



12 December 2012

PRESS SUMMARY

Imperial Tobacco Limited (Appellant) v The Lord Advocate (Respondent) (Scotland) [2012] UKSC 61

On appeal from [2012] CSIH 9

JUSTICES: Lord Hope, Lord Walker, Lady Hale, Lord Kerr, and Lord Sumption.

BACKGROUND TO THE APPEAL

In this appeal, the Appellants argue that sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 (the “2010 Act”) are outside the legislative competence of the Scottish Parliament. Section 1 of the 2010 Act prohibits the display of tobacco products in a place where tobacco products are offered for sale. Section 9 prohibits vending machines for the sale of tobacco products [3].

The limits to the legislative competence of the Scottish Parliament are set out in the Scotland Act 1998 (the “1998 Act”). The Appellants’ first broad argument is that, by reference to their purpose, sections 1 and 9 relate to “the sale and supply of goods to consumers” and “product safety”. These are matters which are reserved to the UK Parliament under the 1998 Act and on which the Scottish Parliament cannot legislate. Their second broad argument is that sections 1 and 9 modify the law on reserved matters. They say that two sets of Regulations (the Tobacco for Oral Use (Safety) Regulations 1992 and the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002) should be treated as being part of the law on reserved matters because their subject matter is a reserved matter. Those Regulations contain rules of Scots criminal law which are special to a reserved matter. Sections 1 and 9 modify those rules, which under the 1998 Act they cannot do. The Appellants also say that sections 1 and 9 create new offences, in addition to those already provided for in the Regulations, which can only be committed in the course of the sale and supply of goods to consumers [2, 3, 25 and 38].

This is the first case in which provisions of an Act of the Scottish Parliament have been challenged on the ground that they relate to the specific reservations in the list of reserved matters [6]. At first instance, the Court of Session held that none of the Appellants’ challenges to the legislative competence of sections 1 and 9 (which included the challenges made in this appeal) were well founded, and it dismissed their petition for judicial review. Their reclaiming motion (appeal) to the Inner House of the Court of Session was unsuccessful [4].

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Sections 1 and 9 of the 2010 Act are within the legislative competence of the Scottish Parliament. The judgment is given by Lord Hope with whom all the other Justices agree.

REASONS FOR THE JUDGMENT

Three principles should be followed when undertaking the exercise of determining whether, according to the rules that the 1998 Act lays down, a provision of an Act of the Scottish Parliament is outside competence. First, the question of competence must be determined in each case according to the

particular rules that have been set out in the 1998 Act. Second, those rules must be interpreted in the same way as any other rules that are found in a UK statute. Third, the description of the 1998 Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation [12 – 15].

The exercise is essentially one of statutory construction. The answer to the question of whether the challenged provisions are within legislative competence is to be found by construing the words used by the 1998 Act and examining the challenged provisions in the light of the meaning that is to be given to those words. In this case, the first stage is to examine sections 1 and 9 and to identify their purpose. The second stage is to examine the relevant rules in the 1998 Act to identify the tests that have to be applied. This stage is of critical importance and it requires to be handled with great care. The final stage is to draw these exercises together to reach a conclusion on the legislative competence of sections 1 and 9 [9 and 18].

The purpose of section 1 is to enable the Scottish Ministers to take steps which might render tobacco products less visible to potential consumers and thereby achieve a reduction in sales and thus in smoking. The purpose of section 9 is to make cigarettes less readily available, particularly (but not only) to children and young people, with a view to reducing smoking. The legal effect and short term consequences are consistent with those purposes [22].

In the 1998 Act, the reserved matter of “the sale and supply of goods and services to consumers” encompasses all aspects of regulation of the sale and supply of goods and services to consumers within the field of consumer protection. The reserved matter of “product safety” extends to matters falling within the scope of section 11 of the Consumer Protection Act 1987 (which gives the Secretary of State power to make product safety regulations) [34, 36, 40 and 42].

The Court does not see how it can be said that the purpose of sections 1 and 9 has anything to do with consumer protection. The aim of sections 1 and 9 is to discourage or eliminate sales of tobacco products, not to regulate how any sales are to be conducted so as to protect the consumer from unfair trade practices [40 – 41]. The purpose of sections 1 and 9 also has nothing to do with the standards of safety to be observed in the production and sale of tobacco products. Sections 1 and 9 are designed to promote public health by reducing the attractiveness and availability of tobacco products, not to prohibit in any way their sale to those who wish and are old enough to purchase them. The words “product safety” in the 1998 Act direct attention to matters that are of concern to the single market in the general area of trade and industry. It is not the purpose of sections 1 and 9 to disrupt or unbalance trading in tobacco products in that way at all [42].

Sections 1 and 9 do not seek to amend or otherwise affect anything that is set out in the two sets of Regulations. In that sense they cannot be said to modify them. The purpose of the offences that sections 1 and 9 create is to discourage or eliminate the sale or supply of tobacco products. If this purpose is realised, that will be their effect. This is plain in the case of the vending machines, because the effect of section 9 is to prohibit the sale of tobacco products by way of vending machines. The Court can see no connection between the purpose and effect of section 1 and the law on reserved matters. The criminal law relating to any sales in a place where tobacco products are available for sale will not be affected by section 1. Section 1 does not create any new offence in regard to any such sales, and the existing offences are not modified. Section 1 is not a provision within the scope of section 11 of the Consumer Protection Act 1987 [44 – 45].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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