



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 16

A76/20

OPINION OF LADY CARMICHAEL

In the cause

MARTIN JAMES KEATINGS

Pursuer

against

(FIRST) ADVOCATE GENERAL FOR SCOTLAND AND
(SECOND) THE LORD ADVOCATE

Defenders

**Pursuer: O'Neill QC, Welsh; Balfour and Manson LLP
First Defender: Johnston QC, Webster QC, Pirie; OAG
Second Defender: Mure QC, C O'Neill QC (sol adv); SGLD**

5 February 2021

Introduction

[1] The pursuer seeks two declarators:

- (1) that the Scottish Parliament has power under the provisions of the Scotland Act 1998 to legislate for the holding of a referendum on whether Scotland should be an independent country, without requiring the consent of the United Kingdom Government or any further amendment, by the Union Parliament, of the Scotland Act 1998 as it stands and;

(2) that the Scottish Government's proposed Act of the Scottish Parliament concerning an independence referendum contains no provision which, if passed by the Parliament, would be outside its legislative competence.

[2] The Scotland Act 1998 is referred to as "the 1998 Act" in this opinion, and references to sections are, unless otherwise stated, to the sections of the 1998 Act.

[3] The proceedings are in the form of an ordinary action for declarator. By interlocutor of 4 November 2020 I appointed the cause to the procedure roll for debate. The defenders seek to have the action dismissed on the basis of certain preliminary pleas. The pursuer seeks decree de plano in terms of his first conclusion.

[4] Both defenders say that the court should decline to consider the pursuer's substantive case that, as a matter of law, he is entitled to declarator. They advance a number of preliminary pleas, to the effect that the pursuer lacks standing, that the action is hypothetical and premature, that the action is incompetent, and that it would, for a variety of reasons, be wrong as a matter of constitutional law for the court to grant the declarator the pursuer seeks. The first defender has offered submissions on the pursuer's substantive case, but the second defender has not. The pursuer says that he is a campaigner for Scottish independence. He pleads that as a campaigner, and as a voter in the forthcoming Scottish Parliamentary elections, he has a sufficient interest to give him standing to seek the orders that he does. He says he and other campaigners and voters need to know the legal position before the election, in order to determine how to campaign, and how to cast their votes.

[5] On 30 July 2020 Lady Poole refused the pursuer's application for a protective expenses order: *Keatings v Advocate General for Scotland and others* 2020 CSOH 75.

[6] The Scottish Ministers initially lodged defences, as the third defender in the action. They moved to withdraw those defences, and the motion was granted on 17 August 2020.

On a number of occasions after the Scottish Ministers withdrew defences, the pursuer commented on what he described as the “unconstitutional ambiguity” of the second defender’s position in the action, and called on him to clarify whether he was representing the Scottish Government, of which he was a member (Scotland Act 1998, section 44); or appearing in the public interest and as the appropriate constitutional defender of the powers of the Scottish Parliament.

[7] The second defender confirmed in written and oral submissions at the procedure roll debate that his interest in defending these proceedings was, acting in the public interest, to advance legal submissions directed to ensuring the proper interpretation and operation of the law as it bears on the constitutional structures created by the 1998 Act. His position was that it would not be legally sound for the court to be drawn into expressing any view, in anticipation of a bill, on the questions of legislative competence posed by the conclusions of the summons.

[8] The reference to the “proposed act of the Scottish Parliament” in the second conclusion is to a document first referred to in the pleadings by the second defender in a minute of amendment. He averred that “The Scottish Government has indicated its intention to publish a draft bill before the end of the current parliamentary session (which is anticipated to be 21 March 2021).” The reference to a draft bill comes in turn from a document entitled “Protecting Scotland, Renewing Scotland” published by the Scottish Government in September 2020, and described in the second defender’s inventory as “the programme for government”. An extract from it is 18/1 of process. All parties refer to it in the pleadings. It contains the following statement:

“The Scottish Government has a democratic mandate in this Parliament to offer the people of Scotland their right to choose a future as an independent country in which decisions about Scotland are taken by the people who live here. In 2014, shortly

before the referendum of that year, the political leaders of the campaign against Scottish independence affirmed an important principle when they collectively agreed:

‘Power lies with the Scottish people and we believe it is for the Scottish people to decide how Scotland is governed.’

The right of people in Scotland to decide their own future was also unanimously acknowledged in the Smith Commission report of November 2014 which said: ‘It is agreed that nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose.’

In line with its mandate, constitutional precedents and agreed all-party principles, the Scottish Government sought an agreement on an order under Section 30 of the Scotland Act 1998 to place a referendum on independence beyond legal challenge. The Scottish Parliament has already passed into law the Referendums (Scotland) Act which sets out the framework, campaign rules and conduct of polls and counts for any referendum that is within devolved competence. A future independence referendum would apply these rules. Under the terms of the Referendums (Scotland) Act, a further Act of the Scottish Parliament is required setting the question to be asked and the date of the poll before a referendum can be held.

Because of the pandemic the Scottish Government paused work on independence and it will clearly not be possible to organise and hold an independence referendum that is beyond legal challenge before the end of the current Parliamentary term next year.

However, before the end of this parliament, to set out the terms of a future referendum clearly and unambiguously to the people of Scotland, the Scottish Government will publish a draft bill for an independence referendum setting out the question to be asked, subject to appropriate testing by the Electoral Commission, and the timescale in which, within the next term of Parliament, we consider the referendum should be held taking account of the development of the COVID-19 pandemic at the time of publication, and ensuring the flexibilities to respond to any further restrictions caused by it.

If there is majority support for the bill in the Scottish Parliament in the next term, there could then be no moral or democratic justification whatsoever for any UK government to ignore the rights of the people of Scotland to choose our own future.”

[9] The pursuer twice sought recovery of the “draft bill” and other associated documents by means of a motion for commission and diligence, first on 30 September 2020, and then again on 12 January 2021. On both occasions I refused to grant the motion. I record elsewhere in this opinion the arguments of parties and the reasons for my decisions

on those motions. After my decision on 12 January senior counsel for the pursuer asked me to record my reasons in the Minute of Proceedings. I indicated that I would in this opinion, following the debate, set out those reasons, along with a reasonably full narration of the procedural history of the case. That seemed to me the preferable course, in the interests of open justice. The procedural history of the case between 30 September 2020 and 12 January 2021 forms an appendix to this opinion.

[10] At the debate, parties were agreed that there should be a departure from the practice whereby the defenders spoke first in support of all their preliminary pleas. Senior counsel for the pursuer spoke first in support of his preliminary plea for decree de plano, and in response to the defenders' preliminary pleas. All parties had lodged written notes of argument, and thereby had provided detailed notice of their positions. The order in which matters are addressed in this opinion does not reflect the order in which oral submissions were made.

The defenders' preliminary pleas

[11] The first defender's pleas in law focused contentions that the proceedings were academic; incompetent; and premature; that the pursuer lacked title, interest and standing; and that it was contrary to the constitutional principle of the separation of powers to grant the declarators sought. The second defender advanced similar contentions under reference to pleas that the pursuer lacked title, interest or standing; that the issues the pursuer raised were academic and hypothetical; that the case was in reality an application to the supervisory jurisdiction; that the declarators sought were vague and uncertain; and that to grant the declarators sought would be inconsistent with the structures established by the 1998 Act. The second defender's final plea in law is unusual, and I quote it in full:

“Esto the Court were to consider that the action ought to proceed as an application to the supervisory jurisdiction of the Court, no order in terms of rule 58.15(1) should be made because (i) the pursuer would lack a sufficient interest in the subject matter of the application and (ii) the application would have no real prospect of success (section 27B(2) of the Court of Session Act 1988) because (a) no live question arises at this time which calls for the Court’s determination (see Answers 4 and 5); (b) the Court should not express views on legislative competence in the abstract (see Answers 6 & 17); and (c) for the Court to do so would not be consistent with the constitutional structures established by the Scotland Act 1998 (see Answers 4 and 6).”

[12] The second defender does not advance submissions on the relevancy of the pursuer’s substantive case. His position is that it would be constitutionally wrong for the court to entertain those arguments.

[13] The first defender moved also his preliminary plea to relevancy and specification. He did so in relation to the pursuer’s positive case regarding the legislative competence of the Scottish Parliament. I deal with that elsewhere in this opinion.

First defender’s submissions

[14] The first defender raised the preliminary issues foreshadowed in his first to fourth and fifth to ninth pleas in law. On the basis of these he asked the court to refrain from reaching a view on the substantive issue raised by the pursuer. If the court were justified in reaching a view on it, the pursuer’s interpretation of the 1998 Act was wrong. If I were satisfied that the action fell to be dismissed as a result of the defenders’ preliminary pleas, I should not express any view on the merit or otherwise of the pursuer’s positive case.

[15] It was the function of the court to determine, where necessary, where the limits of powers lay: *R (Miller) v Prime Minister* [2020] AC 373 (“*Miller 2*”), paragraph 38. It was not, however, necessary for the court to decide where the limits of the Scottish Parliament’s powers lay in this action. There was no unqualified right to seek a ruling from the Court on an issue of law: *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111,

paragraphs 22, 55. Actions seeking declarators that had no practical effect were hypothetical or academic, and incompetent: *Wightman*, paragraphs 22, 27. The present action was therefore incompetent.

[16] The 1998 Act provided a scheme for determining before Royal Assent whether a proposed Act would be within the powers of the Scottish Parliament. The conditions for an act were that a bill be passed by the Parliament, and that it receive Royal Assent on submission by the Presiding Officer: sections 28(2) and 32. By the time of the introduction of the bill in the Parliament, the person in charge of it must state that in his view its provisions would be within the Parliament's legislative competence, and the Presiding Officer must do likewise: section 31(1), (2). After introduction, a bill would pass through various stage, at the last of which MSPs would decide whether to pass it: section 36(1).

[17] After the bill was passed, a law officer might refer the question of whether it or any of its provisions would be within legislative competence of the Parliament to the Supreme Court: section 33(1) and (2). The Presiding Officer might not submit the bill for Royal Assent while a law officer's reference was pending or in its unamended form if the Supreme Court had decided, on a law officer's reference, that the bill or any of its provisions would not be within the legislative competence of the Parliament: section 32(2),(3)(a).

[18] The pursuer did not aver that a bill for a referendum on whether Scotland should be an independent country had been or would be introduced in the Scottish Parliament. The court could not assume that a bill would ever be introduced.

Sufficient interest

[19] The pursuer's qualification to request the declarators fell to be determined under the common law test, namely whether he had sufficient interest, relevant to public law

applications to the supervisory jurisdiction, rather than the private law test of title and interest: *AXA General Insurance Company Ltd v Lord Advocate* 2012 SC (UKSC) 122 at paragraphs 58, 62, 159, 169, 171; *Wightman* paragraphs 24, 26. The essence of sufficient interest was that the party was “directly affected”. The qualification “directly” created the necessary distinction between a mere busybody, and a person affected by or having a reasonable concern in the matter to which the application related: *AXA*, paragraph 63; *Walton v Scottish Ministers* 2013 SC (UKSC) 67, paragraphs 91 - 92. A busybody was someone who interfered in something with which he had no legitimate concern: *Walton*, paragraph 92. A personal interest need not be shown if an individual was acting in the public interest and could genuinely say that the issue directly affected the section of the public that he sought to represent: *AXA*, paragraph 63. The type of interest required varied with the context and what would best serve the purpose of maintaining the rule of law: *AXA* paragraphs 169 - 170; *Walton*, paragraphs 90, 94. Relevant considerations included whether denial of the right to bring proceedings would prevent the matter from being brought before the court or vindication of the rule of law: *AXA*, paragraph 170, *Walton*, paragraph 93. The rule of law did not require that every allegation of unlawful conduct by public authority must be examined by a court: *AXA*, paragraph 170. *Wightman* involved a “liberal” exercise of the court’s jurisdiction to declare what the law was. The court had, however, been discriminating as to standing, in finding positively only that MPs had sufficient interest in the matter. Although the pursuer was a voter, there were limits to when a voter could come to court, particularly where no unlawful act was alleged. The court’s role was not to advise campaigners: *Vince v Advocate General* 2020 SC 90, paragraph 10.

[20] The pursuer failed the sufficient interest test. He was a busybody. The 1998 Act left it to the Scottish Parliament to determine its own policy goals and other considerations relevant to the exercise of its powers. The pursuer was not directly affected by the subject matter of the action, because the action was about whether a body of which he was not a member had a power that it was not proposing to use. For similar reasons, he did not represent anyone who was directly affected. The only people with sufficient interest before Royal Assent were those exercising the powers and duties conferred by the 1998 Act.

[21] The rule of law did not require the action to proceed. No legislation was proposed. If it were, the scheme in the 1998 Act provided for the rule of law to be vindicated, including by law officers in the public interest without any need for the present action: *Walton*, paragraph 153, *Keatings*, paragraph 15 - 16. If the action were to proceed it would do mischief to the rule of law, as it would undermine a scheme prescribed by Parliament for the assessment of whether a proposed act of the Scottish Parliament was within its legislative competence.

[22] The pursuer did not claim any knowledge of the 1998 Act or the constitution that would qualify him to ask the court to rule on the powers of the Scottish Parliament: *Walton*, paragraph 153. He could not cure a lack of interest by calling himself a campaigner or claiming support from other people who also lacked sufficient interest: *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260, paragraphs 1, 37. Informed by the legal advice he had obtained, he was free to campaign for the Scottish Parliament to legislate for the holding of a referendum on whether Scotland should be an independent country.

Academic question

[23] The action was academic; the declarators sought would have no real practical effect. There was no bill - either a government or a member's bill - that had been introduced. The current Scottish Government's policy on a referendum on Scottish independence was not to hold one before the elections to the Scottish Parliament due to be held on 6 May 2021; and to "*publish a draft bill*" (rather than introduce a bill in the Scottish Parliament) before those elections. The first defender made those submissions under reference to the content of *Protecting Scotland, Renewing Scotland*. Depending on the outcome of the elections, it was the Scottish Government's policy to seek to obtain an order under section 30 modifying the 1998 Act to give the Scottish Parliament the power to legislate for one. The first defender so submitted by reference to the content of defences that the Scottish Ministers had lodged (but later withdrawn) in the present action.

[24] Second, the action served no practical purpose because the declarator was abstract. There was no act of the Parliament test by reference to whether it related to reserved matters. Section 29(3) provided that the question whether a provision was outside legislative competence for that reason "is to be determined...by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances". Those circumstances included the ones revealed by the bill and the background materials to the bill, such as papers that preceded introduction, explanatory notes, policy memoranda: *Martin v Most* 2010 SC (UKSC) 40, paragraph 25. Neither any bill nor those materials was available to the court in this action. The court could not rule on the purpose or effect of a provision if it had no provision to consider. If the Scottish Parliament did intend to legislate for a referendum on Scottish independence, the question whether the intended legislation related to a reserved matter would have to be considered when any such bill was introduced

or passed. The same applied to the question whether legislation was outside legislative competence for any other reason. The court could not affirm legislation that it had not seen.

[25] Third, the action was analogous to *Wightman* before the notification of withdrawal: paragraph 59.

[26] The second declarator served no purpose because the “proposed Act of the Scottish Parliament” did not exist.

Prematurity

[27] The action, if not academic, was premature. The court had nothing to assess for legislative competence: *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland)* [2019] UKSC 1, paragraph 28; *Keatings* at paragraphs 16 and 18. The court lacked the material to carry out the assessment. It was too soon to know whether the issue required to be determined by the court. There would be no legislation without a bill, and the procedures in sections 31 to 33 might resolve the issue.

[28] The effect of the scheme of provisions in the 1998 Act for determination of the legislative competency of an act prevented the court from entertaining the action: *Keatings*, paragraphs 16 - 17. Those provisions made the action unnecessary. The constitutional function of the court in the field of public law was to ensure that public authorities respected the rule of law. The court could discharge that function before Royal Assent under section 33(1) and (2). This also defeated the pursuer’s reliance on criminal offences created by the Referendums (Scotland) Act 2020: the question whether a referendum was *intra vires* would have to be tested (a) in relation to the specific question which it is proposed the

referendum should ask and (b) under the procedures set out in section 33 of the Scotland Act.

[29] Second, they provided for the procedures that the UK Parliament intended to be followed in working out before Royal Assent if a proposed Act of the Scottish Parliament would be within its legislative competence. The correct interpretation of the provisions was that those procedures were (implicitly) exclusive, and therefore that the action was contrary to the 1998 Act. Alternatively, if the procedures were not exclusive, the common law basis for refusing a declarator on the ground of there being an alternative remedy (eg *MIAB v Secretary of State for the Home Department* 2016 SC 871, paragraph 73) applied by analogy. Chaos would result if applications of the present sort were to co-exist with the statutory scheme.

[30] Third, a decision on the merits in this action would be contrary to the separation of powers. The separation of powers was a constitutional principle: *Miller 2*, paragraph 40. The courts should not interfere with the proceedings of the legislature: *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), paragraph 46. It was incompetent for the court to grant a remedy that did so: *Maugham, Petr* 2019 SLT 1313, paragraph 22. A decision by the court that the Scottish Parliament did or did not have the power to legislate for a referendum on Scottish independence would intrude on the performance by the person in charge of a bill proposing such legislation of his duty under section 31(1); the performance by the Presiding Officer of his duty in relation to that bill under section 31(2); and the MSPs' decision whether to pass that bill under section 36(1): *Maugham*, paragraph 22; *R v HM Treasury, ex parte Smedley* [1985] 1 QB 657 at 667B - C and 672B - G.

Terms of declarators

[31] An action for declarator was incompetent unless the declarator sought is precise and unambiguous in its terms: *Aberdeen Development Co v Mackie, Ramsay & Taylor* 1977 SLT 177 at 181. The first defender asked, rhetorically, by way of submission, what was meant by a “referendum on whether Scotland should be an independent country”, and what was the power “to legislate for the holding of” that referendum? He queried whether that meant any legislation. The second declarator was not precise because it was not clear what the Scottish Government’s proposed Act of the Scottish Parliament was.

Second defender’s submissions

[32] The submissions of the second defender in support of his preliminary pleas were largely similar to those of the first defender. I set out in more detail only those areas in which the second defender said something more than, or different from, the first.

The 1998 Act

[33] In addition to submissions about the effect of the provisions of the 1998 Act on the jurisdiction of the court as to legislative competency prior to Royal Assent, the second defender submitted that it was open to individuals to challenge legislation after it had been brought into force, as in *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29. The second defender drew attention not only to the provisions of the 1998 Act, but those of Chapter 9 of the Standing Orders of the Scottish Parliament. The jurisdiction of the Supreme Court in a reference by a law officer was limited to determination of legislative competence, and did not include wider common law grounds for review that might be available post-assent: *UK Withdrawal from the Continuity (Scotland) Bill*, paragraph 26. That supported the

proposition that no court other than the Supreme Court had jurisdiction to consider the competence of a bill before Royal Assent.

[34] The powers of the court in proceedings against the Parliament itself were strictly limited: section 40; *Whaley v Lord Watson of Invergowrie* 2000 SC 34.

Hypothetical/premature

[35] There were reasons of policy as well as constitutional principle why the court should not adjudicate where that would not determine a live issue directly or indirectly affecting the rights of a party: *R v Secretary of State for the Home Department ex parte Wynne* [1993] 1 WLR 115 at 120A-B; *R (Raw) v Lambeth Borough Council* [2010] EWHC 507 (Admin), paragraph 53; *Turner's Trs v Turner* 1943 SC 389.

[36] The policy set out by the Scottish Government in *Protecting Scotland, Renewing Scotland* did not alter the position of the second defender as to why the court should decline to entertain the action.

[37] The prematurity plea would fall to be sustained even if the pursuer were in a position to proffer a draft bill, or even if a bill were pending before the Scottish Parliament. Any proceedings before a bill received Royal Assent would be premature.

Proceedings in substance an application to the supervisory jurisdiction of the court

[38] While the first defender characterised the jurisdiction being invoked as “a standalone jurisdiction to pronounce a declarator advising as to the law”, the second defender submitted that the pursuer was in substance making an application to the supervisory jurisdiction of the court. This was not a “technical” plea. Parliament had imposed particular procedural requirements on such applications, and the observance of the correct procedures

was essential to the orderly progress of litigation: *Wightman v Advocate General for Scotland* 2018 SC 388, paragraph 9; *Prior v Scottish Ministers* 2020 SLT 762, paragraph 37.

[39] The pursuer did not identify any legal right or interest that the defenders were infringing, or which required clarification; proceedings brought by summons generally involved the vindication of a legal right: *AXA*, Lord Reed, paragraphs 159, 161. He was inviting the court to determine a question of vires, albeit an abstract one, namely the extent of the legislative competence of the Scottish Parliament. The jurisdiction was not that exercised by the court in *Wightman*. If the court were to consider that the proceedings should be treated as a petition for judicial review, it should conclude that the requirements of permission in terms of section 27B(2) of the Court of Session Act 1988 were not satisfied.

Pursuer's submissions

[40] Senior counsel, in the course of his submissions in support of his preliminary plea for decree de plano, made submissions about the constitution of the United Kingdom that I understood to support not only that plea, but his response to the defenders' preliminary pleas. Those submissions are summarised elsewhere in this opinion.

[41] The preliminary pleas that that court was being asked to reach a decision in the present case in a manner inconsistent with the constitutional structures established by the 1998 Act were without merit. The Supreme Court in *AXA General Insurance Limited v Lord Advocate* 2012 SC (UKSC) 122 confirmed that the 1998 Act was not to be read as a standalone constitutional framework document which, within the four corners of its text, definitively and completely sets out the powers, duties and obligations of the Scottish Parliament or the bases upon which and by whom these might be determined by the court: Lord Reed, paragraphs 136-139, 142, 150, citing with approval *Whaley v Lord Watson of*

Invergowrie 2000 34, Lord President (Rodger) at 348, 349. There was no basis for the proposition that before Royal Assent questions of legislative competence were exclusively for those persons identified by the 1998 Act as having a relevant interest in the proposed legislation, and exercising powers conferred by the act. Similarly there was no basis for the propositions that the provisions were implicitly exclusive, or that they constituted an alternative remedy. The processes for which provision was made in the 1998 Act excluded the pursuer, and would come too late for him, as they could be used only after he had cast his vote for the May 2021 Scottish Parliamentary elections.

[42] The second defender's submissions as to the significance of section 40 were not supported by the analysis of the Lord President in *Whaley* at 349H to 350D, and Lord Prosser, concurring, at 357F-358E.

[43] The current Scottish Government had made the legal question of whether the Scottish Parliament had power to legislate for an independence referendum a central election issue. There was a dispute between the Scottish Government and the UK Government about that. Any suggestion that the legal issue should be clarified after the election risked fraud on the electorate. It was not properly open to the Scottish Government to campaign for re-election on the basis that, if re-elected to power, it would purport to act beyond the limits of the powers imposed on it by law. That was contrary to the principle of the rule of law.

[44] The defenders' preliminary arguments amounted to an assertion that the public should accept that it was not their role to question politicians. The ultimate arbiter of political accountability was the vote from individuals in Scotland at elections. The pursuer, as a campaigner and as a voter, was entitled to seek an answer to the specific legal question of whether the route that was being proposed by a significant proportion of those in favour

of Scottish independence was a legally viable route. The answer to that question informed the campaigning and the pressure placed by that campaigning on the elected politicians.

[45] Without the answer sought by declarator in this action, the pursuer would be faced with suggestions that the proposed route was “riven with legal pitfalls”. The Scottish public were entitled to go into an election, knowing whether those pitfalls existed so that the election votes were cast in full knowledge of the law. It was not appropriate in a modern democratic society to require voters to cast their votes where there was a “known and wholly fundamental legal ambiguity” within the issue “that without doubt [would] be the central issue of the upcoming elections to the Scottish Parliament.”

[46] The decision of the First Division in *Wightman v Secretary of State for Exiting the European Union*, 2019 SC 111 was one to pronounce an advisory declarator of law. It entertained the proceedings, and provided a remedy, although the UK Government’s stated position was that even if the notice could be unilaterally withdrawn it would not be, and in circumstances in which there was no vote contemplated or ever initiated before the UK Parliament requiring the UK Government to withdraw its notice.

[47] The action was not premature. No government bill could be introduced without a statement in terms of section 31(1). It was the legal accuracy of that claim that the pursuer required to have determined in order to cast his vote on the basis of proper information. There was a real question of law for the court to consider to allow voters to exercise their rights and responsibilities as voters. The pursuer had standing as a voter in the forthcoming election. He referred to *Crotty v An Taoiseach* [1987] IR 713 which affirmed the standing of an individual citizen to challenge the planned actions of the Irish Government to enter into, ratify, and incorporate into Irish law changes in the European Treaties without a referendum.

[48] The action was not hypothetical. There was a live dispute. The Scottish Government intended to publish a draft bill, and there would be little time available to campaign to support it, or raise concerns as to its lawfulness.

[49] The action had neither the purpose nor effect of binding the hands of the Scottish Government or giving advice to it. No government or legislature was bound to act or refrain from acting in a particular way as a result of the action. It did not breach the separation of powers. To insist that the courts might become involved after an action is taken was to take a view of public law in Scotland which is not consonant with the current understanding of the constitution, or with the decision in *Wightman*. The pursuer sought legal certainty prior to the holding of any such referendum so as to prevent the constitutional paralysis which would result from a retrospective determination that an already-held referendum was outwith the legislative competence of the Scottish Parliament. Members of the democratically elected Scottish Parliament - who were accountable to the Scottish electorate, among them, the pursuer - had to know, in advance of making such a determination, whether such actions would be *intra vires*.

[50] In the course of oral submissions senior counsel placed some emphasis on the difficulty for MSPs of raising the issue in litigation themselves. In the absence of a protective expenses order, they risked insolvency if faced with awards of expenses against them. He submitted that the expenses would run into "six figures". I note that that estimate is in line with an estimate of expenses produced in the pursuer's third inventory of productions for the purposes of the application for a protective expenses order. The question raised by the pursuer was one of law and was for the court. It did not involve interference by the court on matters of policy.

[51] Schedule 6 to, and sections 35 and 36 of, the Referendums (Scotland) Act 2020 created a set of criminal offences which applied when a referendum was being held throughout Scotland in pursuance of any provision made by or under an Act of the Scottish Parliament. Criminal liability for such offences was predicated and conditional on the *intra vires* nature of the referendum to which they are being applied. Certainty as to whether a referendum was lawful would be required otherwise there would be doubt as to whether particular conduct would attract penal sanctions.

[52] The proceedings had correctly been initiated by summons, rather than petition for judicial review, in accordance with the approach of the Lord President in *Wightman*, at paragraphs 21 and 26. Public authorities ought not to engage in litigation tactics designed to avoid or delay the determination of the merits of public law cases: *Taylor v Scottish Ministers* 2019 SLT 228; *Ruddy v Chief Constable for Scotland* 2013 SC (UKSC) 126.

[53] Courts had in the past pronounced advisory declarators on the law as it would apply prospectively, rather than a limited statement of the law as it was being applied in order to resolve a specific dispute: *Napier v Scottish Ministers* 2005 SC 307; *Davidson v Scottish Ministers* 2006 SC(HL) 41; *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin).

[54] The pursuer had standing. The questions for the court were whether the declarator was designed to achieve a practical result, and whether the legal question posed was in dispute. If the answers to those were in the affirmative, the action was not hypothetical or academic, and the pursuer had standing. I do not repeat here all of the detailed written submissions that the pursuer produced on these matters. I take pro veritate his averments about the activities in which he engages as a political campaigner and activist.

[55] There was a dispute as to whether the Scottish Parliament had power to legislate for a referendum on Scottish independence. The pursuer, those supporting him and all voters in Scotland had a constitutional right to know the correct position in law. It would be directly relevant to the decision of every individual in how to cast their votes in the forthcoming May 2021 elections to the Scottish Parliament. The First Division had repeatedly emphasised the essential role which courts play in a democracy in clarifying the law on issues of constitutional importance in order to allow the machinery of democracy properly to function: *Wightman, Cherry*. The defenders' arguments that the 1998 Act excluded legal issues as to the extent of the Scottish Parliament's legislative competency being brought before the court by ordinary members of the public betrayed a misunderstanding of the sovereign role of the people in democracy and a misunderstanding of the court's constitutional role.

[56] The pursuer set out in his written argument a series of statements by the Prime Minister and the First Minister with a view to demonstrating the existence of a dispute. It is the position of the United Kingdom government that the Scottish Parliament does not have that power. The Lord Advocate does not advance any contention in relation to that question. The Scottish Ministers are no longer a party to this action. I do not know what they might contend about the extent of the legislative competence of the Scottish Parliament. For the reasons that I set out at paragraph 128 I do not require to come to a view as to the nature or extent of dispute between the administrations, or the intentions of the Scottish Government, in order to determine whether I ought to consider the substantive matters raised by the pursuer.

[57] The terms of the declarators sought were not too vague. They sought to make it plain that the Scottish Parliament had power under the 1998 Act, as amended, to legislate for

and hold a referendum on Scottish independence without requiring the consent of the UK Government. The terms of the first declarator directly reflected the terms of section 1(2) of the Scottish Independence Referendum Act of 2013.

Legislative competence - the pursuer's positive case

Pursuer's case

[58] Senior counsel made submissions regarding the history of the constitution, and in particular regarding the extension of the franchise over a prolonged period. The constitution had never been fixed. The United Kingdom was a relatively new country, constitutionally. The present policy existed because of the changes that had occurred in the 1920s in the governance of Ireland: the Government of Ireland Act 1920, the Irish Free State (Agreement) Act 1922, the Irish Free State Constitution Act 1922 and in particular the option exercised by the Parliament of Northern Ireland in terms of Article 12 of the 1921 Treaty between Great Britain and Ireland. The constitution was recent and modern, and had evolved from a sectarian oligarchy into a democracy. He submitted that the arc of the constitution bent towards democracy, and that the tendency was most pronounced in the devolved administrations in Scotland and Wales, with the extension of the franchise in the Scottish Elections (Franchise and Representation) Act 2020, and the Senedd and Elections (Wales) Act 2020.

[59] Ecclesiology both embodied and reflected the early modern age's approach to constitutionalism. Whereas England had been episcopal, monarchical and Erastian, Scotland had always subscribed to a "two kingdom" theory, in which church and state were separate, and the king was regarded as "God's silly vassal", a quotation attributed to Andrew Melville (1545-1622). Senior counsel referred in passing also to Buchanan's *De jure*

regni apud Scotos (1579); power was held on trust for the people, was never ceded irrevocably by them, and was always limited. The Scottish constitutional tradition was opposed to elective dictatorship, in which all power was ceded to institutions. This tradition had not been altered by the 1707 Union: *MacCormick v Lord Advocate* 1953 SC 396, Lord President (Cooper) at 411. Legal theory must give way to practical realities in a way that was incompatible with a classically Diceyan conception of Parliamentary sovereignty: *Blackburn v Attorney General* [1971] 1 WLR 1037, Lord Denning MR, at 1040E-G. The Supreme Court had affirmed in *Cherry* the enforceability of the constitution by the courts.

[60] The court was the guardian of democracy. The submission for the defenders reflected a neo-Diceyan vision of the constitution. Democracy was founded on the principle that each individual had equal value; it valued everyone equally, even if the majority did not: *Ghaidan v Godin Mendoza* [2004] 2 AC 557, Baroness Hale, paragraph 132.

[61] The United Kingdom was the creation of predecessor Parliaments of the predecessor nations which united to form it. Senior counsel referred to the Union with Scotland Act 1706 of the English Parliament; the Union with England Act 1707 of the Scottish Parliament; the Union with Ireland Act 1800 of the British Parliament; the Union with Great Britain Act 1800 of the Irish Parliament; the Treaty of 1921 and the Acts of 1922 already referred to; and the Ireland Act 1949. As a matter of UK constitutional law, a union of the constituent nations might be brought to an end by a constitutional process duly mandated by and consistent with the UK's own constitutional law and with public international law. Any statement of permanency was one of political aspiration rather than binding obligation.

[62] The Scottish Parliament was a democratically-elected legislature, and its powers to pass legislation were limited by law (section 29 and Schedules 4 and 5 to the 1998 Act); it did not enjoy the sovereignty of the Crown in Parliament: *AXA General Insurance Ltd v*

Lord Advocate 2012 SC (UKSC) 122, Lord Hope, paragraph 46; *Advocate General's References on the UK withdrawal from the EU (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13, paragraph.

[63] Section 63A(1) of the 1998 Act (inserted by the Scotland Act 2016) provided: “(1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements”. Section 63A(3) declared “that the Scottish Parliament and the Scottish Government [were] not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum”.

[64] Although the devolved Scottish Parliament was created by act of Parliament, it did not follow that the Scottish Parliament owed its legitimacy to Parliament (or indeed the UK Government). It derived its legitimacy from its accountability to the electorate (one now determined by the provisions of Scottish Elections (Franchise and Representation) (Scotland) Act 2020). The 1998 Act was an essential element of the architecture of the modern United Kingdom, and a constitutional statute: *Somerville v Scottish Ministers* 2008 SC (HL) 45. Lord Mance, paragraph 169; *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 WLR 1219, Lord Carnwath, paragraph 120. Its provisions were not subject to implied repeal by later non-constitutional Acts of Parliament: *BH v Lord Advocate* 2012 SC (UKSC) 308, Lord Hope, paragraph 30.

[65] Regular elections and occasional referendums were among the measures that are required in order to ensure the ongoing accountability and legitimacy of a legislature. The 1998 Act included a power to hold referendums which included power to hold a referendum on whether Scotland should be an independent country.

[66] Schedule 5 contained general reservations to the UK Government of matters outwith the legislative competence of the Scottish Parliament, including - at paragraph 1(b) in Part I,

under the heading “the Constitution” - “[t]he following aspects of the constitution are reserved matters, that is ... (b) the Union of the Kingdoms of Scotland and England”.

[67] Senior counsel referred to statements made during Parliamentary debates in 1998 in relation to the Scotland Bill regarding that reservation. The then Secretary of State for Scotland, Donald Dewar MP, had said in the House of Commons:

“If one assumed that [a referendum] is a way of changing the constitution, no, it is not in the power of the Scottish Parliament to change the constitutional arrangements. [...] A referendum that purported to pave the way for something that was ultra vires is itself ultra vires. That is a view that I take and one to which I will hold. But, as I said, the sovereignty of the Scottish people, which is often prayed in aid, is still there in the sense that, if they vote for a point of view, for change, and mean that they want that change by their vote, any elected politician in this country must very carefully take that into account. [...] It is my view that matters relating to reserved matters are also reserved. It would not be competent for the Scottish Parliament to spend money on such a matter in those circumstances.”

[68] Lord Mackay of Drumadoon, the then Conservative Shadow Lord Advocate advised the House of Lords of his view on the same provisions:

“I believe that it would be perfectly possible to construct a respectable legal argument that it was within the legislative competence of the Scottish parliament to pass an Act of Parliament authorising the executive to hold a referendum on the issue of whether those who voted in Scotland wished Scotland to be separate from the UK. It would be perfectly possible to construct an argument that it would assist members of the Scottish parliament in the discharge of their devolved legislative and executive duties to be aware of the thinking of Scottish people on that very important issue. [...] But I remain convinced that the law on this matter should be clarified. If it is not then the festering issue as to whether the Scottish parliament is competent to hold such a referendum will rumble on.”

[69] Senior counsel maintained that he was entitled to rely on those statements.

Parliamentary privilege did not protect statements from being referred to before the courts:

Toussaint v Attorney General of St Vincent and the Grenadines [2007] 1 WLR 2825

paragraphs 16-17, 31. It could not be invoked to prevent the courts from carrying out their

constitutional function: *Whaley v Watson*, 2000 SC 340; *Craig v Advocate General for*

Scotland 2019 SC 230.

[70] A referendum which led to something which would be ultra vires was not in itself ultra vires. The holding of a referendum did not implement the result or outcome of that referendum. A referendum was not the triggering of a bullet which was inevitably going to “hit the target of a dissolution of the Union”: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61, Lord Carnwath (dissenting), paragraph 262. Neither a referendum on Scottish independence, nor a decision in a referendum in favour of it would be an act of secession, or automatically result in the dissolution of the Union. Any attempt to dissolve it would necessarily involve complex and lengthy negotiations.

[71] If the first defender meant to introduce by his reference to the interest of the people of the United Kingdom in whether the Union was dissolved an argument as to who should be enfranchised in any future referendum, that was a matter for political judgment, and irrelevant to the present action.

[72] The goal of statutory interpretation was to discover the intention of the legislation and that intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose: *R (Black) v Justice Secretary* [2018] AC 215, Baroness Hale, paragraphs 36(3), (4). Parliaments were presumed not to legislate idly, or in vain. Individual provisions in Acts of Parliament were intended to have specific effect.

Parliament must have considered that its listing of “the Union of the Kingdoms of Scotland and England” as a reserved matter in Schedule 5 SA was not, of itself, sufficient to prevent the Scottish Parliament from legislating to modify provisions of the Union with Scotland Act 1706 and the Union with England Act 1707. Otherwise, the specific reservation under Schedule 4 of the SA 1998 of “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” would be otiose. In

ordinary language, Articles 4 and 6 of the 1706 Act would clearly be said to “relate to” the “Union of the Kingdoms of Scotland and England”.

[73] For distinct meanings and effect to be given to both paragraph 1(2)(a) in Schedule 4 and to paragraph 1(b) in Part I of Schedule 5 SA, a narrower approach than ordinary language might otherwise indicate had to be given to the phrase “legislation which ‘relates’ to the Union of the Kingdoms of Scotland and England.” The 1998 Act used the phrase “relates to reserved matters” in defining the limits on the legislative competence of the Scottish Parliament as a technical term of art: (section 29(3) SA).

[74] The interpretation of constitutional statutes required a purposive approach to the proper interpretation of, and interplay between, the relevant statutory provisions. No explanation was necessary for resorting to purposive interpretation: *Attorney General’s Reference (No 5 of 2002)* [2005] 1 AC 167, Lord Steyn, paragraph 31.

[75] It was therefore first of all necessary to identify the actual purpose of any Scottish legislation making provision for an independence referendum: *Imperial Tobacco Ltd v Lord Advocate* 2013 SC (UKSC) 153, Lord Hope, paragraph 16. It was clear from the provisions of the 1998 Act that the Scottish Parliament might consult the people of Scotland about the possibility of effecting - in a manner which is consistent with the UK constitution - future change to the UK constitution. The exercise of such a power in such a manner would be a consultative exercise of a principle of democratic accountability consistent with principles of democracy and the rule of law and international norms. The exercise of such a power would be *intra vires*.

[76] The court should grant the first declarator. If it did so, being satisfied that it was appropriate to determine the substantive matter raised, it would have to make a determination as to further procedure with a view to adjudicating upon the second

conclusion. It should consider making an order for recovery of the draft bill referred to in the Scottish Government publication 18/1 of process.

First defender's submissions

[77] The legal propositions advanced by the pursuer were wrong.

[78] Section 29(2)(b) provided that a provision of an Act was outside the legislative competence of the Scottish Parliament so far as it related to reserved matters. Those were defined in Schedule 5: section 30(1). They included, in paragraph 1 of Part I, “The following aspects of the constitution ... (b) the Union of the Kingdoms of Scotland and England, (c) the Parliament of the United Kingdom”. Whether a provision related to a reserved matter was “to be determined ... by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”: section 29(3).

[79] The question of legislative competence was to be answered by looking at the rules laid down in the 1998 Act, rather than case law on how similar issues were determined in other jurisdictions: *Imperial Tobacco v Lord Advocate* 2013 SC (UKSC) 153, paragraph 13. The 1998 Act had to be interpreted in the same way as any other statute and according to the ordinary meaning of the words used in their statutory context: *UK Withdrawal From the European Union (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13, paragraphs 12, 60; *Imperial Tobacco* at paragraphs 14-15.

[80] It was necessary first to understand the scope of the subject matter that was reserved and then determine by reference to the factors in section 29(3) whether the provision under challenge related to it: *UK Withdrawal etc Bill*, paragraph 27. In order to relate to it, a provision of a Scottish Act must have more than a loose or consequential connection with a reserved matter. The purpose in section 29(3) might extend beyond its legal effect, but

purpose was not the same as political motivation. The circumstances to which regard was had under section 29(3) included the situation before enactment, in the assessment of which the usual legislative background materials might be taken into account: *Martin*, paragraph 25.

[81] The court could not apply those principles to decide in this action whether the proposition that the pursuer asked it to declare was correct, because no legislation was available for scrutiny. Even if it could, the proposition was wrong.

[82] The reservation in paragraph 1(c) of Part I of Schedule 5 encompassed the sovereignty of the UK Parliament (ie, its constitutional function as the ultimate source of legal authority, powers and privileges): *Withdrawal etc Bill*, paragraphs 61 - 63. Secession involved (at least) reduction in the UK Parliament's powers: *Moohan v Lord Advocate* 2015 SC (UKSC) 1 at paragraphs 17, 71, 91 and 102. Therefore Scottish independence would affect the reserved matters in both paragraph 1(b) and (c). A referendum on Scottish independence related to those matters within the meaning of that phrase in section 29(2)(b).

[83] First, in the absence of a bill and its background materials, it would be reasonable for the court to infer that the contemplated legislation to establish a referendum would be intended by the MSPs who would promote and vote for it as a means to secession. Support for that inference came from the First Minister's statement on 31 January 2020 that the pursuer cited: "To achieve independence, a referendum...must be legal and legitimate". Further support came from what the First Minister said in introducing the Programme for Government on 1 September 2020 (the pursuer relies on this in support of his second conclusion):

"That is why we will publish, before the end of this session of Parliament, a draft bill setting out the proposed terms and timing of an independence referendum as well as the proposed question that people will be asked in that referendum. Then, at next

year's election, we will make the case for Scotland to become an independent country, and we will seek a clear endorsement of Scotland's right to choose our own future."

[84] Second, a referendum would have more than a loose connection with the reserved matters. Again, since there were no bill provisions to construe, this was necessarily a matter of inference. It would be reasonable for the court to infer that the contemplated legislation would have the legal effect of authorising and requiring counting officers and registration officers in local authority areas to administer a vote and allocating resources to them to do so (as provided for in the Referendums (Scotland) Act 2020) on whether the Union of the Kingdoms of Scotland and England should end and whether the Parliament of the United Kingdom should cease to be sovereign in Scotland. By virtue, however, of section 29(3), to identify the purpose of legislation, the court might look beyond its legal effect. The purpose of legislation authorising a referendum on independence would be to seek to build momentum towards achieving independence, the termination of the Union of the Kingdoms of Scotland and England and the cessation of the sovereignty of the Parliament of the United Kingdom in Scotland.

[85] Third, the correct interpretation of the provisions of the 1998 Act about reserved matters was that their central aim was those matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament: *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29, paragraph 65. The people of the United Kingdom as a whole had an interest in whether the United Kingdom may be divided.

[86] Fourth, the White Paper, *Scotland's Parliament*, Cm 3658 was an aid to the interpretation of the reservations in Schedule 5. It cast light on their legislative aim: eg *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paragraph 56. Paragraph 5 stated,

“The Government believe that reserving power in these areas will safeguard the integrity of the UK”. That supported the proposition that measures which “questioned the integrity of the United Kingdom” were reserved.

[87] Fifth, statements during the passage of the Scotland Bill showed that the UK Parliament did not intend the 1998 Act to give the Scottish Parliament the power to legislate for a referendum on Scottish independence. Referring to the statements by the Secretary of State and the Shadow Lord Advocate quoted at paragraphs 67 and 68 of this opinion, the first defender submitted that the former might be used as an aid to interpretation, but the latter might not. It did not meet condition (b) in *Pepper v Hart* [1993] AC 593 at 640. It was neither made by a promoter of the bill nor necessary to understand a statement made by such a promoter. The statement by the Secretary of State supported the first defender's interpretation of the 1998 Act. The statement by Lord Sewel that caused the withdrawal of an amendment to add the words “including the holding of referendums on questions relating to the maintenance of that union” to what became paragraph 1(b) of Part I of Schedule 5, however, satisfied the condition already mentioned and, again, supported the first defender's interpretation of the SA. Lord Sewel said (*Hansard*, HL, Vol 592, Cols 854 - 855 at 7/8, MS p58):

“I wish the Committee to be in no doubt that as the Bill stands the Scottish parliament will not be able to legislate to hold a referendum on independence as the union of the kingdoms is already a reserved matter under Schedule 5. Explicit reference along the lines proposed by the noble Lord, Lord Rowallan, is just not needed. In determining what relates to a reserved matter, the government amendments tabled to Clause 28 are of help here, because they indicate that we must look at the purpose of what is being done. If the parliament passed an Act to hold a referendum about whether the Union should continue, it would thus clearly be legislating in relation to the reserved matter of the Union. Any such Act would be about the continuation of the Union and it would therefore be beyond the parliament's competence and would not be law. Perhaps I may go through the three steps that lead to that conclusion. First, the parliament cannot legislate if the provision relates to a reserved matter. That is Clause 28(2)(c). Secondly, the Union

of the Kingdoms of Scotland and England is a reserved matter by virtue of paragraph 1(b) of Part I of Schedule 5. Finally, legislation for a referendum on independence would be legislation about whether the Union should be maintained and would therefore relate to the reserved matter of the Union, and so be beyond the competence of the parliament. That is brought in by the purpose test which we discussed earlier.”

[88] Responding to the pursuer’s arguments, the first defender submitted that the circumstance that the 1998 Act was a constitutional statute was not, of itself a guide to interpretation: *Imperial Tobacco*, paragraph 15. Part I of Schedule 5 did not render 1(2)(a) of Schedule 4 otiose. The pursuer’s argument to the effect that it did conflicted with his contention that the 1998 Act should be interpreted “not in the way of a black-letter lawyer”, but purposively. Further, the provision was not otiose for the following reasons. Section 29 required that legislation of the Scottish Parliament satisfy both the requirements of Schedule 4 and those of Schedule 5: section 29(2)(b) and (c). The two schedules served different objectives. Schedule 5 reserved the subject matter of specified areas of law, while Schedule 4 protected certain provisions from modification: *Withdrawal etc Bill*, paragraphs 51, 99; *Martin*, paragraphs 21, 76-77. Even if the purpose of an Act did not relate to a reserved matter and it was therefore within competence in terms of section 29(2)(b) SA, it was still necessary that its provisions should not modify the law relating to reserved matters set out in Schedule 4. An Act might have a perfectly lawful object but seek to achieve it by an invalid method: *Imperial Tobacco* at paragraph 13. The correct approach to construction was that advocated by the first defender.

[89] As to the contention that Scottish independence would not inevitably follow a referendum, that depended on unspoken assumptions about the terms of the legislation providing for the referendum and the attitudes of the Scottish and UK Governments and

Parliaments that the court could not make. In any event, the purpose of provision in section 29(3) was not the same thing as its effect.

Decision

The nature of the court's jurisdiction

[90] I deal first with the question as to the nature of the jurisdiction I am being asked to exercise. This case is one, like *Wightman*, in which the court is asked to answer a question so as to provide a determination as to the existing state of the law on a particular matter. In *Wightman* the question was one of European Union law, and the court referred the matter to the Court of Justice. I do not accept the second defender's analysis that in seeking the declarators that he does, the pursuer in substance invokes the supervisory jurisdiction. That analysis does not engage directly with the case that the pursuer makes, namely that he, like the Member of Parliament in *Wightman*, requires advice as to the state of the law to enable him to vote on an informed basis. The pursuer is not asking the court to make an order to remedy or prevent any unlawful exercise of power on the part of the Scottish Parliament.

[91] The second defender has two pleas in law in relation to this matter. In his third plea in law he seeks dismissal on the basis that the action is incompetent. I quote in full his seventh plea in law at paragraph 11. Applications to the supervisory jurisdiction must be brought by way of petition for judicial review: RCS 58.1(1), (2), and these proceedings have been raised by means of a summons.

[92] In *Wightman* the respondent had contended that the proceedings lay outwith the scope of the supervisory jurisdiction. In making the reference the court did not require to decide as to the nature of that jurisdiction. The views expressed in *Wightman* on that point are all obiter. The Lord President (Carloway) observed at paragraph 21 that the traditional

method of securing an answer to a legal question posed is by action of declarator. At

paragraph 26, he said:

“[26] This petition does not now seek to review the actings of any body. The focus has shifted from one which sought to challenge what was alleged to be Government policy to one seeking a declarator irrespective of the Government’s position. The remedy sought, of reduction of a letter from the respondent, has gone. The contentions about the Government misdirecting itself or failing in relation to a duty of candour do not find their way into the remedies sought. There is no matter left to be reviewed. It may therefore be doubted whether the case falls within the supervisory jurisdiction of the court and thus within the scope of judicial review (RCS 58.3 (Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443 (S 69))) as defined in *West v Secretary of State for Scotland* (Lord President (Hope), delivering the opinion of the court, pp 412, 413). However, the court’s jurisdiction in public law matters is not confined to the review of decisions or failures to act. It may be that the case ought to have proceeded simply by way of an action of declarator rather than a petition for judicial review. However, no procedural point in that regard is taken.”

[93] Lord Menzies did not express a separate view as to the nature of the jurisdiction. He said he was in complete agreement with the Lord President as to his conclusions and reasoning. Lord Drummond Young rejected the respondents’ contention, saying the following at paragraphs 67-69

“[67] The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law.

[68] The present case is a somewhat unusual example of the supervisory jurisdiction, in that the court is ultimately asked to request the CJEU to answer a question on the scope of Art 50 of the TEU. That is not a form of procedure found in traditional administrative law within the United Kingdom. Moreover, the function of the question is to enable certain persons, notably MPs, to be properly informed about the present state of the law in relation to Art 50. Nevertheless, while the form of the proceedings and their effect is different from the traditional application of the supervisory jurisdiction, the underlying purpose is to ensure that those charged with voting on issues of vital importance to the United Kingdom are properly advised on

the existing state of the law. That in my opinion falls squarely within the fundamental purpose of the supervisory jurisdiction.

[69] There is, moreover, a clear analogy with the use of a declarator to advise a public body or authority as to what the law is or how it applies in a particular situation. Declarator has frequently been used as a remedy in the field of public law; its utility is obvious. In relation to EU law, however, it is not the Court of Session that can grant an authoritative declarator as to the state of the law but the CJEU. In order for that to happen, the Court of Session must pose questions to the CJEU. The answers to those questions, however, are functionally equivalent to a declarator issued by the Court of Session. Consequently I am unable to discover any procedural reason for not using judicial review procedure in such a way as to make a reference to the CJEU in order to obtain its opinion. For these reasons I would reject the argument that this petition for judicial review is procedurally or jurisdictionally incompetent.”

[94] The jurisdiction exercised in *Wightman* is properly characterised as one which is necessary to preserve the rule of law in the sphere of public law. There is no conflict between the views expressed by the Lord President and those expressed by Lord Drummond Young in that respect. That is apparent both from the passage quoted above, and from the opinion of the Lord President, at paragraph 24.

[95] The law as to the scope of the supervisory jurisdiction is that stated by the Lord President (Hope) in *West v Secretary of State for Scotland* 1992 SC 385. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that a person or body to whom a jurisdiction, power, or authority has been entrusted does not exceed or abuse that jurisdiction, power or authority, or fail to do what the jurisdiction, power or authority require. An excess or abuse of jurisdiction may involve stepping outside it: *West* at 413. The supervisory jurisdiction can be invoked if the Scottish Parliament acts outside legislative competence, as in *Christian Institute v Lord Advocate*. There is here no allegation that the Scottish Parliament has exceeded its powers. No order is sought from the court to reduce any act, or to order performance in relation to an omission. The pursuer seeks advice from the court as to what the powers of the Scottish Parliament are. While the questions focused

in the declarators raise issues of vires, these proceedings are not applications to the supervisory jurisdiction.

[96] I therefore repel the third and seventh pleas in law for the second defender.

[97] I observe that the point is, in the context of the point this litigation has reached, a sterile one. A debate has been conducted on other pleas which are capable of disposing of the action. I should have been reluctant to dispose of proceedings raising public law issues simply on the basis that they had been raised using the wrong procedure, for the following reasons.

[98] I accept that it is necessary to identify the nature of the jurisdiction that is being exercised. The Scottish Parliament legislated in the Courts Reform (Scotland) Act 2014 so as to impose particular requirements in relation to the exercise of the supervisory jurisdiction, by way of time limits and a requirement for permission, in what are now sections 27A to 27D of the Court of Session Act 1988. The Scottish Parliament's will, which is that applications to the supervisory jurisdiction be subject to those requirements, must not be frustrated by the use of alternative means of procedure.

[99] There is no conflict between the necessity to identify whether the jurisdiction invoked is the supervisory jurisdiction or not, and to follow the procedural requirements associated with the jurisdiction in question, and the imperative to avoid situations in which procedural niceties could stand in the way of the enforcement by the courts of the rule of law. The appropriate disposal will not necessarily be dismissal if an application to the supervisory jurisdiction is made by action rather than petition for judicial review, but is likely to be an order for transfer to judicial review under RCS 58.15, which provides:

“(1) The Lord Ordinary may order that a cause raised as an action should proceed as a petition for judicial review, if satisfied that—
(a) it should proceed in that way; and

(b) the requirements of section 27B(2) or (3) (as the case may be) of the Act of 1988 are met.

(2) If the Lord Ordinary orders that an action should proceed as a petition for judicial review, it must proceed under rule 58.11 (as if permission had been granted) and the Lord Ordinary must also order—

- (a) the petitioner to prepare a minute stating—
- (i) the act, decision or omission to be reviewed;
 - (ii) the remedies which the petitioner seeks; and
 - (iii) the legal grounds of challenge;
- and to intimate the minute and lodge it in process within 7 days;
- (b) the respondent to lodge and intimate answers to that minute within 14 days thereafter.

(3) That minute and answers, together with the earlier pleadings, thereafter comprise the pleadings in the proceedings, subject to such further adjustment or amendment as the Lord Ordinary may authorise.”

[100] Senior counsel for the second defender pointed out that the Lord Ordinary’s power is discretionary. That is true. It is clear, however, that the rule (as it stands after amendment following the introduction of permission requirements) is apt to permit the transfer of an action which is correctly understood to be an application to the supervisory jurisdiction to judicial review procedure, and to ensure that the statutory requirements in relation to permission are applied as they would have been had the proceedings taken the correct form in the first place. A defender wishing to raise a matter of this sort in public law proceedings ought to seek to have the matter determined by the court at an early stage. I understand that the second defender at one stage in this case indicated an intention to enrol a motion for a hearing to that end, but did not proceed to do so.

[101] A plea that a public law case ought to be dismissed on the ground of incompetency, where there is a procedure available to allow the case to be put on the correct procedural track, falls into the category of preliminary objection deprecated by Lord Drummond Young in *Taylor* at paragraph 15. A hearing on the matter under RCS 58.15 would permit argument as to the nature of the jurisdiction being exercised, a finding on that, and, in the event that

the application were one to the supervisory jurisdiction, a determination as to whether the tests for permission were satisfied. It obviates any need for a plea like the second defender's seventh plea in law. The rule does not specify what would happen to an ordinary action if it were not transferred, where the Lord Ordinary had found that it was an application to the supervisory jurisdiction and did not meet the tests for permission, but it would presumably then fall to be dismissed at that point. There may be less difficulty where a party has satisfied the permission requirements in an application for judicial review, but on further analysis it appears that he is not actually invoking the supervisory jurisdiction of the court. In any event, RCS 58.16 provides for transfer to ordinary procedure where a Lord Ordinary is satisfied that the cause should proceed in that way.

The 1998 Act scheme for determining legislative competence

[102] The relevant provisions so far as material for the purposes of this action are the following. There is now also provision for a reference by a law officer to the Supreme Court as to whether a bill or any provision of a bill relates to a protected subject-matter: section 32A.

“28.— Acts of the Scottish Parliament

(1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.

(2) Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent.

(3) A Bill receives Royal Assent at the beginning of the day on which Letters Patent under the Scottish Seal signed with Her Majesty's own hand signifying Her Assent are recorded in the Register of the Great Seal.

...

29.— Legislative competence

(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 —

- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
 - (b) it relates to reserved matters,
 - (c) it is in breach of the restrictions in Schedule 4,
 - (d) it is incompatible with any of the Convention rights or [in breach of the restriction in section 30A(1)]¹,
 - (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.
- (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.
- ...
- (5) Subsection (1) is subject to section 30(6).

30.— Legislative competence: supplementary

- (1) Schedule 5 (which defines reserved matters) shall have effect.
- (2) Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient.
- (3) Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Scotland.
- (4) An Order in Council under this section may also make such modifications of—
 - (a) any enactment or prerogative instrument (including any enactment comprised in or made under this Act), or
 - (b) any other instrument or document,
 as Her Majesty considers necessary or expedient in connection with other provision made by the Order.

31.— Scrutiny of Bills [for legislative competence and protected subject-matter]¹

- (1) [A person]² in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament.
- (2) The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision.

32.— Submission of Bills for Royal Assent

- (1) It is for the Presiding Officer to submit Bills for Royal Assent.
- (2) The Presiding Officer shall not submit a Bill for Royal Assent at any time when—
 - (a) the Advocate General, the Lord Advocate or the Attorney General is entitled to make a reference in relation to the Bill under section 32A or 33,
 - (b) any such reference has been made but has not been decided or otherwise disposed of by the Supreme Court, or
 - (c) an order may be made in relation to the Bill under section 35.

...

(3) The Presiding Officer shall not submit a Bill in its unamended form for Royal Assent if—

(a) the Supreme Court has decided that the Bill or any provision of it would not be within the legislative competence of the Parliament.

33.— Scrutiny of Bills by the Supreme Court (legislative competence)

(1) The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision.

(2) Subject to subsection (3), he may make a reference in relation to a Bill at any time during—

(a) the period of four weeks beginning with the passing of the Bill, and

(b) any period of four weeks beginning with any approval of the Bill in accordance with standing orders made by virtue of section 36(5).

(3) He shall not make a reference in relation to a Bill if he has notified the Presiding Officer that he does not intend to make a reference in relation to the Bill, unless the Bill has been approved as mentioned in subsection (2)(b) since the notification.

40.— Proceedings by or against the Parliament etc.

(1) Proceedings by or against the Parliament shall be instituted by or (as the case may be) against the Parliamentary corporation on behalf of the Parliament.

(2) Proceedings by or against—

(a) the Presiding Officer or a deputy, or

(b) any member of the staff of the Parliament,

shall be instituted by or (as the case may be) against the corporation on his behalf.

(3) In any proceedings against the Parliament, the court shall not make an order for suspension, interdict, reduction or specific performance (or other like order) but may instead make a declarator.

(4) In any proceedings against—

(a) any member of the Parliament,

(b) the Presiding Officer or a deputy,

(c) any member of the staff of the Parliament, or

(d) the Parliamentary corporation,

the court shall not make an order for suspension, interdict, reduction or specific performance (or other like order) if the effect of doing so would be to give any relief against the Parliament which could not have been given in proceedings against the Parliament.

(5) References in this section to an order include an interim order.”

[103] Consideration by a court of proposed legislation will normally be hypothetical and premature at any point before it is in its final form and has been passed by Parliament. A bill may fall. Until it is passed, it will be capable of amendment. Provisions which were

outside legislative competence may have been deleted or amended so as to be within legislative competence. It is also possible that a bill which, when introduced, was within legislative competence, has had provisions added by amendment which are not within legislative competence. A bill, unless it is passed and receives Royal Assent, will not be law. The provisions of the 1998 Act are consistent with that general position. They also recognise that the separation of powers requires that the court not pronounce orders which prevent Parliament from fulfilling its legislative function in that way. The court could not grant an interdict against the Parliament considering a bill, even if it would not be within the legislative competence of the Parliament: section 40(3) and (4); *Whaley*, Lord President (Rodger) at 350G. The power of the court to grant a declarator in proceedings against the Parliament, is, however, not excluded. If Parliament does come to pass legislation that it does not have power to pass, there are remedies which can be pursued by the law officers, or by individuals.

[104] The defenders' submissions, however, go further. The defenders contend that the provisions of the Scotland Act exclude any application to the court regarding proposed legislation before Royal Assent other than one made to the Supreme Court by a law officer.

[105] I reject that contention. It is not consistent with principle or authority. The Scottish Parliament is a creation of statute and remains subject to the jurisdiction of the court where that is not the subject of specific exclusion. Section 40, on which the second defender placed some reliance, is notable in that it excludes the jurisdiction of the court in certain very specific respects, although not in relation to its power to make a declarator. It follows that the jurisdiction of the court is not otherwise excluded. Consideration of section 40(3) and (4) prompted a decision to that effect in *Whaley v Lord Watson*.

[106] The petitioners in *Whaley* sought to interdict a MSP from introducing a particular bill in and from encouraging another member of the Scottish Parliament to do likewise. They alleged that if he were to do so he would be acting in breach of a provision of subordinate legislation prohibiting a MSP from doing anything in that capacity which related to the affairs or interests of, or which sought to confer a benefit on, a person from whom he had received remuneration. The respondent MSP argued that interdict was incompetent by virtue of the provisions of section 40(3) and (4) of the 1998 Act. The Lord President (Rodger) said the following, at page 349H-350D:

“Since subsections (3) and (4) of Section 40 have been specifically enacted to exclude certain powers of the court in relation to proceedings against the Parliament, the inference must be that in other respects the law applies in the usual way to both the Parliament and to members of the Parliament. Under reference to the opinion of Lord Woolf M.R. in *R. v. Parliamentary Commissioner for Standards ex parte Al Fayed* [1998] 1 WLR 669 at p. 670 G - H, counsel for the first respondent submitted, however, that this court should exercise ‘a self-denying ordinance in relation to interfering with the proceedings’ of the Scottish Parliament. Lord Woolf used that expression to describe the attitude which the courts have long adopted towards the Parliament of the United Kingdom because the relationship between the courts and Parliament is, in the words of Sedley L.J., ‘a mutuality of respect between two constitutional sovereignties’. The basis for that particular stance, including Article 9 of the Bill of Rights 1689, is lacking in the case of the Scottish Parliament. While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a ‘self-denying ordinance’ which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law. The correct attitude in such cases must be to apply the law in an even-handed way and, subject to the residual discretion described by Lord Watson in *Magistrates of Kirkcaldy v. Grahame* (1882) 9 R. (H.L.) 91 at pp. 91 - 93, to grant to parties the remedy which they seek and to which they are entitled. In particular, where a competent interim remedy is sought against a member, the correct approach will be to apply the law in the usual way and to have regard to all the relevant factors in deciding where the balance of convenience lies.”

[107] Lord Prosser's opinion was to similar effect, at 357E-358E:

"As I understood the submissions, the argument seemed to rest upon some broad view that since the Scottish Parliament was a parliament, rather than for example a local authority, the jurisdiction of the courts must be seen as excluded, as an unacceptable intrusion upon the legislative function which belonged to Parliament alone. A variant of this argument appeared to be that if the court's jurisdiction was not actually excluded as a matter of law, the court should nonetheless be slow or hesitant or reluctant or unwilling to use the jurisdiction which it had, in order to avoid an undesirable intrusion on Parliament's freedom in relation to legislation. Both forms of argument appear to me to be entirely without foundation. If and in so far as a parliament may have powers which are not limited by any kind of legal definition, there is no doubt scope for concepts of 'sovereignty', with the courts unable to enforce boundaries which do not exist. But if and in so far as a parliament and its powers have been defined, and thus limited, by law, it is in my opinion self-evident that the courts have jurisdiction in relation to these legal definitions and limits, just as they would have for any other body created by law. If anything, the need for such a jurisdiction is in my opinion all the greater where a body has very wide powers, as the Scottish Parliament has: the greater the powers, the greater the need to ensure that they are not exceeded. But the jurisdiction of the courts and the legal definition of the body seem to me to be merely two sides of the same coin. Faced with the suggestion that the courts might abstain from exercising a jurisdiction which they have, allowing the Parliament perhaps to exercise power beyond its legal limits, from a fear that enforcement of those limits might be seen as stopping Parliament from doing what it wanted to do, I am baffled: a defined parliament is there to do not whatever it wants, but only what the law has empowered it to do. In the odd, and perhaps unsatisfactory, context of 'sovereign' or undefined powers, the courts may be faced with problems; but these are very precisely problems of a kind which do not arise, and can afford no guidance, where the issue is one of law, and jurisdiction is its inevitable counterpart. The nature and functions of the Parliament, and of any particular provisions, will of course be matters which must be taken into account, whenever the courts in exercising their jurisdiction require to interpret or apply the provisions which the law has made in relation to the Parliament. But that is a quite different matter."

[108] The Supreme Court, in *AXA*, which involved an application to the supervisory jurisdiction of the court, held that Acts of the Scottish Parliament are amenable to the supervisory jurisdiction at common law, in the absence of any provision in the Scotland Act excluding that possibility. The supervisory jurisdiction is not restricted to review on the grounds that the Scottish Parliament has transgressed against the limits on its powers expressed in section 29 of the Scotland Act. That jurisdiction will not, however, be exercised

on ordinary common law grounds such as irrationality, *AXA*, Lord Hope DPSC, paragraphs 45-52. Lord Reed, paragraphs 135-154. Lord Reed referred to the reasoning of the Lord President in *Whaley*, at paragraph 138, saying:

“As the Lord President’s remarks make clear, the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts.”

[109] By parity of reasoning, just as the court’s jurisdiction at common law is not displaced or limited to review on grounds of legislative competence by reference to section 29 (which sets limits on legislative competence), it is not, in principle, limited or excluded by virtue of the provisions for reference by a law officer of a bill which has been passed, prior to Royal Assent, to the Supreme Court (which provide a structure for review by the courts of legislative competence).

[110] In relation to a question from me regarding that submission, counsel for the first defender responded that the exclusion of the jurisdiction of the court other than when it is invoked by means of the procedures provided for in the 1998 Act did not represent the limitation or removal of a fundamental right requiring express statutory words. I do not accept that analysis. The right to obtain a ruling as to the current state of the law is an aspect of the right access to the court: *Wightman*, paragraph 21. Access to the courts is a fundamental constitutional right, which can only be curtailed by clear and express statutory enactment: *R(Unison) v Lord Chancellor*.

[111] Consideration of section 33 supports the conclusion that the court’s common law jurisdiction is not limited or excluded by the statutory scheme. The expression “legislative competence” features in the index of defined expressions: section 127. It is defined by reference to section 29. In consequence it is only in relation to the legislative competence, so

defined, of a bill that section 33 confers power to make a reference to the Supreme Court law officers. On the defenders' analysis, that would mean that there was no possibility of any competent application to the court before Royal Assent even in the case of unlawfulness of the sort mentioned by Lord Hope and Lord Reed in *AXA*, at paragraphs 49-51 and 151-154 respectively.

[112] Section 31 clearly requires statements about legislative competency to be made in good faith. Those statements are presumably also made on the basis of legal advice from those qualified to provide it. Senior counsel for the pursuer was correct to point out that where the bill is a government bill the principles of collective cabinet responsibility apply to the statement made by a minister in compliance with section 31(1). This is reflected in the practice in recent times of using the heading "Scottish Government Statement on Legislative Compliance" above the statement in question when it is published in the Explanatory Notes accompanying a bill, and the formula formerly used, "Executive Statement on Legislative Competence". The terms of section 31 either taken alone or in combination with the other provisions regarding legislative competence are not apt to indicate an intention to exclude the jurisdiction of the court to make declarators about the state of the law. Statements by politicians do not determine what the law is. That is the preserve of the court: *Wightman*, paragraphs 28, 50.

The action is hypothetical, premature or academic; standing

[113] Parties drew to my attention a number of decided cases in which the courts had pronounced "bare" declarators advising as to the law, or had declined to provide advice in that, or an analogous, way. I have no difficulty in accepting that it is competent in principle for the court to pronounce such a declarator.

[114] Some of the cases to which the pursuer referred were cases in which there had been a dispute between parties which was no longer “live”, such as *Napier* and *Davidson*. What the court was doing in *Napier* and *Davidson* was to clarify the law for the future in the course of a reclaiming motion or appeal in which the original dispute which had prompted argument on the point of law was no longer live between the parties to it. The court took that course because the point of law was an important one which would require to be dealt with in another case if it were not dealt with in the case before the court. In each case there had been a live dispute between the parties of a conventional character, and there was still a practical purpose in obtaining a ruling.

[115] The course followed by the Supreme Court in *Reference by the Attorney General of Northern Ireland of devolution issues to the Supreme Court pursuant to paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2)*, is the mirror image of that approach. In that case, the court declined to allow the reference to proceed because there was other litigation pending which potentially raised most, if not all, of the issues in the reference. They would provide the chance for the issues to be ventilated against a “clear factual backdrop”, as was generally desirable. The court also noted that in those proceedings the courts of Northern Ireland would be able to deal with the issues by reference to the practical reality of their impact on society there. The court did not suggest that the matters could not be raised on a reference, but clearly regarded it as more appropriate that they should be dealt with in a litigation, where there was already one raised and apt for that purpose. None of these cases is directly analogous with the present one.

[116] Similarly, in relation to standing, I was referred to various cases in which individual citizens had been regarded as having standing in public law matters. All of them, save *Wightman*, were cases in which unlawful acts were alleged. The law on standing is as stated

in *AXA* and in *Walton*. Sometimes an individual will have to demonstrate some particular interest in an issue in order to show that he is not a busybody, but in others he will have sufficient interest simply as a citizen, affected as all other citizens are, by a particular violation of the law. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it: *Walton*, Lord Reed, paragraph 94. The same approach must be taken in relation to applications for declarators as to the existing state of the law. Depending on the nature of the issue, an individual may well have standing as an individual citizen, but he will require to demonstrate that the application needs to be determined in order to preserve the rule of law. The protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court: Lord Reed, *AXA*, paragraph 170. A fortiori, where no unlawful conduct is alleged, it is not in every public law case that the court will exercise its jurisdiction to answer a question about a disputed point of law.

[117] I derived no assistance from the case of *Ewing*, referred to by the first defender in relation to the standing of persons designing themselves as campaigners. The court in that case did not have to determine the question of sufficient interest. Further, the case was one in which one of the claimants was the subject of a civil proceedings order (ie was a vexatious litigant) and there appeared to be some doubt about the genuineness of his claim to be a “heritage and environmentalist issues campaigner”. They do nothing to cast light on the circumstances in which being a campaigner in a particular field may provide a sufficient interest to seek a remedy from a court, far less the remedy sought in this case. I note that the pursuer’s averments about his campaigning activities are not known and not admitted by

the first defenders. Presumably if they had any positive basis on which to impugn the truth of his averments they would have met them with denial.

Wightman

[118] The pursuer contends that I am bound, by virtue of the decision of the First Division in *Wightman*, to provide him with a declarator or, in due course, declarators as to what the law is, in particular respects. He submits that the analysis in that case applies to the circumstances of this case, and that it provides a complete answer to the defenders' preliminary arguments. By way of preface, therefore, it is convenient to consider in more detail the matters that were at issue in that case, and how the court disposed of them.

[119] In *Wightman* the petitioners, by the time of the reclaiming motion in August 2018 were two MSPs, three MEPs and two MPs. A referendum had produced a majority in favour of leaving the European Union. The European Union (Notification of Withdrawal) Act 2017 conferred power on the Prime Minister to withdraw from the European Union under Article 50. The Prime Minister gave notice to that effect. The petitioners sought a declarator specifying whether, when and how the notification could unilaterally be revoked. They asked the court to make a reference to the Court of Justice of the European Union ("CJEU") for a ruling on that matter. The UK Government had stated that they did not intend to revoke the notification. The Lord Ordinary dismissed the petition on the grounds that the issue was hypothetical because the UK Government had stated that they did not intend to revoke the notification; that the matter involved an encroachment on parliamentary sovereignty; and that the conditions for a reference to the CJEU had not been met.

[120] By the time of the reclaiming motion, Parliament had passed the European Union (Withdrawal) Act 2018, which set out the means by which parliamentary approval was to be sought once negotiations between the UK Government and the EU Council had been concluded. The Lord President described the resulting state of affairs in the following terms, at paragraphs 5 to 7:

“[5] ... In particular, the withdrawal agreement can only be ratified if it, and the framework for the future relationship of the United Kingdom and European Union, have been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how they propose to proceed with negotiations. If the Prime Minister states, prior to 21 January 2019, that no agreement in principle can be reached, the Government must, once again, state how they propose to proceed. They must bring that proposal before both Houses.

[6] Meantime, on 15 May 2018 the Scottish Parliament refused to consent to what was then the European Union (Withdrawal) Bill (Bill 79) as advised under the legislative consent (‘Sewel’) convention (cf *R (Miller) v Secretary of State for Exiting the European Union*, para 150).

[7] At the expiry of the two-year period, there may or may not be an agreement. If there is an agreement, Parliament will have to decide whether to approve it. If it is not approved, and nothing further occurs, the treaties will cease to apply to the United Kingdom on 29 March 2019. The stark choice is either to approve the agreement or to leave the European Union with no agreement. The petitioners seek a ruling on whether there is a valid third choice; that is to revoke the notification with the consequence, on one view, that the United Kingdom would remain in the European Union. If that choice were available, the petitioners argue, members of the UK Parliament could decide which of three options was preferable. They could not only elect to reject the agreement because it was, in their view, a worse deal than having no agreement at all, but also because both the agreement and the absence of an agreement were worse than remaining in the European Union; a situation which could be achieved by revoking the notification. If such revocation were not a legally valid option, the stark choice would be all that was left. The petitioners wish to have a definitive ruling, to enable them to make informed choices based on the options legally available.”

[121] In determining to make a reference to the CJEU, the Lord President said, at paragraphs 21-25,

“[21] The courts exist as one of the three pillars of the state to provide rulings on what the law is and how it should be applied. That is their fundamental function.

The principle of access to justice dictates that, as a generality, anyone, who wishes to do so, can apply to the court to determine what the law is in a given situation. The court must issue that determination publicly. As *Bankton (Institute IV, xxiii, 18)* puts it:

‘[A]ll persons may pursue, for the law ought to be open to all people, to make their claims effectual; since for every right there must be a remedy, and want of right and want of remedy are the same thing’.

The traditional method of securing an answer to a legal question posed is by action of declarator. ‘[T]he general rule is, that any right may be ascertained by a declarator’ (*Barbour v Grierson*, Lord Glenlee (with whom the other members of the court agreed), p 604; *Gifford v Trail*, Full Bench, pp 867, 868; see also *Earl of Mansfield v Stewart*, Lord Brougham, p 160). For the avoidance of doubt, this jurisdiction is not one of *parens patriae*, which involves the court assuming the role of the sovereign in relation to children or the incapable (*Law Hospital NHS Trust v Lord Advocate*, Lord President (Hope), p 313).

[22] For practical reasons, which are principally resource driven, there are limits to the general right to a legal ruling. One is that a court should not be asked to determine hypothetical or academic questions; that is those that will have no practical effect. In a case where there are no petitory conclusions, the declarator must have a purpose. There has to be some dispute about the matter sought to be declared. The declarator must be designed to achieve some practical result. This procedural limitation often overlaps with questions of title or interest. It was put thus by Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 (at 448, quoted in *Law Hospital NHS Trust v Lord Advocate*, Lord President (Hope), at 309):

‘The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarised thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.’

All of that is sound, but its context has to be one in which the default position is that the issue is justiciable; ie the pursuer or petitioner has a right to have the question of law decided. The issue is correctly focused, as it is in this case, in a plea in law for a respondent or defender.

[23] The approach of Lord Dunedin in the related area of title and interest is set out in what was, until recently, the *locus classicus* of *D & J Nicol v Dundee Harbour Trs*. In *D & J Nicol* (pp 12, 13), Lord Dunedin confined the necessary qualifying title to situations in which a person had ‘some legal relation’ which created a right which was infringed or denied by his opponent. This approach is reflected, returning to academic questions, in the celebrated *dictum* of the Lord Justice-Clerk (Thomson) in *Macnaughton v Macnaughton’s Trs* (p 382) that:

'Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case. I doubt whether any good purpose is to be served by trying to extract any general rule from the decided cases. Each case as it arises must be considered on its merits, and the Court must make up its mind as to the reality and immediacy of the issue which the case seeks to raise. Unless the Court is satisfied that this is made out, it should sustain the plea of incompetence, as it is only with live and practical issues that the Court is concerned.'

[24] The merits, in terms of court time and parties' expense, of a restrictive approach which limits access to the courts may be clear, but they are inconsistent with the modern view on the functions of a court in the public law field set out by Lord Reed in *AXA v Lord Advocate* (paras 159 *et seq*) having regard to: (i) the establishment of judicial review as a distinct procedure; (ii) *West v Secretary of State for Scotland*; and (iii) the increase in judicial review applications. Although referring specifically to judicial review, and distinguishing litigation under that heading from actions to enforce private rights, Lord Reed (paras 169-171) emphasised the need for an interests, rather than a rights, based approach in the area of public law as follows (para 170):

'What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends ... upon the context, and in particular upon what will best serve the purposes of judicial review in that context.'

He emphasised (para 169) the essential function of the courts as being 'the preservation of the rule of law, which extends beyond the protection of individuals' legal rights.'

[25] *Macnaughton* involved private succession rights and is far removed from the present case (*cf Clarke v Fennoscandia* 2008 SC (HL) 122, Lord Rodger, para 29). Even then, the Lord Justice-Clerk in *Macnaughton* was careful to confine his general remarks to 'the ordinary run of contentious litigation', even if they may have some resonance in a wider context. The Lord Ordinary (Guthrie), to whose interlocutor the court adhered, had carried out a review of the earlier authorities. While stating (p 389) that the function of the court was not to advise parties on their future course of action or to answer a question which may never arise, he emphasised that the court would answer a question which was 'neither academic or premature, but is both practical and of immediate urgency' (*Turner's Trs v Turner*, Lord President (Normand), p 398). He continued:

'If in such circumstances a party is 'excusably uncertain' as to his rights, an action of declarator can be competently raised, in order to avert the consequences of his being compelled to test his rights by experiment - ... The recent practice of the Court is less strict than formerly as to the competency of actions of declarator, and 'the modern tendency appears to be to open the doors wider to such proceedings' (*Turner*, Lord Carmont, p 394)."

[122] The court was satisfied that the petition was competent at least at the instance of an MP: Lord President, paragraph 27; Lord Menzies, paragraph 29. MPs would be required to vote on whether to ratify any agreement between the UK Government and the EU Council. Without any other proposal a vote against ratification would result in the departure of the United Kingdom from the European Union on 29 March. It was neither academic nor premature to ask whether it was legally competent to revoke the notification. The answer would clarify the options open to MPs in the lead up to what was an inevitable vote: Lord President, paragraph 27; Lord Menzies, paragraphs 36-38; Lord Drummond Young, paragraphs 55-58. Lord Drummond Young's analysis at paragraphs 57 to 58 focuses on the need for MPs (and not any other class of person) to have advice as to the law in question.

[123] MPs never required to vote on any proposal to withdraw the Article 50 notification, and there was no contention in the case by anyone that they would.

[124] From the reasoning of the court in *Wightman* I derive the following.

- (1) It is an aspect of the right of access to justice that a person may apply to the court to determine what the law is in a given situation.
- (2) The court will not entertain hypothetical, premature or academic questions.
- (3) The circumstance that a public authority may assert that it has no intention to take a particular course will not be determinative of whether a question is hypothetical, premature or academic.

- (4) In determining what is hypothetical, premature or academic in the context of public law cases it is essential that the court consider the matter in the light of its function to preserve the rule of law, which extends beyond the protection of individuals' rights.
- (5) In determining whether an individual has standing in a public law case of this sort, the court should follow the approach desiderated in *AXA* and *Walton*, again with a view to fulfilling its function in preserving the rule of law.

Decision - title, interest and standing

[125] The submissions made by all parties in relation to these matters overlap significantly. The defenders' submissions on these matters all express in slightly different ways the underlying proposition that it is either not necessary, or not possible, for the court to provide this pursuer with the remedy that he is seeking. The matters are very closely interrelated, because they all turn on whether the advice of the court is required in order to preserve the rule of law in a democratic society.

[126] For reasons more fully set out below, I do not need to decide in the present case whether, as the defenders assert, only those with statutory functions under the Scotland Act could ever have sufficient interest to bring a question to the court about the lawfulness of a proposed act of the Scottish Parliament, or to raise a question about the powers of the Parliament other than in relation to legislation that had received Royal Assent. I doubt whether that is in principle correct, as the question of who has standing must be determined in the light of the need to ensure respect for the rule in relation to a particular matter.

[127] The defenders' focus on the provisions of the Scotland Act as excluding the jurisdiction of the court, and as the source of a definitive answer to the question whether an

individual had standing, meant that at times they did not seem to engage directly with what I consider was the pursuer's central contention in this action, namely that he had standing, and required an answer to his legal questions now, or at least before the Scottish Parliamentary elections, because he is a voter in those elections. If the pursuer is right about that, the remedies that the defenders say are available, whether by way of exclusive procedure (or on the first defender's esto position, available alternative remedy) would come too late to be of any use to him. It is for that reason that I focus below on the contentions made by the pursuer as to why the remedy he seeks is required.

[128] Another matter on which I do not require to reach a view is what the intentions of the Scottish Government are as regards any draft bill. They have stated an intention to publish a draft bill, in a publication which features in the pleadings. Both the first defender and the pursuer to some extent asked me to speculate, by reference to statements made by the First Minister which feature in the written arguments, but not on record, as to what the intentions of the Scottish Government might be. The first defender invited me to look at the now withdrawn pleadings for the Scottish Government. Even if I were to have the benefit of a stated position from the Scottish Government in these proceedings, which I do not, that would not be determinative of whether there was an issue of law on which the pursuer was entitled to a ruling from the court: cf *Wightman*. I accept that there is uncertainty as to the correct answer to the questions that the pursuer focuses in the conclusions, because no court has ever answered them. The question, so far as the preliminary issues raised by the defenders are concerned, is whether the court ought to provide an answer to one or more of them in the circumstances of this case.

[129] The pursuer offers six separate submissions as to why he is entitled to a remedy in this action. He submitted that the court was obliged to pronounce a declarator, or declarators, for the following reasons;

- (1) Legal certainty was needed to prevent the constitutional paralysis which would result from a retrospective determination that an already-held referendum was outwith the legislative competence of the Scottish Parliament.
- (2) Without certainty as to the lawfulness of any referendum to be conducted, there would be doubt as to whether sanctions for crimes contrary to the provisions of the Referendums (Scotland) Act 2020 might eventuate.
- (3) Members of the Scottish Parliament had to know in advance of passing legislation for a referendum whether their actions would be *intra vires*.
- (4) It was not properly open to the Scottish Government to campaign for re-election on the basis that, if re-elected to power, it would purport to act beyond the limits of the powers imposed on it by law. That would be contrary to the rule of law.
- (5) The pursuer required the questions posed in the declarators to inform his campaigning and the pressure he was thereby able to exert on politicians. In Article 3 of condescence he pleads that he

“has a constitutional right to obtain legal certainty on this issue to allow him, and all other individual members of civil society both in Scotland and across the United Kingdom, to be able, in a properly informed way, to exercise their democratic rights as citizens of publicly campaigning and political lobbying on the issue of possible future constitutional change in our democratic structures.”

- (6) The pursuer says he has a sufficient interest as a voter, and also that the issues are not hypothetical as regards his interests as a voter. He advances these propositions on the following bases.

- (i) The pursuer avers that as an enfranchised individual voter resident in Scotland, he is a relevant “decision-maker” in the context of the introduction, promotion or passing of legislation in the Scottish Parliament: Article 4 of Condescendence.
- (ii) He avers also that as a voter he is a person affected by the matter to which the subject matter relates: Article 4 of condescendence. He expands on this averment by saying in his note of argument that there is a real question of law for this court to consider and determine to allow the pursuer (and all others having the right to vote in these elections) properly to exercise their democratic right and responsibilities as voters.

[130] Points (1) and (2) are plainly raised prematurely. They are also hypothetical, and may never come to pass. They proceed on the assumption that a referendum is to be conducted, or has actually already been conducted, under an act of the Scottish Parliament which may be ultra vires. First, each of these propositions depends on there being an act of the Scottish Parliament under which a referendum might proceed or have proceeded. It would be that act, as passed by the Scottish Parliament, that would require to be scrutinised as to its legislative competency. Answers provided by the court now, whether in the abstract, or on the basis of a draft bill, would not serve to avoid the difficulties apprehended by the pursuer. Second, there is no need for the court to try to provide an answer at the present time. Other remedies would be available at the time any legislation came to be passed. The bill in question might be referred to the Supreme Court by a law officer before Royal Assent. If it were not, the act could be subject to judicial review after Royal Assent. That could all be achieved before any referendum was conducted in reliance on the act in question.

[131] So far as point (3) is concerned, it will generally, as I have already indicated, be premature and pointless for the court to adjudicate as to the lawfulness of a proposed act of Parliament at any point before it is passed, because it is open to change by way of amendment at the hands of the Parliament itself until it has been passed. Advice in the abstract, or about a draft, or even a bill as presented, would not necessarily avail Members of the Scottish Parliament who wanted to know whether their vote would result in the passing of legislation that was ultra vires.

[132] Point (4) is formulated so as to raise a question about the vires of the Scottish Government, and possibly an apprehension that the government might, presumably by campaigning on the draft bill which it has said it will publish, act unlawfully. I understand it to be an aspect of the pursuer's case, related to points (5) and (6), that the electorate requires a determination in order to be able to exercise the right to vote in accordance with the rule of law. I turn, therefore, to points (5) and (6). Like *Wightman* this is not a case in which the pursuer seeks to bring any violation of the law to the attention of the court. Rather, he seeks advice as to the state of the law, and asserts that he has a need to, and right of, access to the court for it to provide an authoritative determination because the rights to campaign, and to vote, are of the essence of the rule of law in a democratic society. It is obviously correct that the rights to campaign and to vote are of fundamental importance in a representative democracy.

[133] The First Division was discriminating in its approach to sufficient interest in *Wightman*. It was satisfied as to sufficient interest in relation only to the MPs who would have to participate in an inevitable vote, for which provision had already been made in statute. It is not (contrary to the pursuer's submission) to understate or undervalue the importance of the individual franchise in general elections to note that the MPs in *Wightman*

were acting in their capacity as elected members of Parliament in a representative democracy. Their votes would directly determine a matter of importance to every citizen of the United Kingdom. They were voting in relation to a single issue.

[134] The Lord President said that the answer provided by a declarator “[would] have the effect of clarifying the options open to MPs”: paragraph 27. The context, as set out above, was one of two options - ratification of the agreement, or leaving the EU with no agreement. The declarator would inform MPs as to whether there could ever, as a matter of law, be a third option. Lord Menzies analysed the case as one concerning an impending decision involving a choice, in which it was contended that in order to make the choice the decision-maker needed to know with certainty the proper meaning of a legal provision: paragraph 36. It was legitimate for those involved in the vote to know the meaning of Article 50 of the Treaty on European Union with respect to the potential for revocation of the notification: paragraph 37. Lord Drummond Young said that it was impossible to hold that the question of the withdrawal of the Article 50 notification was irrelevant to Parliament’s deliberations. He noted that some MPs appeared to consider it significant. It was not, however, for the courts to tell MPs what considerations they should regard as relevant: paragraph 58.

[135] Point (5) does not support the contention that there is a need for a determination in order to preserve the rule of law. How the pursuer and other campaigners decide to carry out campaigning activities and the questions they choose to pose to elected politicians are, generally, a matter for them. Depending on the nature of the interests of particular campaigners, it might be advantageous or otherwise to a campaign if the court were to grant one or more of the declarators sought. If the court were to find that the position in law were otherwise than that asserted in the declarators, it might provide campaigners with a basis

for focusing their activities in a particular way or direction. None of that indicates that the rule of law risks being undermined in the absence of a determination from the court. It is advice of a nature properly characterised as directed merely to individuals' determining how to order their own affairs. The ability to campaign politically or lobby for a desired result does not necessarily depend on information as to whether or not that result can be achieved without a change in the existing law. There is not the close relation between the right to campaign and the advice sought that there was between the vote in which the MPs in *Wightman* were to be engaged and the advice that they sought.

[136] In relation to point (6) it is relevant to note, first, that the pursuer is an enfranchised voter in a system of representative democracy. In the forthcoming elections he and every other voter has the right to vote for representatives in the Scottish Parliament. It is correct to say that Parliament derives its authority, strength and legitimacy from the electorate. It is, however, the elected members who then go on to make judgements, in their capacity as legislators, as to what is in the country's best interests as a whole: Lord Hope, *AXA*, paragraph 49. The representatives derive their authority from the voting decisions of the pursuer and others enfranchised to vote in the election. The proportions in which representatives from different parties, and independent candidates, are elected will no doubt affect what bills come to be introduced, what bills come to be passed, and the terms in which they come to be passed. It is, however, those representatives constituting the Parliament, and not the individual voters, who are the decision-makers in relation to the introduction, promotion and passing of legislation. I do not accept as correct the pursuer's characterisation of individual voters as the decision-makers in relation to the introduction, promotion or passing of particular pieces of legislation.

[137] Second, exercising the right to vote in a parliamentary election is not directly comparable to the vote in which the MPs in *Wightman* were to participate. Parliamentary elections are the subject of campaigning by a multiplicity of parties about a multiplicity of issues. They do not, as a referendum may, necessarily involve voting on a single issue. There is, again, not the close relation between the advice sought and the vote to be undertaken that there was in *Wightman*. Beyond a broad assertion that a determination of the law is necessary to allow voters to exercise their democratic rights and responsibilities, the pursuer does not elaborate on what choice, or choices, would be informed by that advice, or the relevance of the advice to the choice or choices involved in casting votes in the election in question. The pursuer has not demonstrated that it is required in order for democracy in Scotland, in the context of the forthcoming elections, to operate in accordance with the rule of law for the court to provide advice in the form of the declarators sought.

[138] I observe that there is in theory no limit to the number of issues about which politicians might make proposals in the lead up to elections, and in relation to which voters, or some voters, might be in more or less doubt as to the potential for their lawful execution. It does not follow that advice from the court is needed about them to permit voters to exercise their democratic rights.

[139] The action is for these reasons, hypothetical, academic, and premature, and the pursuer lacks standing to bring it. For the reasons given above, I would have reached the same conclusion even if a draft bill were available for consideration. I express no separate conclusion in relation to the proposition that the declarators sought are too vague. It is unnecessary to do so in order to dispose of the action.

Separation of powers

[140] Having reached the view that I have in relation to standing, prematurity and the hypothetical nature of the proceedings, I do not require to determine whether to grant the declarators sought would have been incompatible with the separation of powers. A declarator as to the state of the law would not compel the Scottish Government, the United Kingdom Government, or the Scottish Parliament to act in any particular way. It may be that the matter is not really one of separation of powers, in that the court would not impede or intrude on the work of parliament: see *Wheeler*, paragraph 46.

[141] It is, however, important, that matters which may properly be the subject of political debate and campaigning in the democratic process are permitted to unfold and be worked out in the political process, and that the courts intervene only when they need to do so to fulfil their function as guardians of the rule of law. The courts will clearly intervene to determine allegations of unlawfulness. Where, however, there is no allegation of unlawfulness, and the court is asked for a determination as to the state of the law in an area which is the subject of current political debate and controversy, it will be important to ensure that the question of whether an answer is required in order to protect the rule of law is addressed with rigour.

Disposal

[142] Having reached the view that I have as to the preliminary issues raised by the defenders, I consider that it is unnecessary, and would be inappropriate, for me to express an opinion on the question of law focused in the first declarator.

[143] I therefore sustain the first to fourth pleas in law for the first defender, and the first and second pleas in law for the second defender and dismiss the action. I repel the third, sixth and seventh pleas in law for the second defender.

Appendix

Procedural matters 30 September 2020 to 12 January 2021

30 September 2020

1. Senior counsel for the pursuer made a motion at the hearing for permission to have IndyLive, an online radio station, transmit a live audio feed of the hearing. He produced a note of written submissions in support of the motion and made oral submissions. The pursuer had approached the court administration on the day before the hearing regarding the request and had been referred to the Protocol on Recording and Broadcasting of Proceedings in the High Court of Justiciary (“the protocol”).
2. Senior counsel for the defenders said they had received the note of submissions only shortly before the hearing. They did not oppose the motion, but said it was a matter for the court. Senior counsel for the pursuer referred to the guiding principles in the protocol, including the principle of open justice. He submitted that the protocol did not have the force of law, and was simply indicative of the court’s approach to requests to record and broadcast. He referred to *Scott v Scott* [1913] AC 417, at 475; *R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218, at paragraph 38; *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2013] QB 618, at paragraphs 1, 2; *A v BBC Scotland* 2014 SC (UKSC) 151, at paragraphs 23-32; *SmithKline Beecham Biologicals SA v Connaught Laboratories* [2000] FSR 1, at 15-16; *GIO Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd* [1999] 1 WLR 984, at 996E-G; *Lily Icos Ltd v Pfizer Ltd (2)* [2000] 1 WLR 2253, at paragraph 25(i); and *R v Howell* [2002] EWCA Crim 486, at paragraph 197. All of these authorities essentially vouch the same well-established

principle, namely that the doors of the court must be open if the court is to be subject to the public scrutiny that is essential to its authority to preserve the rule of law.

3. I had no difficulty in accepting that consideration must be given to how best to provide public access to the hearing in the context of remote hearings during the COVID-19 pandemic. The part of the protocol relating to legal debates in civil first instance proceedings provides a process for consideration of applications to broadcast, including livestreaming, and which takes into account, amongst other things, the journalistic or documentary-making experience and qualifications of the applicant. It makes provision for the sharing of material with other broadcasters and imposes certain other requirements on the broadcaster. An application is considered by the Broadcast Working Group, which seeks the views of the presiding judge, and the Broadcast Working Group then makes recommendation to the Lord President or Lord Justice Clerk. Requirements on the broadcaster additional to those in the protocol may be specified. The protocol provides an orderly procedure for consideration of a range of relevant matters on the basis of information submitted in an application. I considered that any application to livestream proceedings using a radio station ought to be made using the process in the protocol, and refused the motion.

4. All subsequent hearings in the case were conducted remotely using Webex Events, which allowed a remote audio and visual hearing, and provided a facility for up to one thousand listeners to access a live audio feed of the proceedings.

5. In the course of this hearing, senior counsel moved for commission and diligence in terms of a specification of documents which sought recovery of the following:

“1. The draft Bill (referred to both by the pursuer and by the second defender in their respective pleadings), whether in the hands of the second defender or of the Scottish Ministers, Victoria Quay, Edinburgh EH6 6QQ, or those acting on their

behalf, together with all draft sections, draft explanatory notes and draft guidance related to the said draft Bill.

2. All documents (as defined at section 9 of the Civil Evidence (Scotland) Act 1988 and whether held electronically or otherwise), in the hands of the second defender or of the Scottish Ministers or anyone on their behalf relating to the draft Bill, proposing a referendum on Scottish independence during or after 2021, and containing entries showing or tending to show

- a. The terms on which the referendum is proposed; or
- b. The date on which the referendum is proposed; or
- c. The question to be asked at the referendum; or
- d. The rules of enfranchisement for the referendum; or
- e. The considerations anent the requirement for approval from the UK Government for such a referendum;

in order that excerpts may be taken therefrom at the sight of the commissioner of all such entries.

failing principals, drafts, copies or duplicates of the above.”

6. At the point at which I dealt with this motion, there was an open amendment process. The second defender had lodged a minute of amendment seeking to delete averments to the effect that work on an independence referendum had been paused because of the COVID-19 pandemic, and to introduce averments that:

“The Scottish Government has indicated its intention to publish a draft Bill before the end of the current parliamentary session (which is anticipated to occur in March 2021).”

7. The pursuer’s answers included an admission in relation to that averment. The answers also included calls for production of that bill, and calls on the defenders to withdraw their pleas to the effect that the action was academic, incompetent or premature.

8. The second defender opposed the motion for commission and diligence on the basis that the material sought was irrelevant to the matter raised for determination by the Court. The pursuer sought a declaration in abstract terms, and not by reference to any published bill. The documents sought did not exist, and in any event no preliminary work relative to a

draft bill could be treated as representative of the final position of the Government on the draft to be published by March 2021. An early working draft could not assist the court. It would in any event be wholly inappropriate for the court to order the disclosure of information about the ongoing development of the Scottish Government's policy in relation to a draft bill. Any draft bill eventually published might or might not represent the text of a bill introduced in or passed by the Scottish Parliament. It was premature for the court to consider a specification of documents where the pleadings were not finalised, and the second defender sought a debate on preliminary issues of competency, relevancy, standing and prematurity, none of which required access to documents for their resolution.

9. Senior counsel for the pursuer submitted, both in writing, and orally, that it was the second defender who had introduced reference to the draft bill into the pleadings. The issue whether it was within the legislative competence of the Scottish Parliament to pass the draft bill in the form and on the terms presented to it was central to Scottish Government policy and to the question raised in the present case. The purpose of the motion was the conventional one of seeking recovery of a document in order to make more specific or pointed averments in an existing case. The Lord Advocate's assertion that no relevant documents existed was not a good reason for the court to refuse the motion, and nor was his assertion that documents recovered would not assist the court. As to "appropriateness", documents might be produced in a sealed envelope, for examination by the court during or after debate as to whether the Lord Advocate had made out a case for their non-disclosure. The pursuer's position was that it was essential that the electorate know whether the draft bill was within legislative competence. Otherwise they would be voting in ignorance on that matter, and there was a risk that a fraud would be perpetrated on the electorate. The

avermments about the policy of the Scottish Government had been introduced in the interests of candour.

10. Counsel referred to *Paterson v Paterson* 1919 1 SLT 12; *Bank of East Asia v Shepherd & Wedderburn* 1994 SCLR 536, at 588C-F, affirmed 1995 SC 255; *Macrae v British Transport Commission* 1957 SC 195; *Graham Builders Merchants Ltd v Royal Bank of Scotland plc* 1992 SCLR 402 (Notes), at 403.

11. I refused the motion. I proceeded on the basis that there was no technical bar to granting a motion for commission and diligence while there was an open amendment process. I accepted that it was entirely legitimate for a party to seek to recover documents which would assist him in making his pleadings more specific. I noted the terms of the declarator which the pursuer sought, which at that point was only that sought in the first conclusion, and that it was sought on the basis of the pleadings in Articles 12 to 17 of condescence, which gave notice of the pursuer's position regarding the law relevant to the legislative competence of the Scottish Parliament with regard to provision for referendums. I was not satisfied that recovery of a draft bill would enable the pursuer to make those pleadings more pointed or more specific. A case proceeding on the basis of argument as to whether or not a particular draft bill was within legislative competence would not be the pursuer's present case made more specific, but would be a different case entirely.

4 November 2020

12. The case called on the by order adjustment roll. Parties agreed that the matter should be sent to debate. They disagreed as to the scope of that debate. The pursuer moved for debate to be on all pleas, including his own for decree de plano. The defenders sought

debate on their preliminary pleas to the effect that the proceedings were academic, incompetent, premature, hypothetical, contrary to the constitutional principle of the separation of powers, and inconsistent with the structures of the Scotland Act, and to the effect that the pursuer lacked title, interest or standing. To allow a debate on all pleas would risk the court's adjudicating on issues which, according to the preliminary pleas, it ought to regard as non-justiciable.

13. The pursuer maintained it was not open to me to allow a debate restricted to specific pleas, other than on the consent of parties: RCS 22.3; *McIntosh v Cockburn & Co* 1952 SC 88. The defenders submitted that it was open to me to restrict debate to their preliminary pleas, citing *McGinty v Scottish Ministers* [2011] CSOH 163 and *J v Lord Advocate* 2013 SLT 347, both of which are cases which proceeded as judicial reviews. I did not require to determine which contention was correct. This case was, on the pursuer's analysis, time-sensitive. If the pursuer was right, he required a determination of his substantive case before the Scottish Parliamentary elections. It would not have been efficient to restrict the scope of debate with the consequence that if the defenders' preliminary pleas were repelled there might have to be a second stage to the debate. I considered that it was a matter for the defenders which of their pleas they chose to move at that debate, and whether or not they chose to engage with the pursuer's substantive case, or simply to rely on their own preliminary pleas. The defenders would not be inhibited from seeking to persuade me that I should not determine or express a view about the substantive matter raised by the pursuer. A procedure roll debate was set for 21 and 22 January 2021.

12 January 2021

14. The pursuer moved a specification of documents in identical terms to the one already mentioned. Subsequent to my decision of 30 September, the pursuer had introduced a second conclusion:

“For a declarator that the Scottish Government’s proposed Act of the Scottish Parliament concerning an independence referendum contains no provision which, if passed by the Parliament, would be outside its legislative competence.”

15. Senior counsel submitted that it was clear from the notes of argument prepared for the procedure roll debate that both defenders would rely on the absence of a draft bill, and argue that the declarators sought should be refused because they were insufficiently specific, and that the court could not determine the question of legislative competency in the abstract. The defenders raised that specifically in relation to the pursuer’s second conclusion. Against that background, there had been a material change of circumstances since the motion was last before the court.

16. The only test that the court should apply was whether or not a relevant basis for recovery had been set out in the pleadings: *Henderson v Robertson* (1853) 15 D 292; *McInally v John Wyeth & Brother Ltd* 1996 SLT 1223; *Somerville v Scottish Ministers* 2008 SC (HL) 45; and *Cherry & Others*.

17. He submitted that recovery was not sought with a view to making the pleadings more specific, but in order to provide the court with “documentary evidence bearing on the issues of law raised by the defenders”. Notwithstanding the submission that he was not seeking the documents with a view to making his pleadings more specific, he referred to the following passage in *Bank of East Asia* at 588C-F in support of his motion:

“In the present case, the pursuers are faced with a challenge by the defenders to the relevancy and specification of their pleadings. This is evident from the fact that the defenders have insisted that their [first] plea-in-law should be discussed at procedure

roll, having declined to consent to a proof before answer. Thus, in the procedure roll discussion which may occur in this case, the pursuers can expect that the relevancy and specification of their pleadings will be the subject of serious criticism.

That being so, it may well be necessary for them to consider, in the face of such arguments, whether they are in a position to amend their pleadings to meet the arguments that may be deployed against them. If they were not, in that situation, to be in possession of the relevant documentary material, it might well be that they would be unable to reach an early and definite decision on such a matter. In that event, they might well then have to resort to approaching the court for commission and diligence to recover documents.”

18. The second defender opposed the motion. Whether a bill was within the legislative competence of the Scottish Parliament depended on its terms when introduced and when passed. Any draft published by the Scottish Government in due course might or might not represent the text ultimately introduced in or passed by the Parliament. The action would fall to be dismissed whether or not a draft bill was available, as would be submitted at the procedure roll debate. The Scottish Government’s stated intention was to publish a draft bill before the end of the current parliamentary term in March 2021. The pursuer’s motion was an illegitimate attempt to use the court’s powers to force the Scottish Government to depart from its stated policy and to secure the disclosure of a draft bill at a time of the pursuer’s choosing. The pursuer’s second conclusion could not support the recovery or disclosure of any draft bill before its publication by the Scottish Government. Senior counsel for the second defender questioned the professional propriety of seeking a declarator in terms of the second conclusion, in circumstances where the pleader could have had no idea as to the terms of the “proposed act” in question. There was no proper basis for that conclusion. It was fallacious to plead first and then seek documents to provide a proper basis for the pleadings.

19. No preliminary work relating to a draft bill could be treated as being representative of the final position of the Scottish Government on the draft bill that was to be published in

due course. Having sight of a working draft of the bill or any documents falling within the scope of the calls in the pursuer's specification, could not assist the court in disposing of this action. It would be inappropriate for the court to order the disclosure of information about the ongoing development of the Scottish Government's policy in relation to a draft bill. The logical consequence of the pursuer's approach was that any statement of intention as to future policy would provide a basis for a pursuer to raise proceedings seeking clarification as to the legality of the policy, and ask the court to "open up the government's filing cabinet ahead of time".

20. He observed that the motion had been left until very shortly before the procedure roll debate, although the pleadings had been in their final form since the by order adjustment roll hearing.

21. Senior counsel for the pursuer responded by submitting that the pursuer relied on the fact that if any bill were introduced, a minister would require to make a statement in terms of section 31 of the 1998 Act that it was within the legislative competency of the Scottish Parliament.

22. I refused the motion for commission and diligence. What had changed since the pursuer last moved a similar motion was that the pursuer had added a second conclusion to the pleadings. In oral submissions senior counsel for the pursuer confirmed that he had no knowledge of the content of the proposed act, and that he said he was relying on the responsibility of those placing any bill before the Scottish Parliament as regards the statement they would have to give as to their opinion that it was within legislative competency. Those statements must, of course, be made in good faith, and are made, presumably, on the basis of legal advice. They are not, however, determinative of the question. As is amply vouched in authorities cited elsewhere in this opinion, statements by

politicians are not determinative of the law. Although the terms of the statute considered by the Supreme Court in *Christian Institute* were not identical to those of the bill as introduced, it is clear that the section 31 statement of view in that instance must have been incorrect so far as the information sharing provisions in part 4 of the bill were concerned.

23. A conclusion so drafted did not provide a proper basis on which to order the recovery of the documents sought. It remained the case that the pursuer had no averments about the content of any bill or draft bill to justify recovery. There were none that fell to be rendered more specific. I regarded the motion as a fishing diligence which fell to be refused.

24. I observe that the authorities bearing on commission and diligence are generally in relation to recovery to enable detailed pleading about, or proof of, something which has already happened, not about recovery of documents that may reflect the terms of a draft bill to be published in the future. There was considerable force in the second defender's submission that any draft available in January 2021 was not the "draft bill" or "proposed act" in relation to which the pursuer submitted he needed a determination from the court. On the pursuer's hypothesis, the bill about which he needs advice is the one that comes to be published before the election. What relation any draft or preparatory documents that might be recovered in January 2021 would have on a draft bill in relation to which a minister might come to make a statement in terms of section 31 is a matter of speculation.

25. I add the following observations. I doubt the constitutional propriety of requiring a government to disclose material relevant to the formation of policy, or the terms of a bill, while policy is in development and before any draft bill or bill has been published in the circumstances of this case. Absent allegations of unlawful acts or omissions requiring the intervention of the court to preserve the rule of law, governments are generally entitled to develop policies and proposals and decide for themselves whether and when to publish

them without interference. There is no allegation of unlawfulness or abuse of power in this case.