FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 25
A76/20

Lord President
Lord Menzies
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

MARTIN JAMES KEATINGS

Pursuer and Reclaimer

against

(First) THE ADVOCATE GENERAL; and (Second) THE LORD ADVOCATE

Defenders and Respondents

Pursuer and Reclaimer: O'Neill QC, Welsh; Balfour & Manson LLP
First Defender and Respondent: Webster QC, Pirie; Office of the Advocate General
Second Defender and Respondent: Mure QC, C O'Neill QC (sol adv); Scottish Government Legal Directorate

30 April 2021

Introduction

[1] The pursuer is a campaigner for Scottish independence. He is a voter in the upcoming election for the Scottish Parliament. He seeks two declarators. The first is that the Scottish Parliament has power under the Scotland Act 1998 to legislate for a referendum on whether Scotland should be independent, without requiring the consent of the United

Kingdom Government. The second is that the Scottish Government's "proposed Act" concerning an independence referendum contains no provisions which would be outside the Parliament's legislative competence.

[2] Although called as third defenders, the Scottish Ministers withdrew their defences. The action was also intimated to the Parliamentary Corporate Body, but they elected not to intervene. The first and second defenders plead *inter alia* that: the pursuer has no title, interest or standing to sue; the action is academic, hypothetical, premature and thus incompetent; and the declarators are inconsistent with the structure of the 1998 Act. The pursuer responds with a plea that the defences are irrelevant and decree should be pronounced *de plano*. By interlocutor dated 4 November 2020, the Lord Ordinary remitted all these pleas to the Procedure Roll for a debate. Meantime, on 30 July 2020, the pursuer's motion for a Protective Expenses Order had been refused (2021 SLT 8).

[3] By interlocutor dated 5 February 2021 (2021 SLT 233) the Lord Ordinary sustained the defenders' pleas that the action was academic, hypothetical, premature and thus incompetent but repelled the plea that it was inconsistent with the 1998 Act. The pursuer reclaims the decision that the action was incompetent and the defenders reclaim it in so far as relating to its inconsistency with the Act.

[4] The reclaiming motion is therefore primarily about whether the pursuer can obtain a declarator that the holding of a referendum on Scottish independence would be within the powers of the Parliament and that what is now a draft Scottish Independence Referendum Bill would be within legislative competence. There is a subsidiary challenge to the refusal to grant the PEO.

The Powers of the Scottish Parliament

[5] The Parliament was established by the 1998 Act. In terms of section 28, it can pass Acts which, in their proposed form prior to Royal Assent, are known as Bills. Legislative competence is dealt with by section 29 which provides:

> "(1) An Act… is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply –
>
> … (b) it relates to reserved matters.
>
> (3) … whether a provision of an Act… relates to a reserved matter is to be determined… by reference to the purpose of the provision, having regard … to its effect in all the circumstances".

[6] Reserved matters include "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" (Sch 5 Part I paras 1(b) and (c)). An Order in Council can modify what is, or is not, a reserved matter. Such an Order may allow the Parliament to legislate for a referendum even if that were thought to be outwith legislative competence. This is what occurred prior to the referendum of 18 September 2014 (The Scotland Act 1998 (Modification of Schedule 5) Order 2013).

[7] On or before its introduction, the person in charge of a Bill requires to state his view that its provisions would be within legislative competence (s 31(1)). With a Government Bill, this would normally be done by the relevant Government minister. The Presiding Officer must subsequently decide whether or not "in his view" it would be within competence (s 31(2)). If passed, the Presiding Officer will submit the Bill for Royal Assent.

[8] Section 33 deals with the "Scrutiny of Bills by the Supreme Court", by which is meant the Supreme Court of the United Kingdom. It provides that:

> "(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."

This must be done within four weeks of the passing of the Bill (s 33(2)(a)). A Bill cannot be submitted for Royal Assent pending a decision of the UK Supreme Court (s 32(2)).

[9] Section 40 of the 1998 Act prohibits the court from granting any order for suspension, interdict, reduction or specific implement against the Parliament, but it does permit the court to grant "instead" a declarator.

The Protective Expenses Order

[10] On 30 July 2020 the Lord Ordinary (Lady Poole) refused the pursuer's motion for a protective expenses order at common law. In doing so, she followed *Newton Mearns Residents Flood Prevention Group for Cheviot Drive* v *East Renfrewshire Council* [2013] CSIH 70 which adopted the five criteria in *R (Corner House Research)* v *Secretary of State for Trade and Industry* [2005] 1 WLR 2600. She held that the pursuer did have real prospects of success, that matter not being disputed, and that the issues raised were of general public importance. The Lord Ordinary did not accept that the public interest required these issues be resolved in this process, given the alternative means of doing so by a section 30 order or a reference to the UK Supreme Court.

[11] The Lord Ordinary held that the pursuer had an indirect financial interest in the case because of crowdfunding. She was under the impression that, if the pursuer were successful and received £30,000 in expenses from each defender, he might have an amount, including the crowd funding sum, which exceeded his expenses. There was no requirement to return any surplus to the crowdfunders and the surplus would thus be available to the pursuer. The Lord Ordinary noted that the pursuer was a person of modest means, but he had

obtained £43,000 in crowdfunding. She rejected the pursuer's contention that expenses would amount to £140,000 (inclusive of VAT) per party; noting that legal aid funding would total only about £25,500. The pursuer's estimate had included extravagant sums for counsel's fees. Ultimately, she estimated reasonable costs at £65,000 per party. The Lord Ordinary was not satisfied that the pursuer would be unable to meet the costs of the proceedings, having regard to the crowdfunding receipts. It was reasonable to expect the pursuer to meet his own expenses and a substantial part of the defenders' costs, but not the whole of the latter.

[12] The Lord Ordinary remarked upon the pursuer's carefully worded affidavit concerning his ability to pursue the action in the absence of a PEO. She took note of the number of those prepared to crowdfund the case. She was not satisfied that the refusal of a PEO would result in a discontinuation of the action. Rather, what would occur would be another round of crowdfunding. Ultimately, therefore, a PEO was not fair and just.

[13] During the course of the reclaiming motion, the pursuer sought a PEO again, but for the expenses in the cause generally, including those in the Outer House. On 22 February 2021 the court (a procedural judge exercising his delegated jurisdiction; RCS 37A.1) refused this motion. This was on the basis that the court was not satisfied that the reclaiming motion had real prospects of success. It observed that, given the amount of crowdfunding obtained (£258,000) and the pursuer's extrajudicial remarks that he intended to proceed with the case, if necessary to the Supreme Court of the United Kingdom, the criteria for a PEO would not be met.

The Lord Ordinary's Opinion on Declarator

[14] At the time of the Lord Ordinary's (Lady Carmichael's) opinion, the Scottish

Government had stated an intention to publish a draft Bill prior to the end of the Parliamentary session (21 March 2021). This had followed a programme for government (*Protecting Scotland, Renewing Scotland*, September 2020), which referred to the Government having a mandate to offer the people a right to choose a future as an independent country. A request had been made to the UK Government for a section 30 order to allow an Act authorising a new referendum. The Government has now submitted a draft Scottish Independence Referendum Bill to the Parliament.

[15] The Lord Ordinary accepted that consideration of proposed legislation by a court would normally be hypothetical and premature. A Bill may fall, or be amended. The provisions of the 1998 Act were consistent with this and recognised that the separation of powers required that the court should not pronounce orders which prevented the Parliament from fulfilling its function. The Lord Ordinary rejected the contention that the 1998 Act excluded an application to the court concerning proposed legislation in advance of Royal Assent other than by application by a law officer to the UK Supreme Court. She reasoned that the Parliament, as a creature of statute, remained subject to the court's jurisdiction except where expressly excluded. Section 40 did not oust the court's power to grant a declarator. Relying upon dicta in *Whaley* v *Watson* 2000 SC 340 (at 349-350 and 357-358) and *AXA General Insurance Co* v *Lord Advocate* 2012 SC (UKSC) 122 (at para [138]), on the status of the Parliament in comparison with the UK Parliament, the Lord Ordinary held that it followed that jurisdiction was not excluded. The right to obtain a ruling on the law was an aspect of access to the court (*Wightman* v *Secretary of State for Exiting the European Union* 2019 SC 111 at para [21]). This was a fundamental constitutional right which could only be curtailed by clear, express enactment.

[16] The Lord Ordinary determined that an individual may well have standing, but had to demonstrate that the application needed to be determined in order to preserve the rule of law. Where no unlawful conduct was alleged, it was not in every public law case that the court would answer a question about a disputed point of law. Although the principle of access to justice dictated that, as a generality, anyone could apply for a ruling on what the law was, there were limits to this. One of these was that a court should not be asked hypothetical or academic questions; that is those with no practical effect (*Wightman,* at para [22]).

[17] The Lord Ordinary examined the pursuer's central contention that he had standing and required an answer before the forthcoming election because he was a voter. She rejected as premature the pursuer's submission that legal certainty was needed to prevent the "constitutional paralysis" which would result from a retrospective decision that a referendum had been outwith competence. If a Bill were passed, it would be that version which would require scrutiny. There was no need to supply answers given the availability of other remedies in the form of a reference from a law officer or a judicial review after Royal Assent.

[18] The Lord Ordinary rejected the contention that MSPs had to know whether their actions, in passing a referendum Bill, would be *intra vires*. She repeated her view that it would generally be premature and pointless to adjudicate on the competence of a "proposed Act" at any time prior to it being passed. How political campaigners chose to carry out their activities was a matter for them. An answer to the questions asked might focus campaigning in a particular direction, but that did not mean that the rule of law would be undermined in the absence of a decision. There was no close relationship with a decision of the nature which existed for MPs in *Wightman*. It was the MSPs, and not the voters, who

made the decisions concerning legislation. The pursuer had not demonstrated that a decision was required in order for democracy to operate in accordance with the rule of law.

[19] The Lord Ordinary therefore held that the action was hypothetical, academic and premature. She added that, in relation to the separation of powers, where there was no allegation of unlawfulness and the court was asked for a determination in an area of current political debate and controversy, the question of whether an answer was required in order to protect the rule of law should be addressed with vigour.

Submissions

Pursuer

[20] The pursuer elected to present his argument in the form of two Notes of Arguments, which bore only a passing resemblance to the requirements of the Practice Note No 3 of 2011 (para 86) and contained references to authorities grossly in excess of the number which had been permitted by the court (cf 20 in total for all parties per the interlocutor of 19 February 2021). Given that the Practice Note is designed to ensure that parties present their cases in a manner which focuses the issues for the court and restricts written and oral pleading to that which will assist the court in determining these issues, such discrepancies are disappointing. They will be matters which, in an appropriate case, the court (para 88) and the Auditor may wish to take into account. The two Notes were followed by a separate "Speaking Note". What is attempted here is a summary of the more significant points made in all three of these documents and in oral submission.

[21] The pursuer was asking the court to exercise its constitutional jurisdiction to safeguard democracy (*Wightman*; *Cherry* v *Advocate General* 2020 SC 37, 2020 SC (UKSC) 1). The Scottish constitutional tradition reflected popular sovereignty (Declaration of Arbroath

1320; Marsilius of Padua: *Defensor Pacis (1324)*; Buchanan, *De iure regni apud Scotos*). The Diceyan view of absolute parliamentary sovereignty was redundant (*R (Jackson)* v *Attorney General* [2006] 1 AC 262 at paras 71 and 102), hence the process by which Ireland attained statehood. Dicey's (*Introduction to the Study of the Law of the Constitution* (8th ed)[1] at 29 and 33) despotism of the King in Parliament had been banished in favour of the constitutional principles of democracy, the rule of law and accountability (*AXA* at paras [49] and [50]; *Cherry* v *Advocate General* (UKSC) at paras [38], [41], [44]-[46] and [48]). Parliamentary sovereignty ran contrary to the Scottish tradition (*MacCormick* v *Lord Advocate* 1953 SC 396 at 411). The UK Parliament had not legislated in vain (*RM* v *Scottish Ministers* 2013 SC (UKSC) 139 at para [34]) when providing for the permanence of the Scottish Parliament and Government subject only to a referendum (1998 Act, s 63A). The Scottish Parliament's legitimacy now derived from the people of Scotland. Voters needed a ruling on what was a live question of law to allow their votes to be cast in an informed way.

[22] The 1998 Act did not exclude declarator. Any ouster of this court's jurisdiction required to be done with exacting clarity (*R (Privacy International)* v *Investigatory Powers Tribunal* [2020] AC 491 at paras 120, 131-132). There were grounds of challenge beyond legislative competence as defined by the 1998 Act (*AXA* at paras [136]-[139], [142], [150] and [153]); *Whaley* v *Watson* at 357-358). It was not a standalone constitutional framework document. Section 40 envisaged declarator relative to the extent of the Parliament's powers. The defenders were not entitled to rely on an implied exclusion (*R (UNISON)* v *Lord Chancellor* [2020] AC 869 at para 76). If there was a proportionality test to be applied (*Benkharbouche* v *Embassy of Sudan* [2019] AC 777), it would not be met where the aim was to prevent voters establishing the legal position.

[1] See 10th (Wade) ed at 75 *et seq*

[23] The action was not premature, academic or hypothetical. Democracy required that voters should know if and when campaign and manifesto promises would be carried out. This would achieve politically and legally responsible governance (*Cherry* v *Advocate General* (UKSC)). It was not sufficient for a party to seek election on the basis that, regardless of the legal limitations on the Parliament, it would interpret a vote in its favour as a democratic mandate to exercise powers beyond those limitations. The Government was seeking re-election on the basis of a promise to introduce a referendum Bill. In accordance with the principle set out in *Wightman* (at paras [21] and [22]), the pursuer was entitled to a ruling. There was a genuine dispute between the UK Government and the pursuer (cf House of Commons Library Briefing Paper, *Scottish independence referendum: legal issues*, No CBP9104, 8 March 2021).

[24] The second defender must have been consulted on the competence of the Bill. His position was that the publication of the Bill did not mean that he must be taken to accept that it was within legislative competence. This implied that the Government was acting contrary to the Ministerial Code by not knowing or caring whether the Bill would comply with the law. This was constitutionally irresponsible and thereby unlawful. The second defender had said that the Bill would not be introduced if it was contrary to the law; but the announcement by the Government on 23 January 2021 had said that Parliament would legislate irrespective of there being a section 30 order. This implied that its position was that the Bill would be competent in any event.

[25] The second defender's submission that campaign promises and manifesto undertakings were non-binding and non-justiciable was cynical and anti-democratic. The Government had undertaken to introduce the Bill in the next Parliament. This was not to be analysed in terms of legitimate expectation in public law (cf *R (Wheeler)* v *Prime Minister*

[2008] 2 CMLR 57 at paras 16-19). The historic basis of legitimate rule in Scotland involved an adherence to binding promises or undertakings. The court was being asked to adjudicate on a legal obligation arising from a promise (*Regus (Maxim)* v *Bank of Scotland* 2013 SC 331 at paras [33] and [34]), which had been made to induce the exercise of the basic right to vote (*Moohan* v *Lord Advocate* 2015 SC (UKSC) 1 at para [33]) in a particular way. MSPs would benefit from knowing whether the Bill, if passed, would be *ultra vires*. If the Scottish Ministers had made this promise not knowing or caring whether the Bill was within legislative competence, they would be guilty of unduly influencing voters (Representation of the People Act 1983, s 115; *R* v *Rowe Ex p Mainwaring* [1992] 1 WLR 1059 at 1064-5) by using a fraudulent device.

[26] The issues were not abstract. The question was one of principle which could be answered without reference to the terms of any specific Bill. It was not a question about the intricacies of particular legislation or parliamentary process, but a fundamental one of parliamentary authority. The defenders' position ran contrary to the separation of powers (*Cherry* (UKSC) at paras [34] and [36]). The court was being asked to refrain from determining the law for political reasons. A declarator would not bind or oblige MSPs to act in a particular way, but it would allow voters to hold them to account. The court should not be complicit in a political calculation, which had been made by the UK and Scottish Governments, to withhold awareness of the Parliament's powers.

[27] Given the replacement of parliamentary sovereignty with constitutional principles of democracy and accountability, it would be surprising if the Parliament were deprived of the power to hold referendums. A careful and restricted meaning had to be given to the phrase "legislation which relates to the Union of the Kingdoms of Scotland and England" (s 29(2)(b) and (3); sch 4, para 1(2)(b); sch 5, para 1(b); *Martin* v *Most* 2010 SC (UKSC) 40 at para [159]).

Apart from the express prohibitions, the Parliament was free to pass legislation even if it had incidental legal effects, or apprehended or foreseeable political effects, on the Union.

[28] The first defender's assumption was that a referendum would achieve a particular result and could, therefore, not be held. The basis for this was that the Bill's purpose was "to seek to build momentum towards achieving independence". The pursuer did not claim that the Parliament had the competence or the intention to dissolve the Union. A referendum would have no effect on the Union. The assumption of the UK Government may be that the purpose was for a vote in favour of independence to provide political cover for a unilateral declaration of independence, akin to the 1916 Proclamation of the Irish Republic. The pursuer was not asserting that a UDI was within legislative competence. Any change to the Union was for the UK Parliament to effect (*Blackstone's Commentaries on the Laws of England* at 97), doubtless advised by any agreement which may be reached with the Scottish authorities.

[29] On the Protective Expenses Order, the Lord Ordinary had innovated on the common law criteria set out in *Newton Mearns Residents Flood Prevention Group* and *Gibson* v *Scottish Ministers* 2016 SC 454 by considering the availability of alternative means of resolving the issues. She had taken into account that the pursuer had a financial interest in the case, when she had not been addressed on that. If there were a surplus, that would be placed in an access to justice fund by the crowdfunding website, with any donor of £1,000 or more being given a pro rata refund. The Lord Ordinary had wrongly assumed that a PEO would require that substantial expense would be borne by the public purse. She had wrongly taken into account the level of legal aid rates. Her assessment had involved too detailed an examination of the issues.

First Defender

[30] The statutory scheme for determining whether a Bill would be within the powers of the Parliament excluded any common law right to a declarator. If an action for declarator was permitted, it would undermine the rule of law by eliding that scheme. The scheme implicitly excluded a declarator; it could not co-exist with that remedy ((*R (Child Poverty Action Group)* v *Secretary of State for Work and Pensions* [2011] 2 AC 15 at paras 27-28 and 31-35). Parliament had decided that competence at this stage could only be judicially determined upon a reference to the UK Supreme Court. If declarator were available, there could be multiple litigations on the same Bill, resulting in inconsistent decisions and disruption of the orderly progress of the Bill.

[31] A determination of legislative competence would intrude on the performance of the duties of the introducer of the Bill and the Presiding Officer, and on MSPs' decision whether to pass the Bill (cf *Maugham, Petr* 2019 SLT 1313 at para [22]; *R* v *HM Treasury, ex parte Smedley* [1985] QB 657 at 667-672). The court was being asked to determine legislative competence without the necessary background materials (cf *Martin* v *Most*; *Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153). There were no provisions whose terms or effects could be the subject of objective consideration. Legislative competence was a matter of law, but it could not be determined in the abstract.

[32] If the 1998 Act did not implicitly exclude declarator, the rule excluding the exercise of the court's supervisory jurisdiction, where there was an alternative remedy, should be applied by analogy. The statutory scheme and the remedy of judicial review after Royal Assent provided sufficient protection for the rule of law. The court should be wary of treading on a jurisdiction allocated by Parliament (*MIAB* v *Secretary of State for the Home Department* 2016 SC 871 at para [73]). Declarator would run contrary to the constitutional

principle of the separation of powers (*Cherry* v *Advocate General*). Courts ought not to interfere with legislative proceedings (*R (Wheeler)* v *Prime Minister* [2008] EWHC 1409 at para 46). A remedy doing so was incompetent (*Maugham Petr* at para [22]).

[33] There was a fundamental right of access to the court to safeguard legal rights and determine liabilities (*R (UNISON)* at para 77). By disputing whether the right had been removed, the pursuer was enjoying that right. The need for clarity when excluding a fundamental right derived from the legality principle (*AXA* at para 151). When there was a statutory provision, removal of a right, which could otherwise be vindicated in court, did not engage the principle of legality (*R (Child Poverty Action Group)* at paras 29-31).

[34] The court was not obliged to answer every public law question it was asked (*Wightman* at paras [22]-[23] and [55]). There was no right to a declarator where a pursuer lacked standing or the determination sought would be hypothetical, academic or premature. The Lord Ordinary correctly determined whether declarator was required to preserve the rule of law in a democratic society. She noted the absence of any allegation of unlawfulness (see *Vince* v *Advocate General* 2020 SC 90 at para [10]) and that the context was in an area of political controversy. She correctly identified that a declarator would be pointless and premature given that the law officers could make a reference.

[35] The pursuer had clearly decided how to vote. The court's decision was not material to this. A refusal by the court to give legal advice did not compromise the principle of accountability of the executive to Parliament (*Cherry* (UKSC) at paras 46 and 55). The Lord Ordinary was correct to take into account the possibility of unlimited litigation about the legislative competence of campaign promises. This would be a disproportionate use of the court's resources (*R (Cart)* v *Upper Tribunal* [2012] 1 AC 663 at para 100).

[36] Declarator was incompetent because there was nothing to suggest that the Scottish Parliament would legislate in the manner described. The declarators related to a non-existent document. The 1998 Act had left it to Parliament to determine its own policy goals and the political and other considerations which were relevant to the exercise of its powers (*AXA* at paras [49] and [146]-[147]). The action was about whether an institution, of which the pursuer was not a member, had a power that it was not proposing to use. That made him a "busybody" who lacked standing and sufficient interest (*AXA* at para [63]; *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 at para [92]).

[37] If the court refused the reclaiming motion and/or upheld the cross appeals, the court ought not to express a view on the substantive issue raised by the conclusions for declarator. To do so would defeat the purpose of sustaining the defenders' pleas. The court could not express a view in the abstract. However, the propositions in the declarators were wrong. Competence was to be determined according to the ordinary meaning and statutory context of the 1998 Act (*UK Withdrawal from the EU (Legal Continuity) (S) Bill* 2019 SC (UKSC) 13 at paras [12] and [60]; *Imperial Tobacco* at paras [14]-[15]), not on how similar issues were handled in other jurisdictions (*Imperial Tobacco* at para [13]).

[38] A referendum on Scottish independence would affect two reserved matters, *viz* the Union of the Kingdoms of Scotland and England, and the Parliament of the United Kingdom. The sovereignty of the UK Parliament was reserved (*UK Withdrawal from the EU (Legal Continuity) (S) Bill* at paras [61]-[63]). Secession involved a reduction in its powers (*Moohan* at paras [17], [71], [91] and [102]). The central aim of the reservations was "that 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 at para [65]; White Paper, *Scotland's Parliament*, Cmnd 3658; *Wilson* v *First County*

Trust (No. 2) [2004] 1 AC 816 at para 56). The people of the UK had an interest in whether the UK was divided. Statements made during the passage of the 1998 Act (*Pepper* v *Hart* [1993] AC 593 at 640) rebutted any intention to give the Scottish Parliament the powers contended for. These included those of Lord Sewel (Hansard HL Vol 592 cols 854-855) and the Lord Advocate (Hansard HL Vol 593 col 1953).

[39] Legislation which provided for a referendum would have more than a loose connection with reserved matters (*UK Withdrawal from the EU (Legal Continuity) (S) Bill* at para [27]). The legal effect would require resources for a ballot 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. The purpose would be to seek to build momentum towards both of these outcomes. That purpose could be discerned from an objective consideration of the effect of its terms, for which the background materials, headings and side-notes would assist (*Martin* v *Most* at para [25]; *Imperial Tobacco* at paras [16]-[17]).

[40] The pursuer's challenge to the PEO was incompetent. Prior interlocutors could only be opened up for the purpose of doing justice in respect of an interlocutor which has been competently reclaimed. It was not competent to challenge an interlocutor that had nothing to do with the merits of that under review (*John Muir Trust v Scottish Ministers* 2017 SC 207 at para [57]). The action had proceeded without a timeous reclaiming motion and the interlocutor could not now be reversed (*Telfer* v *Buccleugh Estates* 2013 SLT 899 at para [42]). On 22 February 2021, this court had also refused to grant a PEO in relation to the expenses of the whole cause as the appeal did not have reasonable prospects of success.

[41] There were no grounds for interfering with the Lord Ordinary's decision on the PEO. She had correctly directed herself on the relevant principles. The pursuer did not satisfy the

criteria for a PEO. The issue was not one which the public interest required to be resolved. The pursuer now had £258,000 in crowdfunding. He would continue even if there were no PEO.

Second Defender

[42] The Lord Ordinary erred in finding that the declarators sought would not be inconsistent with the constitutional structures for the scrutiny of legislative competence in the 1998 Act. There was an irresistible inference that Parliament intended that the court should not become involved in Bills prior to Royal Assent (*Westminster Bank* v *Minister of Housing and Local Government* [1971] AC 508 at 529; *R* v *Lord Chancellor, ex parte Lightfoot* [2000] QB 597 at 628). Only the UK Supreme Court was entitled to determine legislative competence prior to Royal Assent. The UK Supreme Court's consideration was restricted to considering legislative competence in terms of section 29 of the 1998 Act. It did not assess competence of the Bill at common law (*UK Withdrawal from the European Union (Legal Continuity) (S) Bill*, at para [26]).

[43] This constitutional procedure was carefully crafted to support the rule of law in a parliamentary democracy. It respected the proper roles of the legislature and the judiciary. It was an exceptional jurisdiction for the prompt and authoritative determination of legislative competence; the very enactment of which presupposed that only once a Bill became law could its *vires* be examined. This respected the separation of powers by ensuring Parliament's freedom to debate and pass legislation, but recognised the desirability of obtaining an authoritative ruling within a limited time period.

[44] Were it to be otherwise, a new advisory jurisdiction with disruptive consequences would be created. A ruling in the sheriff court or this court could be obtained on the

legislative competence of a Bill at any time. It could significantly disrupt Parliament's work, particularly if there were appeals. The ruling would become the subject of debate in the press and the Parliament. Where a decision on an existing Bill was made, there was no provision to allow reconsideration in the Parliament in response to an adverse ruling. The law officers would not be able to refer the Bill directly to the UK Supreme Court.

[45] The pursuer did not have standing. The broader view of standing (*AXA* at paras [159]-[162]) was limited to the court's supervisory jurisdiction. Even if adopted here, questions of legislative competence were exclusively for those identified by the 1998 Act as having a relevant interest in proposed legislation, ie elected MSPs. That other persons may have had standing was irrelevant.

[46] The Lord Ordinary was correct in dismissing the action on the basis that the declarators sought were abstract, hypothetical, premature and/or academic. The rule of law did not require a determination. Relevant policy considerations were the protection of the court's resources and the avoidance of binding precedent where there had been no dispute (*R (Raw) v London Borough of Lambeth* [2010] EWHC 507 at paras 53-54). The courts were neither a debating club nor an advisory bureau (*Macnaughton* v *Macnaughton's Trs* 1953 SC 387 at 392). The Lord Ordinary's view that the floodgates would be opened to an unlimited number of challenges was correct. There was a limited discretion to hear an appeal on a point of law in public law litigation where the underlying dispute had been practically resolved. Appeals which were academic should not be heard in the absence of a good reason for doing so (*R* v *Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456-457).

[47] There was no absolute right of access to the court (*Benkharbouche* v *Embassy of the Republic of Sudan* [2019] AC 777 at para 14). The court was required to determine legal rights

and liabilities. The court was not being asked to do so here. The prematurity of the action did not turn on the publication or availability of a draft Bill. Only an Act could affect the legal rights, obligations or status of any person. The "real world practical effects" that would arise were political. There was no "practical" or "immediate urgency" (*Turner's Trs* v *Turner* 1943 SC 389 at 398). Concerns about a retrospective challenge to a referendum were speculative.

[48] The statements in respect of legislative competence were necessarily conducted with reference to the text of an actual Bill or Act, in the context of its supporting documents (1998 Act, ss 29 and 101). The contention that the pursuer required to test the accuracy of such a statement ignored the fact that no such statement had been made. If it had, it would have no effect on any person's legal rights, obligations or status. The publication of the draft Bill changed nothing. It did not imply any view of the Lord Advocate on legislative competence. The time had not come for the person in charge of the Bill to give a statement on legislative competence. That statement would be informed by the state of the law at the time when a Bill was introduced, taking into account: (i) the provisions of the 1998 Act, (ii) the relevant jurisprudence, (iii) any order under section 30, and (iv) the accompanying Policy Memorandum and other documents. It would not be appropriate for the Lord Advocate to pre-empt the view of the law officers in a future government.

[49] The pursuer's submissions on promise were irrelevant, as were his extravagant submissions about the Representation of the People Act 1983. The Government could give no enforceable legal promise that a future government would introduce a referendum Bill. That was a matter of policy for the future government, formed after election.

[50] The court ought not to entertain the challenge against the refusal of a PEO. This was an attempt to subvert the decision of the procedural judge. It would be neither just nor fair

to review the Lord Ordinary's interlocutor now. The pursuer had not sought leave to reclaim at the time. That constituted an acceptance by him of the procedure which followed (*McCue* v *Scottish Daily Record & Sunday Mail* 1998 SC 811 at 821). He had acquiesced in the procedure (*Clark* v *Greater Glasgow Health Board* 2017 SC 297 at para [40]).

Decision

Prematurity, hypothesis and academia

[51] The issue of when the court will decline to entertain an application for a declarator on the present state of the law was recently extensively explored in *Wightman* v *Secretary of State for Exiting the European Union* 2019 SC 111 (LP (Carloway) at para [21] *et seq*). The principle of access to justice requires that, as a generality, anyone can apply to the court to determine what the law is in a given situation. There are limits to this. One of them is that, again as a generality, the court will not determine hypothetical or academic questions. Those are questions, the answers to which have no practical effect. There may be certain situations in which the court may decide that it should determine a hypothetical question, but only if there is a good reason, in the public interest, for doing so, such as where it is anticipated that the same question will need to be resolved in the near future (*R* v *Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, Lord Slynn at 456-457).

[52] A good reason for not intervening would be because to do so would be to usurp or encroach upon a function which has been specifically conferred upon Parliament (*Maugham, Petr* 2019 SLT 1313 Lord Pentland at para [22]; see in England and Wales *R (Wheeler)* v *Prime Minister* [2008] EWHC 1409 (Admin), Richards LJ, delivering the judgment of the court, at para 49 and following *R* v *HM Treasury, ex parte Smedley* [1985] QB 657, Donaldson MR at 666, see also Slade LJ at 672), such as the scrutiny of Bills.

[53] Where a bare declarator is sought, it must have a purpose. It must produce a practical result. In so far as this overlaps with title and interest (standing), the result must be one for the person seeking the remedy, although it may also affect others. Whether a person has a sufficient interest depends upon the context (*AXA General Insurance Co* v *Lord Advocate* 2012 SC (UKSC) 122, Lord Reed at para [170]). There is no difference in this area between ordinary actions and petitions for judicial reviews where each seeks a public law remedy.

[54] In identifying the context, the court does not accept that the pursuer requires a declarator of the law in order to exercise his right to vote at the forthcoming election. Even in the unlikely event that his voting decisions might be influenced by whether or not the Parliament has the competence to pass an Act in terms of the draft Bill, that fact would fall far short of providing a sufficient basis for the court to adjudicate upon the issue. The litigation is readily distinguishable from *Wightman*. In *Wightman*, ascertaining the legal principles that applied to the use of Article 50 of the Treaty on European Union and its consequences were a matter of considerable practical importance for MPs who would require to take the final decisions about the UK's withdrawal from the EU and the arrangements that would replace the existing law (Lord Drummond Young at para [54]). Determination of that issue clarified the options which were open to MPs in the lead up to what was an inevitable vote on a matter of importance to the UK (LP (Carloway) at para [27] and Lord Drummond Young at para [58]).

[55] At present, there is no Bill before the Parliament, although there is a draft Bill. A draft Bill has no legal status. The result of the election is not yet known. A Bill may or may not be introduced, depending upon the Government formed as a consequence of the election. If introduced, a Bill may or may not be passed by the Parliament, depending upon that institution's composition. If a Bill is introduced, it may or may not be in the form which

is contained in the draft. No matter what its initial form, it may be amended. The UK Government may or may not be prepared to obtain an Order in Council under section 30 of the 1998 Act, which would, in any event, allow the Bill to proceed to Royal Assent. If the Bill were passed without such an Order, it is highly probable that the UK Government's law officers would refer the Bill for scrutiny by the UK Supreme Court. All of these eventualities render the current remedies sought premature, hypothetical and academic. A decision by this court on the matters litigated would serve no practical purpose.

[56] For these reasons the court will adhere to the Lord Ordinary's interlocutor of 5 February 2021 in so far as it sustains the first to fourth pleas-in-law for the first defender and the first and second pleas-in-law for the second defender and dismisses the action. The Lord Ordinary's repelling of the second defender's third and seventh plea-in-law is not challenged and those too will be adhered to.

The Structure of the 1998 Act

[57] There is no dispute that, as a generality, the Scottish Parliament is subject to the jurisdiction of the court (*AXA*, Lord Reed at paras [137] (citing *Whaley* v *Watson* LP (Rodger) at 348-349 and [138]). Whether the Parliament has acted within its powers falls within this court's jurisdiction (*AXA*, Lord Reed at para [139] citing *West* v *Secretary of State for Scotland* 1992 SC 385 at 412-413). As it was put in *Whaley* (LP (Rodger) at 348), if a statutory institution does not operate within its powers:

> "… then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation".

[58] These last words are important. The Lord Ordinary is not quite correct to say that the Scottish Parliament is subject to the jurisdiction of the court unless that jurisdiction is

specifically excluded. Exclusion can also occur by necessary implication and, in that respect, it is a question of the construction of the particular statute in each situation (*R (Child Poverty Action Group)* v *Secretary of State for Work and Pensions* [2011] 2 AC 15, Lord Dyson at paras 27 (citing *Deutsche Morgan Grenfell Group* v *Inland Revenue Commissioners* [2007] 1 AC 558, Lord Hoffman at para 19 and Lord Walker at para 135), and 29 (citing *R (Morgan Grenfell & Co)* v *Special Commissioner of Income Tax* [2003] 1 AC 563, Lord Hobhouse at para 45); *AXA* v *Lord Advocate*, Lord Reed at para [151] citing *R* v *Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, Lord Hoffman at 131).

[59] An attempt to exclude completely the jurisdiction of the court to review acts of inferior tribunals or to prevent access to such tribunals would undoubtedly require clear and unambiguous terms (eg *R (Privacy International)* v *Investigatory Powers Tribunal* [2020] AC 491; *R (UNISON)* v *Lord Chancellor* [2020] AC 869, Lord Reed at para 76). The same would apply if it were contended that a fundamental human right was being interfered with (*Westminster Bank* v *Minister of Housing and Local Government* [1971] AC 508, Lord Reid at 529 citing *Colonial Sugar Refining Co* v *Melbourne Harbour Trust Commissioners* [1927] AC 343, Lord Warrington at 359). This is not such a case. This is a situation in which the statute which creates the relevant institution provides a specific remedy in relation to a particular, matter, viz. the scrutiny of Bills; the latter being a temporary state given the ability of an affected person to challenge any subsequent Act. Where such a specific statutory remedy is inconsistent with the use of an ordinary one, the latter may be held excluded by necessary implication. That is the situation here.

[60] It is important *in limine* to make a clear distinction between an Act of the Parliament and a Bill. Only a provision of an Act can be outwith legislative competence (1998 Act, s 29(1)). The contents of a Bill cannot be, since a Bill has no legislative force. The 1998 Act

makes express provision for both the person in charge of a Bill and the Presiding Officer to express their views on legislative competence. The phraseology is careful and is designed to ensure that such an expression does not amount to a decision which is subject to the supervisory jurisdiction of the court. The Act goes on to provide expressly for the scrutiny of Bills at a stage after a Bill has been passed by the Parliament but prior to it receiving Royal Assent. It has confined that scrutiny to the Supreme Court of the United Kingdom and then only on the application, within a limited window of time, of the principal law officers of Scotland and the United Kingdom (1998 Act, s 33(1)). This is the only method of scrutinising a measure for legislative competency prior to Royal Assent.

[61] If it were otherwise, there would be the potential for conflict between applications which challenge competency made by other persons to the Court of Session or a sheriff court in advance of Royal Assent. Put another way, "the coexistence of two systems, overlapping but varying in matters of detail… would be a recipe for chaos" (*R (Child Poverty Action Group)*, Lord Dyson at para 35 citing *Unisys* [2003] 1 AC 518 Lord Millett at para 80). The time frame for applications to the UK Supreme Court would be rendered somewhat redundant, if an application from one of the law officers could be made prior to the passing of the Bill by the Parliament. The idea that the law officers are able to seek such scrutiny only after the passing of a Bill would be rendered nugatory if they could do so during the Bill's passage through Parliament.

[62] For these reasons, the defenders' cross-appeal should be allowed and the Lord Ordinary's interlocutor of 5 February 2021 should be recalled in so far as it repels the sixth plea in law for the second defender. The second defender's sixth plea in law should be sustained.

The Merits

[63] Were the court to have been of the view that it ought to have answered the questions asked, it would have done so as a matter of straightforward statutory interpretation. The 1998 Act "must be interpreted in the same way as any other statute… according to the ordinary meaning of the words used" (*UK Withdrawal from the EU (Legal Continuity) (S) Bill* 2019 SC (UKSC) 13 at para [12]), and in their "statutory context" (para [60]; *Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153, LP (Hamilton) at para [14]).

[64] The pursuer's submissions on the Scottish constitutional tradition and the manner in which it may differ from that in England, which were described in *MacCormick* v *Lord Advocate* 1953 SC 396 (LP (Cooper) at 411), would have been of peripheral relevance in this exercise. The continuing relevance of the principle of the sovereignty of the UK Parliament, as it was described by Dicey (*An Introduction to the Study of the Constitution* 10th (Wade) ed 64 and 69), would not require to be explored. That is so albeit that the pursuer's reports of its demise seem greatly exaggerated (see *Cherry v Advocate General* 2020 SC (UKSC) 1 at para [41]; *UK Withdrawal from the EU (Legal Continuity) (S) Bill* at para [63]; *R (Jackson)* v *Attorney General* [2006] 1 AC 262, Lord Steyn at para 102; *Wightman*, Lord Drummond Young at para [46]).

[65] References to the Declaration of Arbroath and mediaeval or renaissance tracts fall into the same category. Analogies with the private law principles on unilateral promises are similarly of little, if any, moment. The expectation of the public, if any, based on the promises of political parties, is similarly largely irrelevant. Issues about whether a particular party might have breached the Representation of the People Act 1983, or whether the Lord Advocate had breached the Ministerial Code, would not have entered the equation.

[66] The question would have been whether an Act to hold a referendum on Scottish Independence "relates to" (s 29(2)(b)) "the Union of the Kingdoms of Scotland and England" or "the Parliament of the United Kingdom" (sch 5 part I para 1(b) and (c)) having regard to its effect in all the circumstances (s 29(3)). The Act would relate to these reserved matters if it had "more than a loose or consequential connection with them" (*UK Withdrawal from the EU (Legal Continuity (Scotland) Bill* 2019 SC (UKSC) at para [27], quoting *Martin* v *Most* 2010 SC (UKSC) 40, Lord Walker at para [49]). Viewed in this way, it may not be too difficult to arrive at a conclusion, but that is a matter, perhaps, for another day.

The Protective Expenses Order

[67] The reclaiming motion against the Lord Ordinary's refusal of the PEO is incompetent, and, in any event, at least something which the court will not now interfere with, for two reasons. It is incompetent because the pursuer's motion for a PEO in the reclaiming motion in respect of the expenses of the whole process was refused by this court in the form of the procedural judge's interlocutor of 22 February 2021 and the accompanying statement of reasons. The matter is thus *res judicata*.

[68] Secondly, although RCS 38.6 provides that a reclaiming motion has the effect of submitting all previous Outer House interlocutors to review, this is only in so far as such interlocutors require to be opened up for the purpose of doing justice in respect of the interlocutor which has been competently reclaimed. It is not competent to challenge an interlocutor that has nothing to do with the merits of that under review (*Prospect Healthcare (Hairmyres)* v *Keir Build* 2018 SC 155, LP (Carloway), delivering the opinion of the court, at para [23], following *John Muir Trust* v *Scottish Ministers* 2017 SC 207 LP (Carloway), delivering the opinion of the court, at para [57]).

[69] The pursuer did not seek to reclaim the Lord Ordinary's refusal of the PEO. The action was allowed to proceed on the basis that there would be no PEO. In such circumstances, the pursuer must be taken to have acquiesced in the refusal. It is too late to re-visit what is essentially a procedural matter at this late stage. The court will adhere to the Lord Ordinary's interlocutor of 30 July 2020.

[70] Before leaving the matter of expenses, it is worth commenting that the figures, which were given to Lord Ordinary about the potential level of expense, provide considerable cause for concern in relation to access to justice. The sum of £65,000 per party, which the Lord Ordinary fixed upon, is worrying, if this is thought to be reasonable in a case which involves no substantial dispute of fact and is resolved at a legal debate. Although the case proceeded, correctly, as an action rather than a petition for judicial review, the expenses regime ought not to be too different. The judicial review hybrid petition process was designed to be a "speedy and cheap" method of review in the wake of the remarks which were made in *Brown* v *Hamilton District Council* 1983 SC (HL) 1 (Lord Fraser at 49; see *Prior* v *Scottish Ministers* 2020 SLT 762, LP (Carloway), delivering the opinion of the court, at para [35]). If the cost of pursuing an action, which does not even require proof, is to amount to sums of the nature contemplated by the Lord Ordinary, the court, and perhaps also the Auditor, will require to consider what steps require to be taken to remedy the position. It may need to revisit the principles of the Gill Review in this regard.