of achieving it must be valid. If the object here was public health, the method was the regulation of the sale of goods, a matter which fell within the scope of paragraph (a) of Section C7.

[128] On behalf of the respondent, it was submitted that the pith and substance of sections 1 and 9, and their true purpose, was the protection of health, which was not a reserved matter, and that the provisions therefore did not relate to the matter reserved by paragraph (a) of Section C7. Reference was made to documents published by the Scottish Executive in 2004, 2006 and 2008 relating to tobacco; to an assessment, seemingly prepared by officials, of tobacco provisions to be contained in a Health (Scotland) Bill; to the Policy Memorandum prepared by the Scottish Executive in respect of the Bill which became the 2010 Act; to statements and speeches made by ministers during the passage of the Bill; to the Stage 1 Report of the Health and Sport Committee of the Scottish Parliament; to briefings prepared by the Scottish Parliamentary Information Centre; and to a selection of documents submitted in evidence before the Scottish Parliament. These were said to show that the overriding concern of the promoters of the Bill was the protection of health. I note that it is also apparent from some of the documents that the potential impact of sections 1 and 9 on

smoking, and hence on health, was disputed by tobacco manufacturers, vending machine operators and voluntary organisations, who submitted evidence in support of their arguments, including evidence concerning experience in other countries where similar measures had been introduced.

[129] A second argument advanced on behalf of the respondent was that the ability of the Scottish Parliament to pass legislation restricting sales of goods or services, in the interests of health or other "devolved purposes", had not been challenged when other comparable measures had been passed. Examples were the sale of spray paint to children under the Antisocial Behaviour etc. (Scotland) Act 2004, sections 122-125; the restriction of smoking in public places and the establishment of powers to prevent sales of tobacco to persons under 18, under Part 1 of the Smoking, Health and Social Care (Scotland) Act 2005; restrictions on the sale of alcohol, under the Licensing (Scotland) Act 2005, sections 1, 8, 118 and 127-128; the amendment of section 141A of the Criminal Justice Act 1988, relating to the sale of knives to young people, by the Police, Public Order and Criminal Justice (Scotland) Act 2006, section 75; and the regulation of the provision of sunbeds, under Part 8 of the Public Health etc. (Scotland) Act 2008.

[130] A third argument was that the UK Government treated restrictions on point of sale displays of tobacco and sales by vending machines as a health matter. The Tobacco Advertising and Promotion Act 2002 had proceeded on the basis of a Sewel motion, which implied an acceptance that the legislation concerned a devolved area.

The legislation governing the display of tobacco and the banning of vending machines in the rest of the UK was contained in the Health Act 2009, sections 20-24, and regulations made under that Act.

[131] A fourth argument was that, since sections 1 and 9 of the 2010 Act did not affect the terms of any contract for the sale of tobacco, it followed that they fell outside the scope of paragraph (a) of Section C7.

[132] A fifth argument was that, even if sections 1 and 9 affected a reserved matter, that effect was merely incidental to the true purpose of the provisions, namely the protection of health.

[133] I have set out the terms of section 1. It begins by prohibiting the display of tobacco products in places where such products are sold, subject to a discretion conferred on the Scottish Ministers (by subsection (4)) to provide that no offence is committed by a display which complies with prescribed requirements. It then provides a limited exception in respect of tobacconists (subsection (2)), again subject to compliance with any requirements which may be prescribed by the Scottish Ministers. It also provides a general exception in respect of wholesalers (subsection (3)), again subject to compliance with any requirements which may be prescribed by the Scottish Ministers. The legal effect of section 1 is therefore to establish a statutory basis for the regulation by Scottish Ministers of the display of tobacco products in places where such products are sold. Its short-term practical consequences will depend, in the first instance, upon how Scottish Ministers exercise their regulatory powers. The court is

not equipped to predict the ultimate long-term effects of the provision; nor does it require to do so in order to identify the purpose of section 1. The extrinsic material indicates that the purpose of section 1 was to enable 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. The legal effect of section 1 is consistent with that purpose.

[134] The position is similar in relation to section 9. I have set out its terms. Put shortly, it prohibits persons from having cigarette machines available for use on their premises. Its legal effect is to make it a criminal offence to have such machines available for use. Its short-term practical effect will be to prevent, or at least discourage, that method of selling cigarettes. The extrinsic material indicates that the purpose was to make cigarettes less readily available, particularly (but not only) to children and young people, with a view to reducing smoking. Its legal effect and its short-term practical consequences are consistent with that purpose. It is unnecessary to consider whether, in the long term, the provision will achieve its object.

[135] The question which then arises is whether, by reference to their purpose, the provisions relate to the matter described in paragraph (a) of Section C7. In my view, they do not. I do not construe paragraph (a) as covering every situation which might be considered to involve regulation of the sale and supply of goods to consumers: the relevant context, as indicated by the title of Section C7 (and by the White Paper and other background material), is that of consumer protection.That expression is not a

term of art, and it is not defined by the Scotland Act. Nevertheless, its scope is not unlimited: its ordinary usage would cover certain types of legislation but not others. The point can be illustrated by some of the legislation mentioned by counsel for the respondent. The provision in the Antisocial Behaviour etc. (Scotland) Act 2004 prohibiting the sale of aerosol paint sprays to children is not concerned with consumer protection but with preventing children from spraying graffiti. In the Smoking, Health and Social Care (Scotland) Act 2005, the provision enabling ministers to modify section 18 of the Children and Young Persons (Scotland) Act 1937, which prohibited the sale of tobacco to children, is not a consumer protection measure but lies within the legislative field of children and young persons. The provisions referred to in the Licensing (Scotland) Act 2005 concern the law of licensing, which again is a separate area of the law from consumer protection. The provision in the Police, Public Order and Criminal Justice (Scotland) Act 2006 amending the Criminal Justice Act 1988, and concerned with the sale of knives, is again not concerned with consumer protection but with the prevention of crime.

[136] These are all examples of the regulation of particular sectors of retailing, not for the purpose of protecting individual consumers, but because of concern about their effects upon the community generally, or upon children and young persons in particular. Besides the sale of alcohol, tobacco, knives and aerosol paints, many other illustrations could be given: for example, the sale of solvents, firearms and explosives, controlled drugs and pornography. Similar regulation also exists in respect of the

retailers of certain services to consumers, such as gambling. The regulation of such sectors of retailing is broadly distinguishable from consumer protection in that it is, in general, the social effects of the particular retail sector's activities which are regarded as calling for regulation of that sector in the public interest. The regulation is therefore specific to particular sectors of retailing, and is directed at the retailers because of concern about the consequences of unregulated retailing. In some instances, regulation of this kind is a reserved matter; in other instances, it is not. Where it is reserved, it is the subject of a specific reservation, as in the case of controlled drugs (Section B1), firearms (Section B4), video recordings and cinemas (Section B5), betting, gaming and lotteries (Section B9). It is not treated as falling under the rubric of consumer protection.

[137] Consideration of the background to the Scotland Act supports this approach. It appears that Section C7 was intended to cover matters falling within the area of responsibility of the DTI. Legislation of the kind which I have discussed would not, prior to devolution, have fallen within that department's area of responsibility: in relation to Scotland, it would have fallen within the scope of the Scottish Office and, in relation to England and Wales, within that of other departments, notably the Home Office.

[138] Part 1 of the 2010 Act is another example of this type of regulation. Sections 1 to 3 provide a basis for the regulation of the display by retailers of tobacco products and their prices. Sections 4 to 8 are concerned with the sale of tobacco products to

children and young persons, and supplement or modify existing provisions dealing with that matter. Section 9, by prohibiting the use of vending machines, ensures that tobacco will be retailed only by individual persons. Part 2 then goes on to establish a system for the registration and regulation of tobacco retailers. Sections 1 and 9, in particular, thus form part of a wider system of regulation of the sale of tobacco, which extends existing regulation of that sector of retailing (under such legislation as the Children and Young Persons (Scotland) Act 1937, the Children and Young Persons (Protection from Tobacco) Act 1991 and the Tobacco Advertising and Promotion Act 2002) and establishes a system broadly analogous to that which exists in relation to other retail sectors which are regarded as calling for specific regulation in the public interest.

[139] My conclusion that sections 1 and 9 do not relate to a matter reserved by paragraph (a) of Section C7 does not, therefore, depend upon the arguments presented by counsel for the respondent, none of which I find persuasive.

[140] It is also necessary to consider whether sections 1 and 9 of the 2010 Act may relate to product safety, and therefore to a matter reserved by Section C8 of Schedule 5 to the Scotland Act. That question arises because, as I have explained, counsel for the petitioners argued that provisions to the same effect as sections 1 and 9 could have been made by regulations under section 11 of the Consumer Protection Act 1987. Counsel for the respondent disputed that contention, on the basis that

sections 1 and 9 did not have the purpose of securing that goods which are unsafe are not made available to persons, either generally or of a particular description.

[141] Regulations made by UK ministers under section 11, and extending to Scotland, have included several concerned with tobacco. The Oral Snuff (Safety) Regulations 1989 (SI 1989/2347) made it an offence to supply, offer to supply, agree to supply, expose for supply or possess for supply any oral snuff. The Tobacco Products Labelling (Safety) Regulations 1991 (SI 1991/1530), subsequently amended, required producers of tobacco products to ensure that the packets carried a health warning and, in the case of cigarettes, information as to the tar and nicotine yields, and made it an offence to supply etc. tobacco products which did not comply with these requirements. The Cigarettes (Maximum Tar Yield) (Safety) Regulations 1992 (SI 1992/2783) made it an offence to supply etc. cigarettes with a tar yield above a permitted maximum. The Tobacco for Oral Use (Safety) Regulations 1992 (SI 1992/3134) made it an offence to supply etc. any tobacco for oral use. The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 (SI 2002/3041), subsequently amended, prohibited the manufacture and supply of cigarettes with a yield of tar, nicotine or carbon monoxide above a permitted maximum, required producers of cigarettes to ensure that the packets carried a health warning and a statement of the yields, and prohibited packaging which suggested that the product was less harmful to health than other tobacco products. All these regulations were headed "Consumer Protection", and they were all made by the

Secretary of State for Health. All, except those of 1989 and 1992 concerned with tobacco for oral use, were made in the exercise of powers conferred by section 2(2) of the European Communities Act as well as section 11 of the Consumer Protection Act, reflecting the extent of EU legislation in this area.

[142] In Section C8, product safety and product labelling are reserved without any exception in respect of tobacco. The fact that regulation of the safety and labelling of tobacco products is not devolved, notwithstanding the connection between these matters and public health, reflects the need for such regulation to be effected consistently throughout the UK (and, in many respects, throughout the EU), in order to maintain a single market for consumers and business.

[143] In considering the arguments advanced by counsel in relation to this matter, I observe at the outset that the question whether sections 1 and 9 of the 2010 Act relate to product safety, within the meaning of Section C8, may not be the same as the question whether equivalent provisions could have been introduced by regulations made under section 11 of the Consumer Protection Act. I am not in any event persuaded that regulations equivalent to sections 1 and 9 could have been made under that provision. In relation to section 1 of the 2010 Act, none of the purposes mentioned in section 11(1) of the Consumer Protection Act would appear to be relevant. In relation to section 9 of the 2010 Act, the only purpose mentioned in section 11(1) of the Consumer Protection Act which might be relevant would be to secure that tobacco was not made available to persons of a particular description,

namely children and young persons. Provisions designed specifically to protect children and young persons would not however fall aptly under the rubric of product safety: as counsel for the petitioners acknowledged, there is a distinct body of legislation which protects children and young persons as a class, and which includes provisions designed to protect children from smoking. Accordingly, applying section 29(3) of the Scotland Act as I have construed it, and taking the purpose and effect of sections 1 and 9 of the 2010 Act to be as I have described them, these provisions do not in my opinion relate to product safety.

Conclusion on the first ground of challenge

[144] For the foregoing reasons, I conclude that the first ground of challenge should be rejected.

The second ground of challenge

[145] As I have explained, the second ground of challenge is based on section 29(4) of the Scotland Act, which provides *inter alia* that a provision which would not otherwise relate to reserved matters but makes modifications of 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.

[146] It was argued on behalf of the petitioners that, since sections 1 and 9 of the 2010 Act create new offences, they modify Scots criminal law. Since the new offences concern the sale of tobacco products to consumers, it follows that the provisions make modifications to Scots criminal law as it applies to regulation of the sale and supply of goods to consumers, which is a reserved matter. The proviso to section 29(4) of the Scotland Act does not apply, since the purpose of the provisions is not to make the law in question apply consistently to reserved matters and otherwise.

[147] On behalf of the respondent, on the other hand, it was argued that section 29(4) did not apply, for a number of reasons. First, since there were no existing rules of Scots criminal law restricting the freedom to display tobacco products or to make vending machines available for the sale of such products, it followed that sections 1 and 9 of the 2010 Act did not make any modification of Scots criminal law. Secondly, even if sections 1 and 9 modified Scots criminal law, they did not modify the law "as it applies" to any reserved matter. That form of words envisaged the modification of a rule whose application was not confined to reserved matters. Thirdly, sections 1 and 9 did not in any event create any offence relating to the "sale and supply" of goods: there need be no sale or supply in order for an offence to be committed. Fourthly, the proviso to section 29(4) was in any event applicable, since sections 1 and 9 applied consistently to any reserved matter found to be affected and also to other matters, such as health.

[148] In my opinion section 29(4) has no application in the circumstances of this case. First, I note that the Scotland Act distinguishes between a modification of Scots private law, or Scots criminal law, "as it applies to reserved matters", which falls within the scope of section 29(4), and a modification of "the law on reserved matters", which falls within the scope of paragraph 2 of Schedule 4. I am inclined to agree with the view expressed by Lord Rodger in *Martin* v *Most* at para 116 that section 29(4) covers a case where the provision in question modifies the general law (e.g. of evidence or procedure) as it applies to a reserved matter. Secondly, and more fundamentally, the regulation of the sale of goods to consumers is a reserved matter, under paragraph (a) of Section C7, only within the overall context of consumer protection. For the reasons already explained, I do not consider that the provisions in question fall within the scope of consumer protection, and I therefore do not consider that section 29(4) is engaged. I accordingly conclude that the second ground of challenge should be rejected.

The third ground of challenge

[149] The third ground of challenge is based on paragraph 2 of Schedule 4 to the Scotland Act, which provides by sub-paragraph (1) that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters. The phrase "the law on reserved matters" is defined by sub-paragraph (2) as meaning, put shortly, enactments and rules of law whose subject-

matter is a reserved matter. In terms of sub-paragraph (3), sub-paragraph (1) applies to a rule of Scots criminal law only to the extent that the rule in question is special to a reserved matter. In terms of paragraph 3, paragraph 2 does not apply to modifications which are incidental to, or consequential on, provision made which does not relate to reserved matters.

[150] It was argued on behalf of the petitioners that sections 1 and 9 modify two enactments whose subject-matter is a reserved matter. The first was regulation 2 of the Tobacco for Oral Use (Safety) Regulations 1992, which provides:

> "No person shall supply, offer to supply, agree to supply, expose for supply or possess for supply any tobacco for oral use."

The second was the Tobacco Products (Manufacture, Presentation and Sale (Safety) Regulations 2002, as amended. As I have explained, those regulations make it an offence to supply cigarettes with a yield of tar, nicotine or carbon monoxide exceeding a permitted maximum (regulation 3), or to supply any tobacco product which does not comply with requirements in respect of health warnings, statements of yield and related matters (regulation 14). "Supply" is defined by regulation 2 as including exposure or possession for supply. It was argued that, since sections 1 and 9 of the 2010 Act added to the prohibitions on the supply of tobacco products, they therefore modified the 1992 and 2002 Regulations. Although sections 1 and 9 were rules of Scots criminal law, they were special to a reserved matter, namely the regulation of the sale and supply of goods and services to consumers.

[151] On behalf of the respondent, on the other hand, it was argued that, since sections 1 and 9 did not modify the regulation of the terms of sale and supply of tobacco products to consumers, there was therefore no modification of the law on reserved matters. This argument was based on the narrow construction of paragraph (a) of Section C7 which I have rejected. It was further argued that the creation of new offences for the purpose of promoting health was not a modification of existing provisions in the 1992 and 2002 Regulations concerning product safety and labelling. The 1992 and 2002 Regulations were not amended, repealed or otherwise altered in any way. In any event, it was argued, since the 1992 and 2002 Regulations had an aspect concerning health, as well as an aspect concerning matters reserved under Section C8, it followed that the rules contained in those regulations and supposedly modified by sections 1 and 9 of the 2010 Act were not "special to a reserved matter", within the meaning of paragraph 2(3) of Schedule 4 to the Scotland Act. Finally, it was argued that any modification of the rules contained in the regulations was merely incidental to the protection of health, with the consequence that paragraph 2 was disapplied by paragraph 3.

[152] Sections 1 and 9 of the 2010 Act do not in my opinion modify the 1992 and 2002 Regulations: those regulations continue in force as before. The point is not readily capable of further elaboration. Since paragraph 2(1) is not engaged, it is unnecessary to consider paragraphs 2(3) and 3. I accordingly conclude that the third ground of challenge should be rejected.

The fourth ground of challenge

[153] The fourth ground of challenge is based on the provision in paragraph 1 of Schedule 4 to the Scotland Act that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, article 6 of the Union with England Act 1707 so far as it relates to freedom of trade. That article (as amended) provides:

"ARTICLE VI.

> That all parts of the United Kingdom for ever 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 liable 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 throughout the whole United Kingdom."

[154] It was argued on behalf of the petitioners that sections 1 and 9 of the 2010 Act constituted "prohibitions, restrictions and regulations of trade". Since they extended to Scotland alone, they modified article 6. They operated to inhibit access to Scotland's markets by manufacturers and traders of tobacco products inEngland, such as the petitioners, since they prohibited such products from being displayed for sale, or sold from vending machines. Furthermore, they prevented access to the Scottish market by owners and operators of vending machines based in England, such as the petitioners' wholly-owned subsidiary Sinclair Collis Ltd.

[155] On behalf of the respondent, it was argued that article 6 was protected from modification only so far as it related to freedom of trade. That expression, when used in this context, meant access to markets. The object of article 6 was to secure that Scotland had access to English domestic and colonial markets, and vice versa. Article 6 was not intended to cover every possible regulation or restriction on trade: otherwise, there would have been no need for article 16, which standardised the coinage, or article 17, which concerned weights and measures. There were many areas in which Scots and English law differed, creating different conditions of trade: examples included the law relating to licensing, bankruptcy, prescription, housing and planning. The Union had never operated on the basis that the law must be identical in all areas affecting trade. This interpretation was supported by the discussion in *Citizens Insurance Co of Canada* v *Parsons*. In any event, even if the 2010 Act breached the Acts of Union, it did not modify them. Acts of the Scottish Parliament could not be challenged on the ground that they breached the Acts of Union, since section 37 of the Scotland Act provided that the Acts of Union had effect subject to that Act. The Acts of Union were no more protected than any of the other enactments listed in Schedule 4. Furthermore, it would be anomalous to strike down sections 1 and 9 of the 2010 Act because of their effect on trade, when similar restrictions were to be brought into force in England and Wales under the Health Act 2009.

[156] It is generally accepted that free access to the English domestic and colonial markets formed, from the Scottish perspective, an important reason for entering into

the Union. The background to the Union included the failure of the attempt by the Darien Company to establish a Scottish colony in the Americas, resentment of the Navigation Acts, increases in duties upon Scottish exports to England, and the threat in the Alien Act 1705 to prohibit such exports entirely. Accordingly, several articles in the Acts of Union were devoted to matters concerning trade, such as customs duties, rights of navigation, and rights to trade with the colonies. The focus of article 6, in particular, is upon equality of trading conditions. It begins by requiring "... the *same* Allowances, Encouragements and Drawbacks ... the*same* Prohibitions, Restrictions and Regulations ... and the *same* Customs and Duties" (emphasis added). As to what those allowances and so forth should be, it then requires that "the Allowances [etc] ... settled in England ... shall ... take place throughout the whole United Kingdom". As originally enacted, article 6 then gave some specific examples: Scottish cattle exported to England were not to be liable to any duties to which English cattle were not subject within England; English subsidies on exports of grain were to be extended to oats (a Scottish product); and bere (a Scottish variety of barley) was to be given the same export subsidy as barley. Article 6 is not therefore a general guarantee of freedom of trade in the widest sense, and it does not prohibit restrictions on trade. It is concerned with a more specific matter, namely that trade should not be advantaged or disadvantaged, in the respects mentioned, according to whether it is carried on in Scotland or in England and Wales. It is to be noted that the scope of article 6 has not been understood as extending to all distinctions between

Scotland and England which may affect trade: *Citizens Insurance Co of Canada* v *Parsons* at pp 112-113; nor could it have been intended that article 6 should proscribe all such distinctions, given the intention, reflected in article 18, to retain a separate Scottish legal system.

[157] In the present case, however, it is unnecessary to consider whether sections 1 and 9 of the 2010 Act might fall within the ambit of article 6. Even on that assumption, it is not apparent that there is any inconsistency between those sections and article 6. Section 1 is similar to sections 7A and 7B of the Tobacco Advertising and Promotion Act 2002, as inserted by section 21 of the Health Act 2009, which applies in England and Wales. Section 9 is similar to regulation 2 of the Protection from Tobacco (Sales from Vending Machines) (England) Regulations 2010 (SI 2010/864), which were made under section 3A of the Children and Young Persons (Protection from Tobacco) Act 1991, as inserted by section 22 of the Health Act 2009. In the circumstances, it has not been demonstrated that there is any significant inequality between Scotland and England in relation to the subject-matter of sections 1 and 9. That being so, sections 1 and 9 do not purport to any extent to supersede, amend or otherwise modify article 6. I accordingly conclude that the fourth ground of challenge should be rejected.

Conclusion

[158] For these reasons I agree with your Lordships that the reclaiming motion should be refused.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Reed
Lord Brodie

[2012] CSIH 9
P326/10

OPINION OF LORD BRODIE

in the Reclaiming Motion

by

IMPERIAL TOBACCO LIMITED

Petitioners and Reclaimers;

against

THE LORD ADVOCATE,
AS REPRESENTING
THE SCOTTISH MINISTERS

Respondent:

_____

Act: Jones, Q.C., Gill; McGrigors LLP
Alt: Mure, Q.C., Poole; Scottish Government Legal Directorate

2 February 2012

Introduction

[159] The Tobacco & Primary Medical Services (Scotland) Act 2010 was passed by the Scottish Parliament on 27 January 2010 and received the royal assent on3 March 2010. By way of petition for judicial review, Imperial Tobacco Limited, a manufacturer of and trader in tobacco products, including cigarettes, seeks declarator that sections 1(1) and 9 of the 2010 Act ("the 2010 provisions") are outside the legislative competence of the Parliament and therefore, in

terms of section 29(1) of the Scotland Act 1998, not law. Among other consequential orders the petitioner seeks reduction of the 2010 provisions.

[160] No commencement order in respect of the 2010 provisions has as yet been made.

[161] The petition was served on the Lord Advocate ("the respondent") and the Advocate General, each of whom lodged answers. The petition came before the Lord Ordinary for hearing. At the beginning of that hearing the Advocate General withdrew from the process. The respondent maintained opposition. Having heard parties, for the reasons set out in his opinion, the Lord Ordinary concluded that none of the challenges mounted by the petitioner to the legislative competence of the Scottish Parliament was well founded. He dismissed the petition. The petitioner has now reclaimed.

[162] In preparing this opinion I have enjoyed the very considerable advantage of seeing in draft both the opinion of his Lordship in the chair and that of Lord Reed.

Legislative competence

[163] In terms of section 28(1) of the Scotland Act 1998 the Parliament of the United Kingdom devolved the power to legislate to the newly constituted Scottish Parliament. Section 28(1) of the Scotland Act provides that "Subject to section 29, the Parliament may make laws". The legislative power of the Parliament is therefore a circumscribed power which is capable of being exceeded. In this respect and in contrast to the position of the Westminster Parliament, the Scottish Parliament, as Lord President Rodger explained in *Whaley* v *Watson* 2000 SC 340 at 349D, is part of "that wider family of parliaments" which "owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law". This was not in dispute as between the parties. It was agreed that if the relevant provisions were held to be outside the legislative competence of the Parliament as that expression is to be understood in terms of section 29(2) of the 1998 Act, then they were, as is provided by section

29(1), "not law" and might be so declared and consequently reduced by this court on an application to it by way of petition for judicial review.

[164] Thus, section 29 defines the scope of the devolved power. It does so by identifying the characteristics of a provision which place it outside the legislative competence of the Parliament. The scheme whereby legislative competence is conferred on the Scottish Parliament is one where what is not specifically identified as being outside competence is devolved, albeit that in terms of section 28(7), the Parliament of the United Kingdom, consistent with its sovereign character, retains all of its pre-Act power to make law for Scotland (this is qualified in practice by the "Sewel Convention" in terms of which the Parliament of the United Kingdom will not legislate with regard to devolved matters without the consent of the Scottish Parliament). Broadly speaking, a provision will be outside the legislative competence of the Scottish Parliament if what it has to do with is such as to be caught by one or other of the paragraphs of section 29(2), read with Schedules 4 and 5, or by section 29(4). For present purposes only two of the five paragraphs of section 29(2) are of relevance: paragraph (b) which provides that a provision is outside legislative competence if it "relates to reserved matters"; and paragraph (c) which provides that a provision is outside legislative competence if "it is in breach of the restrictions in Schedule 4". Section 29(4) identifies circumstances where a provision which would otherwise not relate to reserved matters will be treated as relating to reserved matters. As Lord Reed explains, the scheme under the Scotland Act for the division of legislative competence between the two legislatures is one of single enumeration, in other words there is one list of the matters allocated or reserved to one of the legislatures with what is left over being allocated or devolved to the other. In this respect it is similar to the scheme of division as between the Commonwealth Parliament and the legislatures of the States under the Commonwealth of Australia Constitution Act 1900, albeit that the Australian scheme is not the same as the Scottish; the legislative powers of the states which united in a Federal Commonwealth are unlisted, whereas the Commonwealth Parliament has only those powers specifically listed in the 1900

Act. Both the Australian and the Scottish are single enumeration schemes but while the Australian scheme lists powers conferred on the Commonwealth Parliament the Scottish scheme lists reservations or restrictions on the powers of the Scottish Parliament. Counsel for the respondent made the point at the outset of his submissions that single enumeration schemes can be contrasted with the scheme of double enumeration adopted for Canada under sections 91 and 92 of what was formerly the British North America Act and is now the Constitution Act 1867. [165] It is uncontroversial that the effect of the Scotland Act is to devolve the power to legislate with a view to promoting public health. The respondent maintains that the enactment of the 2010 provisions, restricting displays of tobacco products at point of sale and prohibiting vending machines and so reducing smoking was an exercise of that power; the purpose of the 2010 provisions being to reduce smoking of tobacco among children and young persons and so improve public health. The reclaimer disputes that. Its contention, as developed in its Grounds of Appeal, Note of Argument, Appeal Submissions and Further Submissions made in response to the Note by the Court, is that the 2010 provisions are outside the Scottish Parliament's legislative competence for any one of four separate grounds (otherwise referred to as challenges) arising from what it submits is the correct interpretation of section 29. The order in which these challenges are set out in the reclaimer's Grounds of Appeal does not correspond to the order in which they were discussed before this court or the (different) order in which they are discussed in the opinion of the Lord Ordinary. In the summary of the four challenges which appears below I shall follow the order in which they are discussed by the Lord Ordinary (which is also the order adopted by Lord Reed):

> (1) The 2010 provisions relate to the reserved matter set out in section C7(a) of Schedule 5, namely the regulation of the sale and supply of goods and services to consumers (section 29(2)(b) and (3));
>
> (2) If it be held that the 2010 provisions would otherwise not relate to a reserved matter, they are nevertheless to be treated as relating to reserved matters in that they make

modifications to Scots criminal law as it applies to the reserved matter of the regulation of the sale and supply of goods and services to consumers and do not apply consistently to reserved matters and otherwise (section 29(4));

(3) Irrespective as to whether they relate to that reserved matter, the 2010 provisions are in breach of the restriction in paragraph 2 of Schedule 4: that an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, a rule that is special to the reserved matter of the regulation of the sale and supply of goods and services to consumers (section 29(2)(c) and Schedule 4 paragraph 2);

and

(4) The 2010 provisions are in breach of the restriction in paragraph 1 of Schedule 4: that an Act of the Scottish Parliament cannot modify Article 6 of the Acts of Union so far as it relates to freedom of trade (section 29(2)(c) and Schedule 4 paragraph 1).

[166] Thus, three of the four heads of argument in the reclaimer's Grounds of Appeal depend on the proposition that the relevant provisions trench in some way on "reserved matters": they relate to reserved matters or they are to be treated as relating to reserved matters or they modify a rule of Scots criminal law as it applies to reserved matters, the reserved matter in question being regulation of the sale and supply of goods and services to consumers. In submitting that the relevant provisions were outside the legislative competence of the Parliament, the reclaimer invites the court to apply the Scotland Act, as properly interpreted. In submitting that the Parliament had power to enact the relevant provisions, the respondent extends the same invitation.

[167] The questions for the court therefore come to be ones of statutory interpretation. The first such question is what is the meaning and scope of the specific reserved matter founded on by the reclaimer: regulation of the sale and supply of goods and services to consumers? Because that reserved matter appears in section C7 of Schedule 5 prefixed by "(a)" I shall refer to that matter as "the section C7(a) reserved matter".

The section C7 (a) reserved matter

Statutory structure

[168] Section 30(1) of the Scotland Act provides that "reserved matters" are defined in Schedule 5. Part I of Schedule 5 contains "General Reservations". It is not suggested that Part I is of relevance. Part II of the Schedule is headed "Specific Reservations". There follow three "*Preliminary*" paragraphs containing general explanatory and interpretive provisions. In terms of paragraph 1, the matters to which any of the sections of the Part apply are reserved. Paragraph 2 provides that a section applies to any matter described or referred to in it when read with any illustrations, exception or interpretation provisions in that section. Paragraph 3 provides that any illustrations, exceptions or interpretation provisions in a section relate only to that section. Thus, an entry under the heading "exceptions" in a particular section does not affect what is comprehended within any other section.

[169] Following the *Preliminary* paragraphs there are the "*Reservations*" under Heads A to L, each with a title. Head C is entitled "Trade and Industry". As I have indicated, the specific reservation founded on by the petitioner is contained in section C7 of that head. Section C7 is entitled "Consumer protection". The matters described or referred to in section C7 are marshalled in three groups, first, the regulation of various matters specified in nine paragraphs, beginning with "(a) the supply of goods to consumers"; second, "Safety of, and liability for services supplied to consumers"; and third, the subject-matter of six statutes or parts of statutes and two statutory instruments. There is one exception: "The subject matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)". The following section is C8, headed "Product standards, safety and liability". One of the specific reserved matters in section C8 is "Product safety and liability". The exceptions to C8 include "food".

The competing constructions

[170] Before the Lord Ordinary and before this court counsel for the petitioner and reclaimer argued for what the Lord Ordinary described as a wide construction of the section C7(a) reserved matter: that is a construction comprehending the regulation of the sale and supply of goods and services to consumers by safety regulations in the field of consumer protection. Counsel for the respondent, on the other hand, argued for what the Lord Ordinary described as a narrow construction: the regulation of the contractual terms and conditions upon which goods and services are sold and supplied to consumers. In so doing counsel for the respondent effectively adopted what appeared in the Explanatory Notes to the Scotland Act 1998. These include the following in relation to section C of Schedule 5(at page 237 of the text lodged as 6/19 of process):

> "*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 from legislating about these wider matters;"

While the Explanatory Notes use the expression "covers the terms on which goods and services are sold and supplied to consumers", this, on the respondent's construction of the C7(a) reserved matter, meant: "is restricted to the terms on which goods and services are sold and supplied to consumers". Counsel for the reclaimer did not take issue with the proposition that regulation of the contractual terms on which goods and services are sold and supplied to consumers was comprehended within the C7(a) reserved matter, but contended that it went further and included the regulation of product safety in the field of consumer protection; hence the Lord Ordinary's description of this as the wide construction as opposed to the respondent's narrow construction.

[171] In the event of the reclaimer's proposed construction of section C7(a) being rejected because product safety was subsumed within section C8, counsel for the reclaimer's riposte was

to point out that the result of that construction would still mean that the regulation of the safety of goods sold or supplied to consumers was a reserved matter.

The decision of the Lord Ordinary as to the construction of the C7(a) reserved matter

[172] The Lord Ordinary favoured what he had identified as the narrow construction advanced by the respondent. He had accepted that, as a constitutional measure, the Scotland Act should be interpreted generously and purposively in a way which promoted a coherent, stable and workable constitutional settlement. He had recognised, under reference to what was said by Lord Hope in *Martin* v *Most* 2010 SC (UKSC) 40 at para 11, that the scheme of devolution meant that it was not possible for reserved and devolved areas to be divided into precisely defined watertight compartments, some degree of overlap being inevitable. That said, he considered that a narrow reading should be given to each of the individually listed reserved matters in order to respect the specific nature of the approach and to avoid one reserved matter encroaching on another. He found the petitioner's argument that the exception of the subject-matter of section 16 of the Food Safety Act 1990 pointed to a construction of C7(a) as otherwise including the regulation of food safety to be strained. He found assistance in the terms of the Explanatory Notes as casting light on the contextual scene of the provision and confirming the narrow construction.

[173] Before addressing the correctness or otherwise of the Lord Ordinary's conclusion as to the meaning and therefore scope of the section C7(a) reserved matter, it is convenient say a little about the approaches to interpretation relied on in argument and by the Lord Ordinary, and their application to the Scotland Act in general and the wording of the section C7(a) reserved matter in particular.

Approaches to interpretation

Ordinary meaning of the words read in their context

[174] The reclaimer contends that its proposed construction of the C7(a) reserved matter no more

than reflects the ordinary meaning of the words used, read in the context of consumer protection. In order to understand that context regard should be had, so argues the reclaimer, to the purpose of the Scotland Act of limiting the legislative competence of the Scottish Parliament in the field of consumer protection in order to preserve a level playing field for businesses and consumers (otherwise a common market) throughout the United Kingdom.

[175] Among the leading contemporary works on statutory interpretation published in the United Kingdom is Bennion *On Statutory Interpretation* (5th edition). There the author systematically describes in the form of a Code of 464 sections with commentary, how courts go about construing legislative texts. At section 2 of his Code (*supra* p24) Bennion identifies the duty of the interpreter of a statutory provision in these terms:

> "(1) The interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation.
>
> (2) The court is never entitled, on the principle *non liquet* (it is not clear), to decline the duty of determining the legal meaning of the relevant enactment.
> ..."

At section 150 (*supra* p 441) Bennion explains that the legal meaning is the meaning that correctly conveys the legislative intention. This usually corresponds to the grammatical meaning of the verbal formula that constitutes the enactment. The grammatical meaning of an enactment is its linguistic meaning taken in isolation from legal considerations. The linguistic meaning is the meaning the enactment bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation and the accepted linguistic canons of construction (*supra* p 443). In introducing his discussion of the linguistic canons of construction (section 363, *supra* p1181) Bennion further explains that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that being its proper and most known signification.

[176] The ordinary meaning of the word or phrase in question may provide a starting point from which to begin the process of coming to what Bennion refers to as the legal meaning, but the

process as a whole is likely to be more complex than simply looking at the word or words to be construed in isolation. The meaning of any communication depends on the totality of the communication and the totality of the information available to the audience to which the communication is directed. That is so with linguistic meaning and it is certainly so with legal meaning. It was Lord Steyn who famously said: "In law context is everything": *R (Daly)* v *Secretary of State for the Home Department* [2001] 2AC 532 at para 28. As we were reminded in the course of submissions, in *R (Westminster City Council)* v*National Asylum Support* [2002] 1 WLR 2956 at 2958 he also said this:

> "... language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it."

As appears from, for example, *R* v *Montila and others* [2004] 1 WLR 3141, another case referred to in argument, the context of a particular enactment includes more than simply what precedes and what follows the text in question. Bennion puts it this way in section 202 of his Code (*supra* p 588):

> "For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts *in pari materia*, and all facts constituting or concerning the subject-matter of the Act."

He then (*supra* p 588) emphasises the width of the context in which an enactment may be considered by citing Viscount Simonds in *A-G* v *Ernest Prince of Hanover* [1957] AC 436 at 461:

> "...words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense... its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy... I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word."

Generous and purposive construction

[177] Viscount Simonds included "the mischief which ...the statute was intended to remedy" as part of the context in which and by reference to which the wording constituting an enactment was to be interpreted. As appears from Bennion (*supra* pp 915-942), the "mischief rule", which requires the court to identify the mischief and defect that Parliament intended to remedy by enacting the statute in question, and then to interpret the statute with a view to suppressing the mischief and advancing the remedy, is of long-standing. The term "mischief" continues to be used: see eg *King* v *Webster* [2011] HCJAC 10. However, in its more modern version, the mischief rule has become the presumption in favour of purposive construction: Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from these words, should aim to further every aspect of the legislative purpose:
Bennion *supra* p 943.

[178] As a matter of generality, I would therefore take it to be uncontroversial that any enactment should be subject to a purposive construction; in other words it should be construed purposively. As Lord Steyn said in *A-G's Reference (No 5 of 2002)* [2005] 1 AC 167 at 185:

> "No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation."

[179] Before us counsel for the respondent renewed the submission he had made before the Lord Ordinary that the Scotland Act was a constitutional statute that should be interpreted generously and purposively, with a view to ensuring that the constitutional settlement that it embodies is coherent, stable and workable; and that the general legislative power of the Scottish Parliament should not be cut down and the intention of the devolution settlement frustrated, by an improperly wide interpretation of the reservations in Schedule 5. The latter part of this submission was to an extent mirrored by counsel for the reclaimer when he characterised the

purpose of section 29 and Schedules 4 and 5 as being to limit the competence of the Scottish Parliament to make laws, with a view, so it appeared to me, to encouraging the court to be astute to prevent any escape from these limitations.

[180] While I do not, and could not, take issue with the proposition that the Scotland Act should be interpreted generously and purposively with a view to ensuring that the constitutional settlement that it embodies is coherent, stable and workable, I am not persuaded, as the Lord Ordinary was persuaded, that giving effect to the proposition in any way advances the respondent's narrow construction of the section C7(a) reserved matter over the reclaimer's wider construction.

[181] The reference to provisions being interpreted not only purposively but "generously and purposively" is taken from the opinion of Lord Bingham in *Robinson* v*Secretary of State for Northern Ireland* [2002] NI 390 at para 11 where he says this:

> "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 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"

Clearly the Scotland Act is a statute having a constitutional character (in *Martin* v *Most supra* at para 44, Lord Walker referred to it as "on any view a monumental piece of constitutional legislation"); the provisions focused on in this petition relate to the distribution of powers as between two legislatures. However, as Lord Reed points out, it is not a constitution; it is an Act of Parliament. In contrast to what might be expected with a truly constitutional document, the Scotland Act can be amended by ordinary legislative means. As an Act of Parliament, the Scotland Act must be interpreted purposively but that would appear to be as far as it would be appropriate to go, at least at this juncture (among the material lodged with the court for the further hearing was an article by Craig and Walters, *The courts, devolution and judicial review* 1999 Public Law 274, where the authors identify that over the course of time the British

North America Act 1867 and Commonwealth of Australia Constitution Act 1900, both statutes enacted by the Westminster Parliament, have come to be read from a constitutional interpretative perspective, but at the same time suggest that viewing the Scotland Act as a constitution subject to constitutional interpretative principles may be problematic, given the differences both in the history of the respective statutes and method of their drafting). By "generously" I would take Lord Bingham to mean no more than "liberally" in contradistinction to "literally", but to the extent that a generous and purposive interpretation is materially different from a construction that is merely purposive, it would seem to be better adapted to the more open textured language to be anticipated in what is truly a political constitution, than the more dense, detailed and precise statutory language of the Scotland Act. Moreover, in order to adopt a generous and purposive interpretation one must be able to identify a relevant purpose which points to a direction in which generosity is to be extended with a view to furthering that purpose. That purpose may be the general purpose of the statute viewed as a whole or it may be the more limited purpose of a particular provision or enactment within the statute, but unless the purpose is identified there cannot be a purposive interpretation.

[182] The Lord Ordinary does not identify which purpose he had in mind, or how his acceptance of the approach described by Lord Bingham in *Robinson*informed his decision as to which construction to prefer. Clearly, the broad purpose of the provisions of the Scotland Act to which reference was made in the course of discussion is the division of legislative competence as between the Scottish Parliament (by devolution) and the United Kingdom Parliament (by reservation). If that is as far as one can go, it follows that the principle derived from *Robinson* that legislation should be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody, is not readily applicable to resolving the issue of what has been devolved as opposed to what has been reserved. The provisions under scrutiny are undoubtedly constitutional but the values that they embody: that some powers should be devolved while others should be reserved, do not lend themselves to

providing an answer to a question as to which precisely are the powers which have been devolved and which are the powers which have been reserved. I do not see the argument as being advanced by characterising a reserved matter, as counsel for the respondent did, as a limitation on the Scottish Parliament's otherwise plenary legislative power. I would see much the same point falling to be made in response both to the respondent's assertion that the general legislative power of the Scottish Parliament should not be improperly cut down and the reclaimer's characterisation of section 29 and Schedules 4 and 5 as being there to restrict the legislative competence of the Scottish Parliament. Neither is more than a rhetorical flourish. Section 29 and Schedules 4 and 5 provide the mechanism for allocating legislative competence as between the two parliaments but I see there to be nothing in that mechanism or in the discernible purposes of the Act as having the result that in construing the relevant reservation one should, on the one hand, lean towards finding a matter to be devolved or, on the other, lean towards finding it to be reserved.

Construction for validity

[183] The respondent's Note of Argument reminded the court that Acts of the Scottish Parliament are passed by a representative, democratically elected Parliament following procedures whereby legislative competence must be scrutinised and certified in terms of section 31 of the Scotland Act. Section 101 provides that Acts of the Scottish Parliament are to be read as narrowly as is required to bring them within the competence of the Parliament. None of this is controversial but it is, in my opinion, nothing to the point. As Lord Hope said in *AXA General Insurance Ltd* v *The Lord Advocate* [2011] 3 WLR 871 at para 46:

> "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament ... Sovereignty remains with the United Kingdom Parliament. The Scottish

> Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes."

Lord Reed explains in his opinion, under reference to what Lord Hope said in *A* v *Scottish Ministers* 2002 SC (PC) 63, that the fact that none of the mechanisms provided in sections 31, 33 and 35 for preventing the enactment of legislation outside the competence of the Scottish Parliament has been triggered in respect of a provision which subsequently becomes the subject of challenge, does not in any way bind the court. The question of deference does not arise. It is indeed the case that section 101 of the Scotland Act provides that Acts of the Scottish Parliament are to be read as narrowly as is required to bring them within the competence of the Parliament and that the court should prefer constructions finding Acts of the Scottish Parliament to be within legislative competence but that point similarly does not arise. It is not suggested that there is a narrow construction of the 2010 provisions which would bring them within legislative competence if, on an alternative construction, they are otherwise determined not to be within competence. As was submitted by counsel for the reclaimer, section 101 has no relevance to the question for this court. I see no basis for suggesting that the Scotland Act should be construed with a view to finding that a provision which has been enacted by the Scottish Parliament is within competence rather than outside it. Indeed, as Craig and Walters *supra* at p296 point out when mooting the possibility of such an approach to construction of the Scotland Act, that section 101 was enacted in the terms that it was, with its reference to a narrow reading of any provision of an Act of the Scottish Parliament and any provision of subordinate legislation made by a member of the Scottish Executive but with no such reference to provisions of the Scotland Act, is an indication that such an approach is precluded.

The Explanatory notes

[184] I have quoted above the passage from the Explanatory Notes to the Scotland Act which counsel for the respondent relied on as setting out what the C7(a) reserved matter "covers".

[185] Explanatory Notes in their current form were introduced in 1999, subsequent to the enactment of the Scotland Act. This was signalled to the profession by an article in the New Law Journal by the First Parliamentary Counsel, Christopher Jenkins QC: "Helping the Reader of Bills and Acts" (1999) 149 NLJ 798 (see also Bennion *supra* pp641 to 643 and Craies *On Legislation* (9th edit) paras 9.4.1 to 9.4.5). I have already quoted from Lord Steyn's opinion in *R (WestminsterCity Council)* v *National Asylum Support Service supra*. The quotation comes within a passage where at para 2 *et seq* Lord Steyn considers the history and status of Explanatory Notes. It includes the following:

> "2. ... Explanatory Notes ... now accompany most public bills in their progress towards enactment by Parliament. ... since [they] are now sometimes placed before the House, it would be sensible to clarify their status.
>
> 3 The background is as follows. Brief explanatory memoranda used to be printed at the front of a Bill. Such a document was a précis and did not provide background. In addition ministers were provided with Notes on Clauses, which did by and large explain what a clause in a Bill was meant to do. Later, in an era of greater transparency, Notes on Clauses were made available to backbenchers.
>
> 4. In 1999 a new system was introduced. It involves publishing Explanatory Notes alongside the majority of public Bills introduced in either House of Parliament by a Government minister... The texts of such notes are prepared by the Government department responsible for the legislation. The Explanatory Notes do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. The notes are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and to ease the task of assimilating the law. This new procedure has the imprimatur of the House of Commons Select Committee on Modernisation and the House of Lords Procedure Committee. The Explanatory Notes accompany the Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. Explanatory Notes are usually published by the time the legislation comes into force. Unlike Hansard material there are no costly researches involved. Explanatory Notes for both Bills and Acts are published by Her Majesty's Stationery Office. The notes are also available on the Internet at:
> http://www.parliament.uk for Bills and
> http://www.legislation.hmso.gov.uk for Acts.
>
> 5. The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only

> resort to evidence of the contextual scene when an ambiguity has arisen... there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross, Statutory Interpretation*,3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged...
>
> 6. 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 *Har*t [1993] AC 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 by the words enacted."

[186] The Scotland Act received the Royal Assent on 19 November 1998. The practice of providing Explanatory Notes for all government bills, as described by the First Parliamentary Counsel, was adopted from the beginning of the Parliamentary session in November 1998. I take it therefore that the new system did not apply to the Scotland Bill. In other words it will have had its Notes on Clauses, as referred to by Lord Steyn at para 3 *supra*, but not Explanatory Notes in the form approved by the respective committees of the House of Commons and the House of Lords. However, as part of the new system the committees also approved the future issue of Explanatory Notes for Acts: Lords Report as agreed to HL Deb December 4, 1997 cc.1484-95, reproduced in Craies *supra* at para 9.4.1. The text of the Explanatory Notes with which we were provided (6/19 of process) are Explanatory Notes on the Act, post-dating its enactment. They may have started life as Notes on Clauses and thereafter been revised, to a greater or lesser extent but they are not, in the language of Lord Steyn, "pre-parliamentary aids". Rather, they are a commentary on or exegesis of what Parliament has enacted. This may not matter. As appears

from para 41 of his opinion in*Martin* v *Most*, Lord Hope had read the terms of the Explanatory Notes to section 104 of the Scotland Act in the course of his consideration of the scope of the power conferred by the section. However, Explanatory Notes can only be used "for what logical value they have". They can be referred to in order to cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed. Exceptionally, an assurance given by the executive may be admitted against the executive in proceedings in which the executive places a contrary contention before a court. But that would seem to be all. The wording used in the Explanatory Notes to describe what is intended to be the effect of a provision is not a substitute for the wording of the provision itself. As Lord Steyn explained, the object of statutory interpretation "is to see what is the intention expressed by the words enacted".

[187] The Lord Ordinary appeared to recognise the parameters within which Lord Steyn envisaged Explanatory Notes being used. He quotes para 6 from *R (Westminster City Council)* v *National Asylum Support Service supra* in his opinion. However I do not find what Lord Steyn had to say about the use of Explanatory Notes reflected in the Lord Ordinary's conclusion. The Lord Ordinary gives his opinion that "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". He does not explain why. The passage which the Lord Ordinary quotes from the Explanatory Notes is that to which I have referred above as having been essentially adopted by the respondent in submission. That passage says nothing about the objective setting or contextual scene of the statute, or the mischief at which it is aimed. This is not an exceptional case where an assurance made to Parliament might be admitted against the executive in proceedings in which the executive places a contrary contention before a court. Rather, the passage provides a commentary on or verbal reformulation of the wording of section C7(a). It is a statement of what the author of the Explanatory Notes considers that section C7(a) means or, at least, "covers". As such it is open to consideration but whatever assistance other parts of the Explanatory Notes may provide, this particular passage does not provide an aid to interpretation. It is no more than the

author's view. Bennion's comment that "explanatory texts are likely to have been produced by persons other than the drafter who may not be skilled in the principles of statute law and may not have the full knowledge of the enactment and its purposes which is possessed by the drafter" (*supra* p 643) may reflect his particular perspective as a former Parliamentary Counsel, but he is obviously correct when he goes on to say "any text which aims to condense, paraphrase or otherwise restate the effect of the enactment is bound to convey a meaning which cannot be exactly the same as the legal meaning of the enactment itself."

[188] Thus, while the Explanatory Notes to the Scotland Act may provide information which helps set the contextual scene of the statute and therefore points to the purpose either of the Act as a whole or particular enactments within it, I do not consider that any legitimate assistance is to be got from the passage relied on by the Lord Ordinary even if it is to be understood as the respondent argued it should be understood. The ambiguity introduced by use of the word "covers" merely makes the matter more problematic. It cannot be said with confidence when the passage relied on was first written. It may post-date the enactment of the Scotland Act in which case it can be no more than a commentary reflecting the author's opinion. It may have originally been included in Notes on Clauses and therefore reflect what the author then considered was intended by the Bill, but that cannot be equated with the intention of Parliament. Parliament is taken to express its will in the words used in the statute, not in any other parallel text.

Interpretation of the section C7(a) reserved matter: discussion and conclusion

[189] With that review of approaches to interpretation I turn to what is the proper or legal meaning of section C7(a). I have previously summarised section C7 and described where it appears within the structure of Schedule 5. I shall now set out the section in full:

> "**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)."

[190] In paragraphs 83 to 86 of his opinion Lord Reed considers and rejects the arguments advanced for the respondent in support of a narrow construction of the section C7(a) reserved matter by reference to its immediate linguistic context. At paragraph 87 he rejects the argument that a narrow construction of the section C7(a) reservation is to be preferred because it must be taken not to include matters falling within sections C8 and C9. At paragraphs 92 to 94 he addresses counsel for the reclaimer's argument that it is only if the section C7(a) reserved matter is given a wider interpretation that there is the necessity to include, as an exception, the subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection). At paragraph 96 he concludes that paragraph (a) of section C7 encompasses all aspects of regulation of the sale and supply of goods to consumers within the field of consumer protection. I respectfully agree with both Lord Reed's reasoning and his conclusion. At risk of unnecessary repetition of what appears in Lord Reed's opinion I would add the following.

[191] I first observe that the section C7(a) reserved matter is one item or topic on what is a list of areas of potential legislative activity under the general heading "*Reservations*" and then the Heads "A" through to "L". Within that list of Heads there are the subordinate lists which constitute the particular sections. The C7 section list contains three groups of reserved matters ("Regulation of -"; "Safety of, and liability for, services supplied to consumers"; and "The subject-matter of -") plus one exception ("The subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)"). I see no reason to conclude that the topics within the multi-topic groups, such as the section C7(a) reserved matter, necessarily share any characteristic (beyond what is to be inferred from the section heading "Consumer protection") with the others than the purely linguistic one of having a common introductory expression. Looking at the other sections in Schedule 5 one can see examples of all the linguistic formulations used in section C7: "Regulation of -", "The subject-matter of -", and a free-standing description of the topic in question, but the structure of the various sections is by no means uniform. Other formulations are used. For example, in section "D2 Oil and gas", the first group is "Oil and gas, including -". There follow ten topics, some introduced by "the subject-matter of", some not. In addition to (italicised) *Exceptions*, some sections include *Interpretations*, with or without *Illustrations*. Other sections do not. It is not always clear on purely linguistic grounds why it has been considered appropriate to include a particular topic. For example, one topic in section E5 under the "Head E - Transport" is "Transport of radioactive material"; another is "Regulation of the carriage of dangerous goods". Equally it is not always clear why one formulation is chosen over another. There is the distinction, without a very obvious difference, as between "Regulation of - (a) the sale and supply of goods and services to consumers" and "Safety of, and liability for, services supplied to consumers." In one case the reserved matter is prefixed by "Regulation"; in the other it is not. What I take from this diversity is that the no doubt very difficult exercise of defining the areas of potential legislative activity which were to be reserved to the United Kingdom Parliament, did not lend itself to an orderly taxonomy, with

the result that any expectation of a section forming in part or whole a completely rational structure may be disappointed. As is observed by Lord Rodger in *Martin* v *Most supra* at para 74, the scheme for devolution which Schedule 5 is designed to effect is one of allocating areas of responsibility for governmental policy. An area of policy responsibility is unlikely to be neatly co-extensive with an area of law. Giving effect to a particular policy may justify making some incursions into, for example, the law of sale, but not others. The language in which reserved matters are described may reflect established usages rather than precise logic.

[192] The aggregations of reserved matters in Part II of Schedule 5 in Heads and Sections is an attempt at synthesis as opposed to the result of an analysis. AsLord Reed observes, it is not really possible to provide definitions of areas of policy or potential legislative activity which form watertight compartments and therefore clearly demarcate one area from another. Lord Hope's observation in *Martin* v *Most supra* at para 11 that some degree of overlap is inevitable may have been directed at the inter-relation of reserved areas on the one hand and devolved areas on the other but it also applies as between one reserved matter and another reserved matter.

[193] These problems of taxonomy and the draftsman's resolution of them by setting out Schedule 5 in the form of a list or series of lists with no very clear organising principle, appear to me to limit the weight that can be given, when interpreting the scope of a particular reserved matter, to the way in which other reserved matters in the list are formulated. In particular, and in agreement with Lord Reed, I am not persuaded that the ordinary meaning of the section C7(a) reserved matter should necessarily be cut down or restricted because of the more particular reservations which follow in section C7 or are to be found elsewhere in Head C.

[194] Turning then to what Bennion identifies as the starting point when interpreting a statute, I would agree that the construction of the phrase defining the section C7(a) reserved matter which is proposed by the reclaimer accords with the ordinary meaning of the words, at least if they are taken in isolation. "Regulation" is a broad term. It perhaps has a connotation of the negative role of statute as remedying a mischief as opposed to its more positive role as promoting some good,

but in my view "regulation" means no more than making rules about the activity subject to regulation and I simply cannot agree with the contention advanced at paragraph 17 of the respondent's Note of Argument that "regulation" of the sale and supply of goods and services is necessarily to be equated with regulation of the terms and conditions on which they are sold and nothing beyond that. Similarly, "the sale and supply of goods and services to consumers" occupies a wide canvass. Construed literally it would comprehend all commercial activity at the point of delivery to the end-user, providing that the end-user is a "consumer". The law regulates the sale and supply of goods and services in many and various ways, with a variety of purposes and with a variety of effects. Were the wording which identifies the section C7(a) reserved matter to be considered in isolation, there is no reason why it should not be interpreted to include all of these instances. However, counsel for the reclaimer does not argue for such a wide construction. He attaches importance, as part of the immediate linguistic context of what appears at C7(a), to the section heading: "Consumer protection". On counsel's approach the relevant reservation is limited to the field of consumer protection. I would agree that the concept of consumer protection provides the relevant context for the section C7(a) reserved matter. In coming to that view I have had regard to the section heading as confirmatory of what I see as the character of the section C7 reserved matters. That is not to say that I consider the whole area of consumer protection (whatever precisely that might be) to have been made a reserved matter by virtue of the C7 section heading. On that I agree with counsel for both parties, but I am of the opinion that the heading sheds light on the meaning of what appears in the section. There was some discussion before us as to whether and to what extent the C7 section heading can legitimately be referred to as an aid to construction. Like other modern statutes, the Scotland Act is divided up by headings of different kinds, pointing up its shape and structure. Counsel for the respondent described them as "signposts". They are impossible for the reader to ignore and it was not suggested on either side of the bar that, in construing what follows, they should be ignored.

The heading to an enactment is part of its context. The authority for that is *R* v *Montila supra* at para 36 where Lord Hope, in giving the opinion of the House of Lords, said this:

> "The headings and side notes are as much part of the contextual scene as [explanatory notes etc] and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise."

[195] For present purposes, in agreement, as I understood them, with counsel both for the reclaimer and the respondent I am content to treat the C7 section heading as part of the context of the section and therefore part of the context of the C7(a) reservation but not as part of the section itself. However, an alternative and perhaps better view would be to regard it as an integral component of the section rather than something which is in some way detached from it. On that view the heading "Consumer protection" would be a "matter described or referred to in [the section]" and therefore something to which section C7 applies, in terms of*Preliminary* paragraph 2 in Part II of Schedule 5. What Lord Hope is discussing at paras 31 to 34 of *R* v *Montila supra* are headings and side notes to sections in the main body of a statute. It is clear that headings and side notes do not form part of the text of the body of an Act. Members of Parliament cannot table amendments to headings: Craies *supra* p 752. Lord Hope recognised that when he noted that headings and side notes were components "included in the Bill not for debate but for ease of reference" and that account must be taken of that in deciding what weight was to be attached to them when considering what was the proper construction to be given to an enactment in the main body of the statute. However, the present case is not concerned with the construction of a section within the main body of the Scotland Act but with the construction of a provision within a Schedule to the Scotland Act. Bennion makes the point (*supra* p 722) that since a Schedule is annexed to an Act as a whole, it is not possible to argue that headings in a Schedule are not really part of the Act and cites a decision of the Court of Appeal, *Qualter Hall & Co Ltd v Board of Trade* [1962] Ch 273, where the ambiguous wording of a paragraph of Schedule 7 to the Companies Act 1948 was construed by reference to its particular cross-

heading. That headings in Schedules (or at least headings in Schedules to the Scotland Act) are treated differently from headings in the main body of the Act by not being regarded as unamendable, gets support from Lord Reed's observation that a whole section from Schedule 5, together with its heading, has been substituted with a section in different terms under a different heading (in terms of Scotland Act 1998 (Modification of Schedule 5) Order 2000, SI 2000/3252 article 2).

[196] Taking then the C7 section heading as doing no more than providing context, the context is "Consumer protection"; that is the field of legislative activity to which the various more particular reserved matters have been ascribed. That said, there is a question as to how much is added to an understanding of the expression "Regulation of ...the sale and supply of goods and services to consumers", by the consideration that it is to be understood as such regulation "within the field of consumer protection" (to quote from para 35 of the reclaimer's Appeal Submissions). The section C7(a) reserved matter specifically refers to sale and supply to consumers. A "consumer", when encountered in a modern statute, is not simply an end-user but a particular sort of end-user. He is a private individual purchasing or receiving goods or services for his own use from a trade supplier. He is assumed to be subject to disadvantages or vulnerabilities (many arising from his own ignorance and gullibility), which require to be balanced by the provision of specific rights or other forms of protection. Indeed, in the expression "consumer protection" the word "protection" is almost redundant. A consumer is assumed to be in need of protection and he will only be mentioned in statute in order to be protected. A further characteristic of a consumer is that he is someone who participates in the market. The purpose of consumer protection legislation is to facilitate and encourage that participation by making the market operate more fairly and therefore more effectively: see e.g. Final Report of the Committee on Consumer Protection, July 1962, Cmnd 1781 (the "Molony Report"); and "Modern Markets - Confident Consumers", July 1999, Cmd 4410. The need for consumer protection arises from the realisation that the market is not perfect in the sense that, generally speaking, there is an inequality of

bargaining power as between the consumer on the one hand and the trade supplier on the other. Consumer protection measures are intended to achieve something closer to a balance. This they do in a number of ways. These include the consumer-specific contractual term provisions of the statutes mentioned in the Explanatory Notes: the Sale of Goods Act 1979 (part VA), the Supply of Goods and Services Act 1982 (part 1B), the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, but they also include other measures with different sorts of effect. By way of example, I would agree with counsel for the reclaimer that an enactment providing for a "cooling off period" during which a consumer is entitled to cancel a contract for the supply of goods or services is a measure for consumer protection. On the other hand, I would not agree that another example put forward on behalf of the reclaimer (at para 47 of the Appeal Submission), the Oral Snuff (Safety) Regulations 1989, is, properly speaking, a measure for consumer protection, notwithstanding that the Regulations were made under powers conferred by section 11 of the Consumer Protection Act 1987. The 1989 Regulations (quashed in terms of the decision in *R* v *Health Secretary ex p United States Tobacco* [1992] 1 QB 353 by reason of a failure to comply with a statutory requirement to consult) banned the sale of oral snuff outright on the ground that it presented a particular cancer risk. While it is true that in *United States Tobacco supra* at 364 Taylor LJ described the Act as "apt to protect the consumer whether one calls its purpose consumer protection or public health", thereby suggesting that a complete prohibition of the supply of a noxious substance might be regarded as an instance of consumer protection, that is not how I would understand the concept of consumer protection, as discussed in the command papers to which I have referred and as exemplified in the various specific reservations in section C7 of Schedule 5 to the Scotland Act. Once trade in a particular commodity is prohibited there can be no "consumers" of the commodity (although there may of course be unlawful end-users) and therefore no consumers to protect.

[197] I agree with counsel for the respondent that not all reserved matters with a bearing on consumer protection, and indeed not all reserved matters with a bearing on the sale and supply of

goods to consumers, are listed in section C7. Product labelling, for example, is to be found in section C8. What I cannot agree is that section C7(a) targets only one specific aspect of consumer protection, that being the regulation of the terms and conditions upon which goods and services are sold and supplied. The respondent commends an approach to the construction of the Scotland Act which will ensure that the constitutional settlement which it embodies is coherent, stable and workable but the result of the interpretation which he urges of section C7 (a) is to reserve to the United Kingdom Parliament some aspects of a distinct and recognisable policy area, that of consumer protection, but not others, without any apparent reason.

[198] Agreeing with counsel for the reclaimer, I consider that the interpretation which he advances and which I prefer, is consistent with a purposive construction of section C7 (a) if its purpose, as with that of the other C7 reservations, is, as would be suggested by the White Paper, Scotland's Parliament (Cm 3658, July 1997) and the Explanatory Notes, to contribute to the preservation of a common market for goods and services within the United Kingdom by retaining a common regulatory regime.

[199] Para 3.3 of the White Paper includes:

> "The matters which the Government propose to reserve in the light of these considerations are listed below in general terms:
> ...
> Common markets for UK goods and services at home and abroad including the law on ...consumer protection ..."

That part of the Explanatory Notes directed to Section C7 includes:

> "Section C7: Consumer Protection
>
> **Purpose and Effect**
> This Section reserves various consumer protection and related matters, subject to certain exceptions.
>
> **General**
> This reservation is designed to ensure the reservation of a common United Kingdom system for the regulation of consumer protection and related matters in order to preserve a level playing field for consumers and business.

> The DTI is responsible throughout the UK for consumer protection matters such as the sale and supply of goods and services to consumers, and related matters, which may not be restricted to consumers, such as trade descriptions, misleading advertising price indications etc. So that the interests of consumers across the whole UK market can best be protected, the current UK-wide arrangements will be maintained. The Scottish Office was formerly consulted on a non-statutory basis in connection with relevant work programme proposals and various other matters to do with Scottish consumer bodies, which receive funding from, and in some cases are appointed by, the DTI eg Scottish Consumer Council and Citizens Advice Scotland. The Scottish Consumer Council, National Consumer Council and the Scottish Association of Citizens Advice Bureaux have been specified as cross-border public authorities.
>
> The Scottish Parliament has legislative power in this area in respect of food safety, because this is integral to the policy areas of agriculture and food which are not reserved, and in respect of advertising which is specific to tobacco and tobacco productions in view of its similar linkage to health."

Only if all the measures put in place to more nearly balance the bargaining power of consumers on the one hand and traders on the other apply uniformly throughout all parts of the United Kingdom will there be a UK common market.

The 2010 provisions

[200] I gratefully refer to the explanation of the scheme of the 2010 Act and the setting out of the 2010 provisions which appears in paragraphs 48 to 54 of the Opinion of Lord Reed.

[201] Having accepted, as I do, the construction of the section C7(a) reserved matter advanced on behalf of the reclaimer, the question comes to whether, because the 2010 provisions trench on the identified reserved matter in one way or another, any of the reclaimer's four challenges to legislative competency is made out. I shall consider these grounds of challenge in turn.

The first ground of challenge: the provisions relate to reserved matters (section 29(1) and (2)(b)

[202] The first ground of challenge is that each of the 2010 provisions "relates to" reserved matters and that they are therefore outside legislative competence by virtue of section 29(1), (2)(b), and (3) of the Scotland Act. The expression "relates to" gets definition from section 29(3).

Subject to the deeming provision in sub-section (4) which is not of immediate importance, in terms of section 29(3) the question of whether a provision 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. Referring to section 29, Lord Hope in *Martin* v*Most* said that the Scotland Act "provides its own dictionary" when it comes to determining whether an enactment is or is not within the legislative competence of the Scottish Parliament. But he also explained that the provisions of the Scotland Act bearing on legislative competence have a jurisprudential background in decisions of the Privy Council and House of Lords on legislative competence in cases from Canada, Australia, India and Northern Ireland; "[the] rule that was evolved and applied in these cases ...provides the background to the scheme that is now to be found in the Scotland Act": *Martin supra* at para 14. The "rule" referred to by Lord Hope, as applied to the Scotland Act, was that any argument as to whether an enactment by the Scottish Parliament "relates" to a reserved matter, must be decided by reference to the enactment's "pith and substance" or "true nature and character". This is the "respection" doctrine which, it would appear from the passage in Hansard referred to by Lord Hope (*Martin supra* at para 14) and quoted in the respondent's Speaking Note, the government spokesman in the House of Lords, Lord Sewell, "intended that the courts should rely on". What I have described as the jurisprudential background of section 29 of the Scotland Act was explored at the further hearing of the reclaiming motion convened to allow further submissions on the points included in the court's Note. Counsel for the reclaimer found support in the Australian cases to which attention had been directed by the court's Note (and an additional one which had not been cited in the Note) for his proposition that in determining whether an Act of the Scottish Parliament "relates to" a reserved matter, the motive or intention of the promoter of the legislation is irrelevant: see *Bank of New South Wales* v *Commonwealth* (1948) 76 CLR 1, Latham J at para 157; *R* v *Barger* (1908) 6 CLR 41, Isaacs J (dissenting but later approved in *Fairfax* v *Federal Commissioner of Taxation* (1965) 114 CLR 1) at 90 and 97 and Higgins J (also dissenting) at

118; *W & A McArthur Ltd* v *Queensland* (1920) 28 CLR 530, Rich J at 560; *Huddart Parker Ltd* v *Commonwealth* (1931) 44 CLR 492, Rich J at 499; *South Australia*v *Commonwealth* (1942) 65 CLR 373, Latham CJ at 424; and *Fairfax* v *Federal Commissioner of Taxation supra*, Kitto J at 6 and Taylor J at 14. Counsel for the respondent, on the other hand, acknowledged that the Australian cases displayed much learning but submitted that they required to be treated with some caution. As he put it at the beginning of his submissions at the further hearing, there was a need to take care before pitching headlong into another legal system. The constitutional schemes under consideration in these cases were different from the Scottish scheme, questions of policy and politics had entered into the decision-making process and different theories had been espoused at different times. In the Scotland Act purpose has a central role, which is not to be found in the Australian constitution. Counsel for the respondent commended the observation by Craig and Walters *supra* at p 299 that in the light of section 29(3) the Australian cases offer little or no assistance in classifying Acts of the Scottish Parliament whereas some value may be derived from the Canadian cases. In the context of Scotland, it is the will of Parliament that what was encapsulated in section 29(3) of the Act should determine whether an enactment was within competence and nothing else. I see force in the submissions made by counsel for the respondent. What this court has to do is interpret and apply section 29(3). In doing so it must have regard to the potentially binding authority of *Martin* v *Most*. While the Australian and Canadian cases are of interest a safe course would seem to be one which avoided the possible complexities of the Commonwealth authorities where possible. What section 29(3) makes determinative is the purpose of the provision in question. That has to do with the legislative objective, as disclosed by the preparatory material: *Martin supra* Lord Hope at paras 25 and 31, Lord Rodger at paras 75 and 125 (quoting from the opinion of the court in *Logan* v *Spiers* 2010 JC 1 at para 24), and Lord Kerr at para 162; but, importantly, in determining the purpose of an enactment section 29 (3) requires regard to be had ("among other things" albeit that this is the only thing specified) to "its effect in all the circumstances". A

provision may, and indeed probably will, have a variety of effects, some more remote than others. In such a case it is the more proximate or direct or crucial effect that is of importance. Incidental effects are to be disregarded. As it was put in the passage from *W & A McArthur Ltd* v *Queensland supra*, quoted by Lord Walker at para 45 of his opinion in *Martin* v *Most*:

> "We have to determine in each case what is the subject of the legislation - what subject is the Act 'with respect to' - what it effects - not what things or operations it may indirectly affect."

[203] In his Note of Argument counsel for the respondent accepts that the aim of the 2010 provisions is to reduce the number of sales of tobacco products. While it is difficult to see how he could say otherwise, he then offers the explanation that the purpose of the provisions is the promotion of public health by reducing the availability and attractiveness of tobacco particularly to children and young persons. This, he contends, is the "statutory purpose" of section 29. I am unable to agree. I see there to be no issue as to why the Scottish Parliament enacted the 2010 provisions; it wished to promote public health, as is generously documented in the material placed before the court. That very general purpose is better described, as it was by counsel for the reclaimer, as the motive for enacting the provisions. The promotion of public health may be hoped for as a long-term consequence of the legislation but it cannot be said to be a necessary effect and it cannot be said to be a direct effect. As I would see it the purpose of enacting provisions in the specific terms of the 2010 provisions (albeit with the aim of promoting public health) was to inhibit the sale of tobacco products. That is the intended effect, as the respondent concedes. It is a likely effect. Does that mean that either of the 2010 provisions relates to the reserved matter of the regulation of the sale and supply of goods to consumers within the field of consumer protection? In my opinion, while agreeing with Lord Reed that none of the arguments presented by the respondent in support of the proposition that the 2010 provisions do not relate to reserved matters are persuasive, the answer to that question is no. Counsel for the reclaimer argues that the effect of section 1 of the 2010 Act is that tobacco products will not be exposed for

sale, subject to certain specified exceptions, that is its purpose; and the effect of section 9 is that tobacco products will not be sold in vending machines, that is its purpose. Therefore, so the argument continues, the 2010 provisions relate to the reserved matter of the regulation of the sale and supply of goods to consumers within the field of consumer protection. I disagree. The 2010 provisions are not provisions for the regulation of the sale and supply of goods to consumers within the field of consumer protection because they are not consumer protection measures. As I have already indicated, the whole object of consumer protection is to permit the consumer to participate in the market on more nearly equal terms with the trade supplier. That is not the intended effect of the 2010 provisions. Neither is it a likely effect. It is not their purpose. One might say that the purpose of the 2010 provisions is the very opposite: it is to discourage participation in the retail market for tobacco products. Therefore the 2010 provisions do not relate to the section C7(a) reserved matter. Similarly, they do not relate to the C8 reserved matter: product standards, safety and liability. They have nothing whatsoever to say about the constituents, standards or specifications of tobacco products.

[204] I accept that the field of consumer protection (perhaps overlapping at this point with product standards) includes the protection of individual consumers from inadvertent exposure to noxious or otherwise dangerous goods and services. One way of promoting participation in the market is to enact provisions which give the otherwise ill-informed consumer confidence that the goods available in that market are wholesome, safe and accurately labelled. This is not what the 2010 provisions relate to. At paragraphs 135 - 139 of his opinion Lord Reed contrasts protection of the individual consumer with regulation of the retail sector in the general public interest and explains that the 2010 provisions come within the latter rather than the former category of legislation. I respectfully agree with both his analysis and his conclusion.

The second ground of challenge: the provisions make modifications to Scots criminal law as it applies to reserved matters (section 29(4))

[205] A provision which would not relate to reserved matters is to be treated as relating to reserved matters where it makes modifications of Scots private or criminal law as it applies to reserved matters, unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

[206] The reclaimer argues that if it be held that the 2010 provisions would otherwise not relate to a reserved matter, they are nevertheless to be treated as relating to reserved matters in that they make modifications to Scots criminal law as it applies to the reserved matter of the regulation of the sale and supply of goods and services to consumers. Scots law, as it previously applied to the sale and supply of goods and services to consumers, did not make criminal the conduct which is criminalised by the 2010 provisions: the display of tobacco or smoking related products in a place where tobacco products are offered for sale; and making available a vending machine for the sale of tobacco products. The 2010 provisions criminalise this conduct. Therefore, so the reclaimer argues, they make modifications to Scots criminal law as it applies to reserved matters.

[207] It cannot be disputed that the enactment of the 2010 provisions add to the general body of Scots substantive criminal law by creating new offences. Whether they make "modifications" of that law and, if they do, whether the modifications were of that law "as it applies" to reserved matters were points disputed on behalf of the respondent but counsel for the respondent first put in issue what is the proper scope of section 29(4). Counsel drew particular attention to the expression "as it applies to reserved matters". He submitted that section 29(4) requires to be interpreted so that its effect is not the same as section 29(2)(b) read with section 29(3) ("relates to reserved matters"), or section 29(2)(c) read with schedule 4 paragraph 2 ("the law on reserved matters"). As an explanation of what is the proper scope of the prohibition contained in section 29(4) counsel commended what was said by Lord Rodger in *Martin* v *Most supra* at paras 116 and 118:

> "[116] ...I am very doubtful whether sec 29 (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. In the present case, by contrast, sec 45 actually modifies the reserved matter - or, rather, the law on the reserved matter - namely the penal provision in Pt I of sch 2 to the RTOA. In my view sec 29 (4) is not designed to cover a provision of this kind. ....
> ...
>
> [118] In effect, the 'unless' clause in sec 29 (4) allows the Scottish Parliament to make a general reform of Scottish private or criminal law, even though it modifies the law which applies to reserved matters. Again, this is not surprising since the UK Parliament's legislation on particular topics has always been framed and operated against the background of the general private and criminal law as it applies in the various jurisdictions from time to time. Equally, any reform of the general law has to take account of all the matters to which it actually applies."

[208] Lord Rodger's discussion of the meaning to be given to section 29(4) may be *obiter* but I would regard it as correct. On the reclaimer's approach, if there is a material difference between "makes modification of ...Scots criminal law, as it applies to reserved matters" in section 29(4) and "modify ... [a rule of Scots criminal law special to a reserved matter]" in paragraph 2 of Schedule 4, I have considerable difficulty in discerning it, whereas on Lord Rodger's approach each expression, and "relates to reserved matters", has its own particular definition and scope. I agree with counsel for the respondents' submission that what section 29(4) is aimed at are modifications to the general law which in some way apply to reserved matters. If they are indeed general in the sense of applying consistently to reserved matters and otherwise, they will be within the legislative competence of the Scottish Parliament. If they apply to reserved matters and do not apply consistently to reserved matters and otherwise, then they are outside legislative competence. It follows that section 29(4) does not advance the reclaimer's argument. The 2010 provisions do not make modifications to the general criminal law. If it is proper to regard them as making modifications the modifications are entirely specific.

[209] Were I to be wrong about what is the proper scope of section 29(4) it would be my opinion that it does not in any event have the result that the 2010 provisions are outside legislative

competence. Irrespective of whether or not they are to be regarded as making modifications of Scots criminal law, for the reasons I have endeavoured to set out above, they do not make modifications to it as it applies to either the section C7(a) or C8 reserved matters.

The third ground of challenge: the provisions modify the law on reserved matter where the rule is special to a reserved matter (section 29(2)(c) and Schedule 4 paragraph 2)

[210] Although I describe this as the third ground of challenge it is the one to which the reclaimer gave pre-eminence in the submissions before this court and accordingly addressed first.

[211] In terms of section 29(2)(c), a provision is outside legislative competence (irrespective as to whether it relates to a reserved matter) if it is in breach of the restrictions in Schedule 4. The restrictions in Schedule 4 include the prohibition in paragraph 2(1) on modifying, or on conferring power to modify, the law on reserved matters. "Modify" is defined in section 126 of the Act as including "amend or repeal". In terms of paragraph 2(2) "the law on reserved matters" means any enactment the subject matter of which is a reserved matter and which is comprised in legislation, and any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter. All this is subject to the proviso, in paragraph 2(3) that the paragraph 2(1) prohibition only applies to the extent that the rule in question (whether or not contained in an enactment) is special to a reserved matter. There is the further qualification that the prohibition does not apply to modifications which are merely incidental to or consequential on a provision which does not relate to reserved matters and do not have a greater effect on reserved matters than it is necessary to give effect to the purpose of the provision.

[212] Counsel for the reclaimer drew attention to what he said were the two enactments which regulated the sale of tobacco products as at the date of passing the 2010 provisions. These were the Tobacco for Oral Use (Safety) Regulations 1992 and the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002. Both were made under powers conferred by

section 11 of the Consumer Protection Act 1987. The 2002 Regulations were also made under powers conferred by section 2(2) of the European Communities Act 1972. Regulation 2 of the 1992 Regulations prohibits the supply etc of tobacco for oral use. Regulation 14 of the 2002 Regulations prohibits the supply of tobacco products in respect of which the producer has not complied with certain requirements of the Regulations (broadly relating to information and warnings to appear on packaging of cigarettes and the ancillary testing of cigarettes for yields of tar, nicotine and carbon monoxide). Counsel submitted that the subject matter of these two enactments is the regulation of the sale and supply of goods, these being tobacco products, to consumers. This is a reserved matter. The 2010 provisions modify these enactments by adding additional prohibitions on the sale of tobacco products. Consequently, the 2010 provisions are outside the legislative competence of the Scottish Parliament.

[213] I agree that the 2002 Regulations form part of "the law on reserved matters" and that they are, in their entirety, "special to a reserved matter" in that their subject-matter lies within the reserved matters of consumer protection, product safety and product labelling, as provided by sections C7(a) and C8. I am not so persuaded in relation to the 1992 Regulations. These are the re-enactment of the Oral Snuff (Safety) Regulations 1989 to which I have already made reference and, for the reasons given in relation to the 1989 Regulations, notwithstanding that they were made under powers conferred by the Consumer Protection Act 1987, I would not regard the 1992 Regulations as a consumer protection measure. I would therefore not regard the 1992 Regulations as forming part of the law on the matter reserved by section C7 (a). Nor do they have the look of forming part of the law on the matters reserved by section C8. Be that as it may, I do not in any event agree that the 2010 provisions modify or confer power to modify either the 1992 or the 2002 Regulations. The point is not really capable of elaboration. The identified enactments are left untouched. And so, although this is simply to repeat what I have said in relation to the first ground of challenge, are those areas of the law which relate to the reserved matters of consumer protection and product standards, safety and labelling.

The fourth ground of challenge: the provisions modify Article 6 of the Acts of Union so far as they relate to freedom of trade (section 29(2)(c) and Schedule 4 paragraph 1(2)(a))

[214] As I have previously noted, in terms of section 29(2)(c) a provision is outside legislative competence (irrespective as to whether or not it relates to a reserved matter) if it is in breach of the restrictions in Schedule 4. The restrictions in Schedule 4 include the prohibition in paragraph 1(2)(a) on modifying (or on conferring power to modify) Articles 4 and 6 of the Union with Scotland Act 1706 and the Union of England Act 1707.

[215] Counsel for the reclaimer focused on Article 6 of the Acts of Union which provides:

> "That all parts of the United Kingdom for ever 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 liable to the same Customs and Duties on Import and Export And that the Allowances Encouragements and Drawbacks prohibitions restrictions and regulations of Trade and Customs and Duties on Import and Export settled in England when the Union commences shall be from and after the Union take place throughout the whole United Kingdom"

[216] Counsel's argument was that the 2010 provisions offend against the requirement that there be "the same prohibitions restrictions and regulations of Trade" in all parts of the United Kingdom. Like your Lordship in the chair I would see what is guaranteed here is free access to markets not that there be uniformity in the conditions applicable to the particular markets associated with the different parts of the United Kingdom. Were it otherwise Scotland could not have a separate legal system from England, something which it is thought to have been guaranteed to Scotland by Article 18 (and see *The Citizens Insurance Company of Canada* v *Parson* (1881) 7 App Cas 96 at 112 to 113). However, this challenge would seem to be comprehensively defeated by the consideration referred to byLord Reed at paragraph 157 of his opinion: having regard to the parallel provisions which are in force in England, it has not been demonstrated that the 2010 provisions constitute prohibitions restrictions and regulations which are other than the same as those applicable in other parts of the United Kingdom. The 2010

provisions do not breach the restriction in Schedule 4, paragraph 1(2)(a). They are not therefore outside the competence of the Scottish Parliament on that ground.

Conclusion

[217] I accordingly agree with your Lordships that the reclaiming motion should be refused.