FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 51
P845/19 and P900/19

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the petitions of

DALE VINCE and OTHERS

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL

Respondent

Petitioners: O'Neill QC, Welsh; Balfour + Manson LLP
Respondent: Johnston QC, Webster QC, Pirie; Office of the Advocate General

9 October 2019

[1] This opinion concerns, first, a petition, which has been presented directly to the Inner House (appellate division) of the court. It seeks to invoke the *nobile officium* (equitable jurisdiction) of the court. In its adjusted form, it craves a series of orders which mirror the procedures which have been prescribed by the European Union (Withdrawal) (No 2) Act 2019. The orders are in three parts; but, for present purposes, the most important is an order

that a letter in the form set out in the Schedule to the 2019 Act be drawn up and signed by the clerk of court on behalf of the Prime Minister. Secondly, the opinion relates to a reclaiming motion (appeal) against the interlocutor of the Lord Ordinary, dated 7 October 2019, which refused the prayer of a second petition, this time to the Outer House (first instance jurisdiction), seeking various orders requiring the PM to comply with the 2019 Act (*infra*).

[2] In both petitions it is averred, and not disputed, that the Prime Minister, or persons in his office, have made various statements to the effect that he will not seek an extension, as he is required to do by section 1(4) of the 2019 Act no later than 19 October 2019, if certain conditions specified in the Act are not satisfied by that date. These conditions are that the House of Commons approves, and the House of Lords takes note, of either: (a) a withdrawal agreement in terms of Article 50(2) of the Treaty on European Union; or (b) the UK's withdrawal from the EU without an agreement. That this is the import of the Act is not in issue (*Cherry* v *Advocate General* 2019 SLT 1143 at para 22).

[3] The respondent's answer in both processes is that the court can expect members of the Government to respect any declarator that it makes about their statutory duties. "There is no question but that the Prime Minister will comply with the requirements of the law". Reference is made to occasions in which the Prime Minister has said this.

[4] In its original form, the petition to the *nobile officium* had sought further orders, notably: (a) interdict preventing the UK Government from taking any action that would undermine or frustrate the will of Parliament as expressed in the 2019 Act; (b) specific performance of the Prime Minister's duties under the 2019 Act; and (c) interdict preventing the Government from withdrawing, cancelling or otherwise undermining the effect of any letter sent in accordance with the Act.

[5] The respondent tabled a plea to the competency of the petition in its original form on the basis that the petitioners had an alternative remedy in the form of an action for specific performance under section 45 of the Court of Session Act 1988; such an action being appropriate for consideration in the Outer House. Perhaps conscious of the strengths of the competency plea, the petitioners presented a separate petition to the Outer House craving the orders for specific performance. Such an order would normally be a necessary precursor to any order authorising the substitution of a signature by the clerk of court.

[6] In his interlocutor dated 7 October 2019 (see [2019] CSOH 77), the Lord Ordinary refused to grant the orders for specific performance and interdict. He held (at para [42]) that it was neither necessary nor appropriate to grant the orders standing the respondent's position on compliance whereby:

> "(a) the [Prime Minister] is subject to the obligations of the 2019 Act; (b) in the event of neither of the conditions in [the 2019 Act] being satisfied, the [PM] will comply with [the Act] no later than 19 October 2019; and (c) that he will not frustrate the purpose of the 2019 Act or the purpose of any of its provisions. In other words, there can be no doubt that the [PM] now accepts that he must comply with the requirements of the 2019 Act and has affirmed that he intends to do so".

The Lord Ordinary did not consider that this was undermined by the absence of a formal undertaking or a sworn affidavit. The respondent had made detailed and specific averments which were presented on counsel's professional responsibility. There was no basis upon which the court could hold that the Prime Minister and the Government were "liable to fail to do what they have in effect undertaken to the court that they will do".

[7] The Lord Ordinary determined (at para [44]) that:

> "…the extra-judicial statements on which the petitioners rely must be understood in the political context in which they were made; that is as expressions of the government's political policy. They were clearly not intended to be taken as conclusive statements of the government's understanding of its legal obligations."

Given the respondent's clearly stated position, there was no need for coercive orders. It would be

> "destructive of one of the core principles of constitutional propriety and of the mutual trust that is the bedrock of the relationship between the court and the Crown for the [PM] or the government to renege on what they have assured the court that the [PM] intends to do."

[8] On the material which was available to him, the court agrees with the reasoning of the Lord Ordinary. At this stage, there is no basis for granting any of the orders sought by the petitioners in either process. Before coercive measures are granted, the court must be satisfied that they are necessary; ie that there are reasonable grounds for apprehending that a party will not comply with the relevant statutory or other legal obligation. In the normal case, that will often involve that party having already failed to comply with the obligation within the statutory or other time limit. In this case, whether the Prime Minister will ever require to send a letter containing an extension request is uncertain. The UK Government and the EU may reach a deal. Parliament may approve a "no deal" Brexit. If neither event occurs, it has not been disputed that the PM must send the letter. Until the time for sending the letter has arrived, the PM has not acted unlawfully, whatever he and his officials are reported to have said privately or in public. The existence of these statements, which are made in a political context, does not give ground for reasonable apprehension of future non-compliance for the reasons given by the Lord Ordinary.

[9] The situation remains fluid. What is known is that, over the next two weeks, circumstances will inevitably change. If 19 October comes and goes without either of the two conditions in the 2019 Act having been satisfied and in the absence of the letter which the Prime Minister would then be required to send, the petitioners would be entitled to

return to court and seek an order ordaining the PM to comply with the terms of the 2019 Act within a prescribed, and possibly very short, period. It is only once that period has expired without the order being obtempered that the court would consider authorising an official to sign the letter which the PM may have failed to do.

[10] The court appreciates that there is a limited amount of time before the expiry of the existing extension period. It understands the concern of persons on both sides of the political debate on the Brexit issue. The political debate requires to be played out in the appropriate forum. The court may only interfere in that debate if there is demonstrable unlawfulness which it requires to address and to correct. At present there has been no such unlawfulness.

[11] The normal course in such circumstances would be to refuse the reclaiming motion and the prayer of the petition to the *nobile officium*. There is force in the argument that the petition should, in any event, be dismissed as unnecessary, given the alternative remedies sought or potentially available in the Outer House petition. Whether that is so or not, refusing the reclaiming motion would be without prejudice to the petitioners' ability to return to court, should the Prime Minister be found not to have complied with the terms of the 2019 Act. That is a matter which can only be ascertained at midnight on 19 October. If there is a material change in the present circumstances, the petitioners would, if the reclaiming motion were refused at this stage, require to frame and lodge a new application in the Outer House, to seek the same orders anew, and subsequently possibly to seek any remedy available under the *nobile officium*. It is clear that there will be changes in circumstances over the next 10 days. In these circumstances requiring the petitioners to raise new, but very similar, proceedings after 19 October may render any remedy, which might ultimately be afforded by the court, ineffective as a result of the passage of time.

[12] The court will for these reasons continue consideration of the reclaiming motion and the petition to the *nobile officium* until Monday, 21 October, by which time the position ought to be significantly clearer. At that time the court will expect to be addressed on the facts as they then present themselves.