

IN THE SUPREME COURT
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

BETWEEN

THE QUEEN
on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

- and -

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

- and -

(1) GRAHAM PIGNEY AND OTHERS
(2) AB, KK, PR AND CHILDREN

Interested Parties

- and -

(1) GEORGE BIRNIE AND OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN

Interveners

PRINTED CASE OF THE COUNSEL GENERAL FOR WALES

1. This is the printed case of the Counsel General for Wales. The Counsel General is the Law Officer of the Welsh Government, appointed by Her Majesty pursuant to section 49 of the Government of Wales Act 2006 ("the 2006 Act").
2. The Counsel General's position (and that of the Welsh Government) is that the result of the referendum to leave the EU should be respected. However, it is submitted that the process of withdrawing from the EU must, and may only, be carried out consistently with the appropriate legal and constitutional requirements.

As explained below, these requirements are highly material to the devolution settlement in the United Kingdom. They are particularly important in an uncertain context such as the present where the terms of withdrawal are wholly unclear.

3. In its judgment, the Divisional Court held that, on a proper interpretation of the European Communities Act 1972 (“the ECA”), Parliament had left no room for a prerogative power to withdraw from the EU ([94]). Further, it held that the executive had no prerogative power to repeal domestic law rights without express authorisation or authorisation by necessary implication from Parliament, which was lacking ([96]). The Court therefore did not need to consider the devolution arguments raised by the second group of interested parties ([102]). However, the Counsel General submits that the effect of triggering Article 50 on the devolution settlement of the United Kingdom provides an additional reason to uphold the Court’s judgment and/or finding that the prerogative cannot be used to trigger Article 50.
4. In outline, the Counsel General contends that the government does not have power under the prerogative to give notification to leave the EU under Article 50(2) TEU for two reasons:
 - a. First, giving notification will modify the competence of the National Assembly for Wales (“Welsh Assembly”) and the Welsh Government under the 2006 Act. The prerogative power cannot be used to dispense with statutory provisions in this way; and
 - b. Secondly, any modification to the legislative competences of the Assembly will engage the Sewel Convention. The Sewel Convention is a convention in the sense of well-established arrangements and practices which operate between legislatures (the Westminster Parliament and, in Wales, the Welsh Assembly). The UK Government does not have the power to short-circuit it through the use of the prerogative.

The proper context of this appeal:

5. It is important to set the Counsel General's intervention in its proper context, namely (i) the permanence of devolution, and increasing empowerment, as features of the United Kingdom constitution; and (ii) the narrow, residual nature of the prerogative power.

6. As the Welsh Government recently said in its written evidence to the House of Lords Constitution Committee's inquiry *The Union and devolution*, devolution has become a fundamental and effectively irreversible feature of the constitution:¹
 - (i) Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations which share and redistribute resources and risks between us to our mutual benefit and to advance our common interests.
 - (ii) The principles underpinning devolution should be recognised as fundamental to the UK constitution, and the devolved institutions should be regarded as effectively permanent features of that constitution.
 - (iii) Devolution is about how the UK is collectively governed, by four administrations which are not in a hierarchical relationship one to another. The relations of the four governments of the United Kingdom should therefore proceed on the basis of mutual respect and parity of esteem.
 - (iv) The allocation of legislative and executive functions between central UK institutions and devolved institutions should be based on the concept of subsidiarity, acknowledging popular sovereignty in each part of the UK.
 - (v) The presumption should therefore be that the devolved institutions will have responsibility for matters distinctively affecting their nations. Accordingly, the powers of the devolved institutions should be defined by the listing of those matters which it is agreed should, for our mutual benefit, be for Westminster, all other matters being (in the case of Wales) the responsibility of the Assembly and/or the Welsh Government.

7. The permanence of devolved government for Wales has recently been recognised in clause 1 of the Wales Bill, which provides for the following provision to be added to the 2006 Act:

A1 Permanence of the Assembly and Welsh Government

¹ See Select Committee on the Constitution, 'The Union and devolution: written and oral evidence' p.727. Available at: <http://www.parliament.uk/documents/lords-committees/constitution/union-and-devolution/FINAL-Evidence-volume-UDE.pdf>.

(1) The Assembly established by Part 1 and the Welsh Government established by Part 2 are a permanent part of the United Kingdom's constitutional arrangements.

(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Assembly and the Welsh Government.

(3) In view of that commitment it is declared that the Assembly and the Welsh Government are not to be abolished except on the basis of a decision of the people of Wales voting in a referendum.

8. Equivalent provisions have already been inserted into a new section 63A of the Scotland Act 1998.
9. As recognised by this Court in *Re Agricultural Sector (Wales) Bill* [2014] 1 WLR 2622 at [42], the direction of travel for devolution in the United Kingdom is undoubtedly one of widening and deepening empowerment. Thus the Welsh Assembly acquired significant new powers to pass Acts, within the legislative competences set out in the 2006 Act, following a referendum held on 3 March 2011.² Similarly, the Wales Bill, if it comes into force, is intended to increase the powers of the Assembly by amending the 2006 Act from a 'conferred powers' to a 'reserved powers' model of devolved competences. As set out above, these reflect permanent transfers of power to the Welsh Assembly and Government.
10. In stark contrast to this direction of travel, a large number of the devolved functions of the Welsh Government derive from EU law, and will therefore be lost upon the UK's withdrawal from the EU Treaties. By way of example only:
 - a. The Welsh Ministers have the power (indeed the duty) to designate sites as Special Areas of Conservation pursuant to certain provisions of the Habitats Directive 92/43.³ These designating powers are designed to ensure the survival of Europe's most threatened species and habitats. Some of the designations depend upon mutual co-operation between EU Member States (such as the designation of certain sites for migrating birds).

² See sections 103-105 of the 2006 Act.

³ See regulation 7 of the Conservation of Habitats and Species (England and Wales) Regulations 2010.

- b. The Welsh Ministers, alongside the Natural Resources Body for Wales (“NRBW”), have been designated to operate certain aspects of the EU Emissions Trading Scheme under Directive 2003/87/EC.⁴ For example, the Welsh Ministers have the power to issue directions to NRBW and to approve certain enforcement actions taken by it.
- c. The Welsh Ministers have been designated as a competent authority under the Nutrition and Health Claims (Wales) Regulations 2007, in relation to certain provisions of Regulation (EC) 1924/2006 on nutrition and health claims made on foods. As a result, any food business operator who wishes to use a novel health claim on foods must apply to the Welsh Ministers. The Welsh Ministers have similar responsibilities in relation to the sale of foods for special medical purposes,⁵ the registration of slaughterhouses,⁶ and the labelling of particular types of food;⁷
- d. The Welsh Ministers are a competent authority for the purposes of the REACH Regulation 1907/2006, which imposes a wide-ranging obligation upon companies importing or manufacturing chemical substances to register those substances.⁸ The competent authorities are responsible for enforcing certain aspects of the REACH regime and are involved in the process of evaluating the safety of certain chemicals.
- e. The Welsh Ministers have been designated as a competent authority in relation to Regulation (EC) No 1069/2009, which lays down health rules regarding animal by-products and derived products not intended for human consumption.⁹ As the competent authority, the Welsh Ministers have a number of control and oversight functions associated with enforcement and compliance with the Regulation.

⁴ See regulation 3 of the Greenhouse Gas Emissions Trading Scheme Regulations (S.I. 2012/3038).

⁵ See the Medical Food (Wales) Regulations 2000 and Article 5 of Directive 1999/21.

⁶ See the Poultrymeat (Wales) Regulations 2011 and Article 12 of Regulation (EC) 543/2008.

⁷ See the Beef and Veal Labelling (Wales) Regulations 2011 which grants powers in relation to certain provisions of Regulation (EC) 1760/2000.

⁸ See the REACH (Appointment of Competent Authorities) Regulations 2007 (S.I. 2007/1742) and the REACH Enforcement Regulations 2008 (S.I. 2008/2852).

⁹ See the European Communities (Designation) (No. 2) Order 2008.

11. These functions (of which there are a vast number) will, to the extent they are maintained and/or modified, require a new legislative basis after the EU Treaties cease to apply. Moreover, whatever arrangements are put in place at that time, they will not be able to replicate the existing EU law frameworks (in particular, any replacement arrangements will not be able to provide for the involvement of EU institutions, or replicate any of the reciprocal obligations between EU Member States that exist under the current EU frameworks). Withdrawal from the EU will therefore inevitably change the Ministers' devolved functions, and the practical implications of this will be very significant indeed.

12. For the reasons set out below, the UK government in this case is claiming a prerogative power to dispense with certain provisions of the statutory framework for devolution in Wales. However, this is at odds with both the increasingly broad and permanent devolution arrangements within the United Kingdom, and the narrow, residual nature of the prerogative power.

13. Thus, Dicey described the prerogative power as:¹⁰

[T]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.

14. Further, as the Divisional Court noted at [24] of its judgment, it has been held by Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 that:

The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute (p.101).

15. Most recently, the Treasury Solicitors Department has affirmed the principle that “*The Crown cannot invent new prerogative powers. This is consistent with the residual nature of the prerogative*”.¹¹

16. In the specific context of the executive's treaty-making powers, the prerogative has been constrained by the ‘Ponsonby rule’, which was placed on a statutory

¹⁰ A. V. Dicey, *Introduction to the Study of the Law of Constitution* (Liberty Fund, Indianapolis reprint of eighth edition, 1915, Macmillan, London. First edition published 1885), p.282.

¹¹ House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Stationery Office, London, 2004), Fourth Report of 2003-04, HC 422, Ev 14.

footing in section 20 of the Constitutional Reform and Governance Act 2010. The rule, which requires treaties to be placed before Parliament before they are ratified, began as an undertaking that Arthur Ponsonby, Parliamentary Under-Secretary of State for Foreign Affairs, gave to Parliament on 1 April 1924.¹² It was the outcome of a programme of reform that Ponsonby and others had promoted during the First World War to constrain the prerogative power. Thus in 1914 he said that:¹³

No treaty should be drawn up with any foreign country without Parliamentary sanction being given to its clauses in detail as well as to its formal ratification ... No treaty, alliance or commitment should be entered upon without the express consent of Parliament. By commitment we mean any sort of understanding, contract, obligation, or liability involving national responsibilities, or necessitating under any circumstances military action.

17. The prerogative is therefore not only a narrow, residual power. It is subject to specific constraints, such as the Ponsonby rule, to control its use.
18. The contexts in which the Counsel General's submissions must be assessed are therefore (i) permanent and expanding empowerment for the devolved nations; and (ii) the narrow, residual nature of the prerogative.
19. The UK Government's case must also be seen in the context of two well-established mechanisms for changing the competence of the Welsh Assembly under the 2006 Act, namely (i) an Order in Council under section 109 of the Act (which requires the consent of Parliament and the Welsh Assembly) (see paragraphs 36-39 below); or (ii) an Act of Parliament amending the 2006 Act itself (which engages the Sewel Convention, and therefore normally requires the consent of the Assembly) (see paragraph 77-91 below). Extraordinarily, the government claims in these proceedings to have a third source of power, through the prerogative, to make changes to the Assembly's statutory competence which would enable it to bypass entirely the important safeguards that apply to these two established mechanisms.

¹² Ministry of Justice/Ministry of Defence/Foreign and Commonwealth Office, *War powers and treaties: limiting Executive powers* (Stationery Office, London, October 2007), CM 7239, p.71.

¹³ Arthur Ponsonby, *Parliament and Foreign Policy* (Union of Democratic Control, London, 1914) p.8.

1. Giving notification will alter the competences of the Welsh Assembly and Welsh Government under the 2006 Act

20. In the Counsel General's submission, there is no prerogative power to alter, or dispense with, statutory provisions. In this case, triggering Article 50 will dispense with certain provisions of the 2006 Act that define the competence of the Assembly and the Welsh Ministers. The prerogative therefore cannot be relied upon to give notice under Article 50.

21. The Counsel General supports the Divisional Court's finding that prerogative powers cannot be used to remove domestic law rights ([33]). However, the constitutional principle at stake is wider and does not permit the prerogative to dispense with primary legislation. It is not confined to legislation that affects individual rights (see paragraphs 28-29 below). It operates to prevent the prerogative from being used so as to have the effect of altering the competence of the Welsh Assembly and Welsh Ministers.

i) There is no prerogative power to dispense with statutory provisions

22. It is a simple and well-established principle of British constitutional law that the prerogative power cannot be used to dispense with primary legislation. The government accepts this at §55(b) of its printed case, where it cites:

... the uncontroversial proposition that the Government cannot purport to countermand laws passed by Parliament.

23. This principle has strong historical foundations. Thus in 1820, Joseph Chitty, a legal scholar, provided an account of the prerogative which included the following description of the limits on the prerogative power:¹⁴

There are also various *boundaries*, which the constitution has set to the royal prerogative ...These consist in the actual and positive limitation of the powers of the Crown, in certain specified cases. Thus, though the King is supreme head of the church, he can neither legally alter his own, or establish any other, than the national religion; and must tolerate the dispassionate religious sentiments of others. His Majesty is invested with the exclusive right to assemble Parliament, but must

¹⁴ Joseph Chitty, *A Treatise On the Law of the Prerogatives of the Crown* (Joseph Butterworth, London, 1820), pp.7-8.

assemble one at least once in three years; is the fountain of justice, but has in person no judicial power, and cannot alter the law, or influence the determinations of his judges; may pardon offenders, but cannot prejudice civil rights and remedies; has the management of martial affairs, but cannot, without the consent of Parliament, raise land forces, or keep them on foot, in time of peace.

24. This is consistent with, and reflects, *The Case of Proclamations* (1610) 12 Co. Rep. 74, cited by the Divisional Court at [27], where Sir Edward Coke said:

... the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.

25. The principle is also set out in section 1 of the Bill of Rights 1688, which provides:

[The] Lords Spirituall and Temporall and Commons ... Declare ...

That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall (emphasis added)

26. In *The Zamora* [1916] 2 AC 77, cited by the Court at [29], the Privy Council said:

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our constitution (p.90, emphasis added).

27. Finally, in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 Lord Oliver said at p.500B-C:

... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament (emphasis added).

28. It has thus been said that the executive may not through the prerogative “change”, “dispense with”, “alter”, “countermand”, “override” or “set aside”¹⁵ statute

¹⁵ For the Professor A.V. Dicey, *An Introduction to the Law of the Constitution* (8th edn, 1915), p.38 (cited by the Divisional Court at [22]: “[Parliament has] the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law ... as having a right to override or set aside the legislation of Parliament”).

law. As the Divisional Court said at [20], this reflects the long-established constitutional relationship between Parliament and the executive:

It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme ... Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen ...

29. The Court went on to set out the basic principle that “*primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers*” ([25]).¹⁶ The Counsel General respectfully endorses that principle.

ii) Triggering Article 50 would dispense with certain provisions of the 2006 Act

30. The triggering of Article 50 will dispense with a number of very significant provisions of the 2006 Act. In particular:

- a. It will dispense with the requirement that the Assembly may not legislate incompatibly with EU law (section 108(6)(c)), and associated statutory provisions;
- b. It will override the specific process for changing the Assembly’s competence by Order in Council (section 109); and
- c. It will dispense with the requirement for the Welsh Ministers to comply with EU law (section 80).

31. These changes to the statute will significantly change the United Kingdom’s devolution settlement as it applies to Wales.¹⁷

a) Competences of the Assembly

32. The competences of the Welsh Assembly are governed by section 108 of the 2006 Act, which provides:

¹⁶ See also [86], where the Divisional Court set out the “*powerful constitutional principle that the Crown has no power to alter the law of the land*”.

¹⁷ And it goes without saying that triggering Article 50 will change the devolution settlement as it applies to the other devolved nations.

108 Legislative competence

(1) Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament.

(2) An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.

(3) A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).

(4) A provision of an Act of the Assembly falls within this subsection if–

(a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and, subject to subsection (4A), does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and

(b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.

(4A) Provision relating to a devolved tax (as listed under the heading “Taxation” in Part 1 of Schedule 7) is not outside the Assembly's legislative competence by reason only of the fact that it falls within an exception specified under another heading in that Part of that Schedule.

(5) A provision of an Act of the Assembly falls within this subsection if–

(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or

(b) it is otherwise incidental to, or consequential on, such a provision.

(6) But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if–

(a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception in Part 3 of that Schedule from those restrictions,

(b) it extends otherwise than only to England and Wales, or

(c) it is incompatible with the Convention rights or with EU law.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

33. Section 108(6)(c) thus places a clear and unqualified restriction on the competence of the Welsh Assembly that it may not legislate contrary to EU law.¹⁸

34. “EU law” is defined for these purposes by section 158, which provides:

“EU law” means–

(a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties,¹⁹ and

(b) all the remedies and procedures from time to time provided for by or under the EU Treaties.

35. The effect of triggering Article 50 will, in substance, therefore be to dispense with section 108(6)(c) entirely so far as it concerns EU law because there will no longer be any “EU Treaties” upon which the restriction bites. The provision will be hollowed out entirely. This would therefore be a paradigm case of the prerogative being used to dispense with a statutory provision, which is not permitted according to the principles set out at 22-29 above. In substance, using the prerogative to trigger Article 50 will amount to the executive drawing a black line through (the relevant part of) section 108(6)(c), thereby removing it from the statute book.

36. Furthermore, the use of the prerogative power to dispense with the EU law restriction in section 108(6)(c) would cut across the specific procedure that the executive must follow if it wishes to alter the competence of the Assembly under section 109 of the 2006 Act, which provides:

109 Legislative competence: supplementary

(1) Her Majesty may by Order in Council amend Schedule 7.

(2) An Order in Council under this section may make such modifications of–

(a) any enactment (including any enactment comprised in or made under this Act) or prerogative instrument, or

¹⁸ Notably there is no equivalent restriction for types of international obligations other than those found in section 108(6)(c), which are dealt with in section 114(1)(d). That provision gives the Secretary of State a power to veto an Assembly Act which is incompatible with any international obligation, but does not place such Acts outside the competence of the Assembly.

¹⁹ The words “EU Treaties” are clearly intended to mean the treaties to which the UK is a party. Otherwise the provision would produce the extraordinary result that Wales would remain bound by EU law even if the Treaties no longer applied to the UK, creating a very substantial asymmetry in the UK’s devolution arrangements.

- (b) any other instrument or document,
as Her Majesty considers appropriate in connection with the provision made by the Order in Council.
- (3) An Order in Council under this section may make provision having retrospective effect.
- (4) No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order in Council—
- (a) has been laid before, and approved by a resolution of, each House of Parliament, and
 - (b) except where the Order in Council is the first of which a draft has been laid under paragraph (a), has been laid before, and approved by a resolution of, the Assembly.
- (5) The amendment of Schedule 7 by an Order in Council under this section does not affect—
- (a) the validity of an Act of the Assembly passed before the amendment comes into force, or
 - (b) the previous or continuing operation of such an Act of the Assembly.

37. The explanatory note to section 109 states:²⁰

The purpose of this section is to allow amendments to be made to Schedule 7, so as to enhance, restrict or change the Assembly's legislative competence to pass Acts.

38. Section 109 thus provides a specific and comprehensive procedure for altering the competences of the Assembly (either by “enhancing” or “restricting” its powers), as set out in Schedule 7 to the Act.²¹ The process requires express approval by each House of Parliament and the Assembly (section 109(4)).

39. Crucially, section 109 does not permit the executive to amend the limits on the competences of the Assembly set out in the body of the 2006 Act itself (including the EU law restriction in section 108(6)(c)). Instead, Parliament deliberately confined the amending power to the competences set out in Schedule 7. In the

²⁰ Explanatory Note to the 2006 Act, paragraph 410.

²¹ Schedule 7 contains a list of the competences, and exceptions to the competences, of the Assembly. For example, paragraph 1 of Part 1 provides that the Assembly may legislate in the fields of agriculture, horticulture, forestry, fisheries and fishing, animal health and welfare, plant health etc. Part 2 provides a number of general exceptions to the Assembly's competence. For example, the Assembly may not pass Acts which have the effect of amending certain statutes (including the ECA) (paragraph 2(1)). Part 3 provides a list of exceptions to the exceptions.

Counsel General’s submission, it would be a clear subversion of section 109 if the executive were able to rely on the prerogative to alter the restrictions on the Assembly’s competences contained in section 108, including the EU law restriction in the 2006 Act, thereby bypassing the requirement for parliamentary approval under section 109(4)(a).

40. Triggering Article 50 will also dispense with section 113 of the 2006 Act, which enables the Assembly to re-consider a Bill where a reference on its compatibility with EU law has been made to the CJEU. Section 113 provides:

113 ECJ references

- (1) This section applies where—
 - (a) a reference has been made in relation to a Bill under section 112,
 - (b) a reference for a preliminary European Court ruling has been made by the Supreme Court in connection with that reference, and
 - (c) neither of those references has been decided or otherwise disposed of.
- (2) If the Assembly resolves that it wishes to reconsider the Bill—
 - (a) the Clerk must notify the Counsel General and the Attorney General of that fact, and
 - (b) the person who made the reference in relation to the Bill under section 112 must request the withdrawal of the reference.
- (3) In this section “*a reference for a preliminary European Court ruling*” means a reference of a question to the European Court under Article 267 of the treaty on the Functioning of the European Union or Article 150 of the Treaty establishing the European Atomic Energy Community.

41. This procedure will obviously disappear once the EU Treaties cease to apply to the United Kingdom because the Supreme Court will no longer have the power to make references to the CJEU. Section 113 is thus a further statutory provision which the government is claiming the power to dispense with by triggering Article 50.

42. Finally, withdrawal from the EU will have very significant effects on the future interpretation of Acts of the Assembly. Section 154 of the 2006 Act provides:

154 Interpretation of legislation

- (1) This section applies to—

(a) any provision of an Assembly Measure, or proposed Assembly Measure, which could be read in such a way as to be outside the Assembly's legislative competence,

(b) any provision of an Act of the Assembly, or a Bill for such an Act, which could be read in such a way as to be outside the Assembly's legislative competence, and

(c) any provision of subordinate legislation made, or purporting to be made, under an Assembly Measure or Act of the Assembly which could be read in such a way as to be outside the powers under which it was, or purported to be, made.

(2) The provision is to be read as narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly.

43. Section 154(2) thus requires Acts of the Assembly to be interpreted, where possible, in a way which brings them within the Assembly's competences. It follows that, wherever possible, a court must interpret an Act of the Assembly in a way which complies with EU law (even if that is not the most natural interpretation) in order to comply with the restriction on the Assembly's competence in section 108(6)(c). As set out at paragraph 35 above, section 108(6)(c) will, in substance, be repealed when the UK withdraws from the EU. It follows that this interpretative requirement will cease to apply. Although the Counsel General does not rely upon this as a free-standing reason for finding that there is no prerogative power to trigger Article 50, it demonstrates the significant effects that withdrawal from the EU will have on Acts of the Assembly, and therefore the devolution framework for Wales as a whole.

44. In summary, the Counsel General therefore submits that the act of triggering Article 50 by the government would:

- a. dispense with section 108(6)(c) of the 2006 Act entirely;
- b. cut across the specific statutory procedure for altering the competences of the Assembly under section 109; and
- c. remove the Assembly's power to reconsider a Bill where a reference to the CJEU is made under section 113.

b) Powers of the Welsh Ministers

45. Triggering Article 50 will also have an important impact on the statutory powers and functions of the Welsh Ministers. In addition to powers conferred directly by primary legislation, powers may be conferred upon the Welsh Ministers by Orders in Council, which must be approved by Parliament and the Welsh Ministers (section 58 of the 2006 Act).

46. Section 80 of the 2006 Act requires the Welsh Ministers to comply with EU law:

80 EU law

(1) A community obligation of the United Kingdom is also an obligation of the Welsh Ministers if and to the extent that the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Welsh Ministers of any of their functions.

47. Section 80(8) then provides:

(8) The Welsh Ministers have no power—
(a) to make, confirm or approve any subordinate legislation, or
(b) to do any other act,
so far as the subordinate legislation or act is incompatible with EU law or an obligation under subsection (7).

48. There is therefore a “red-line” restriction on the Welsh Ministers’ competences that they may not act contrary to EU law. This will be hollowed-out entirely when the UK withdraws from the EU because, as explained at paragraph 35 above, there will no longer be any “EU law” upon which the restriction will bite. The government is thus claiming a power to dispense with this statutory provision entirely. As noted at paragraph 35 above (in relation to section 108(6)(c)), the UK Government will essentially be drawing a black line through this provision on the statute book.

49. As well as dispensing with this important restriction on Welsh Ministers’ powers, the statutory arrangement whereby those Ministers are vested with powers to implement EU law under section 2(2) of the ECA will also be lost. Section 59 of the 2006 Act currently provides the UK Minister with a power to designate Welsh Ministers for this purpose:

59 Implementation of EU law

(1) The power to designate a Minister of the Crown or government department under section 2(2) of the European Communities Act 1972 (c.68) may be exercised to designate the Welsh Ministers.

(2) Accordingly, the Welsh Ministers may exercise the power conferred by section 2(2) of the European Communities Act 1972 in relation to any matter, or for any purpose, if they have been designated in relation to that matter or for that purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council designating them.

50. This power has been used on many occasions to transfer powers to the Welsh Ministers. By way of example only, it has been used to empower the Welsh Ministers to make provisions in relation to protection of public health,²² environmental impact assessments,²³ the prevention and management of waste,²⁴ the prevention and management of environmental damage,²⁵ certain public procurement functions,²⁶ and the construction of buildings.²⁷ By triggering Article 50, the UK government is claiming a prerogative power to empty section 59 of all meaningful content, thereby dispensing with its statutory discretion to vest Welsh Ministers with very significant powers, such as those listed above. It goes without saying that this will have major practical implications for the Welsh Government.
51. For completeness, clause 19 of the Wales Bill, which is currently before Parliament and will be the subject of an LCM before the Assembly, will insert a new section 58B into the 2006 Act. The text of new section 58B provides:²⁸

58B Implementation of EU law: general

(1) Section 2(2) of the European Communities Act 1972 (secondary legislation implementing EU obligations, etc) applies to the Welsh Ministers as if they were a Minister of the Crown or government department designated by Order in Council under that provision.

(2) But subsection (1) confers no power to make provision that would be outside the legislative competence of the Assembly if it were included in an Act of the Assembly (see section 108A).

²² European Communities (Designation) (No.2) Order 2008 (SI 2008/1792).

²³ European Communities (Designation) (No.3) Order 2007 (SI 2007/1679).

²⁴ European Communities (Designation) (No.2) Order 2010 (SI 2010/1552).

²⁵ European Communities (Designation) (No.2) Order 2014 (SI 2014/1890).

²⁶ European Communities (Designation) (No.2) Order 2015 (SI 2015/1530).

²⁷ European Communities (Designation) Order 2016 (SI 2016/161).

²⁸ The Bill is expected to be passed by late February 2016.

52. If this provision comes into force before the EU Treaties cease to apply to the UK (which is likely), the Welsh Ministers will acquire a direct power to implement EU law within Wales. However, that statutory power would subsequently be deprived of all content upon the UK's withdrawal from the EU. Although the Counsel General does not rely upon this (as yet unimplemented) provision in support of his argument that there is no prerogative power to trigger Article 50, it provides a further demonstration of the way in which withdrawal from the EU will unravel the devolution relationship between the United Kingdom and Wales. That makes it all the more surprising that the government is claiming a power to achieve this result through the use of a prerogative power.

iii) The 2006 Act is a statute of fundamental constitutional importance

53. The principle that the executive may not dispense with statutory provisions applies with particular force to statutes which are of fundamental constitutional importance (although the Counsel General's arguments set out above do not depend upon the status of the 2006 Act as a constitutional statute).

54. The 2006 Act has been recognised as a constitutional statute on several occasions. In *Thoburn v Sunderland City Council* [2003] QB 151, Laws LJ expressly recognised the Government of Wales Act 1998, the predecessor to the 2006 Act, as a constitutional statute at [62]. This was subsequently confirmed in *R (Governors of Brynmawr School) v Welsh Ministers* [2011] EWHC 519 (Admin), which was a case about the Welsh Ministers' powers to delegate their education functions under the 2006 Act. Beatson J (as he then was) said:

It is clear that the statutes devolving power from the Westminster Parliament to Scotland, Wales and Northern Ireland are major constitutional measures: see *HM Advocate v R* [2002] UKPC D3 per Lord Rodger at [121]; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at [25], and *Thoburn v Sunderland City Council* [2003] QB 151 per Laws LJ who at [62] included GOWA 1998 in a list of constitutional statutes. Lord Mance has described the Scotland Act 1998 and the Human Rights Act 1998 as "essential elements of the architecture of the modern United Kingdom": *Somerville v Scottish Ministers* [2007] UKHL 44 at [169]. Despite the important differences between the devolution settlement in Scotland and Northern Ireland and that in Wales, this description is equally applicable to both the Government of Wales Acts. Accordingly, in applying the rules of statutory construction in order to determine the

scope of the powers conferred on the Welsh Ministers or the Assembly by GOWA 2006, the court will take into account its constitutional status ([73], emphasis added).

55. This designation of the 2006 Act as a major constitutional measure reflects the fact that the devolution framework has become a permanent feature of the United Kingdom constitution, as set out at paragraphs 7-8 above.
56. The Counsel General relies upon the recognition of the 2006 Act as a constitutional statute not in support of any particular interpretation of the Act (there is no relevant ambiguity) but rather to demonstrate the unreality of the government's claim to have a prerogative power to trigger Article 50 in circumstances where that will override not only ordinary statutory provisions but the provisions of a statute which is of fundamental constitutional importance.
57. Indeed, if provisions of the 2006 Act, as a constitutional statute, may only be repealed by express (or very specific) words in primary legislation (as Laws LJ said in *Thoburn* at [62]-[63]) it would be very surprising indeed if the government could achieve the same result without any primary legislation through the prerogative (as the Divisional Court observed at [88]).

iv) The Northern Ireland High Court's judgment in McCord's Application

58. The effect of triggering Article 50 on the United Kingdom's devolution legislation was considered by the Northern Ireland High Court in *McCord's (Raymond) Application* [2016] NIQB 85. In that case, Maguire J found that various provisions of the Northern Ireland Act 1998, including those which govern the competence of the Northern Ireland Assembly and the Northern Ireland Ministers,²⁹ did not bar the use of the prerogative to trigger Article 50 ([108]).
59. In his judgment, Maguire J said that it was common ground that, unless the prerogative had been displaced by statute, the government's reliance upon it to give notice under Article 50 was unobjectionable.³⁰ However, that is not the right test. For the reasons set out at paragraphs 22-29 above, the question is simply

²⁹ See sections 6(2) and 24(1) of the Northern Ireland Act 1998, respectively.

³⁰ Judgment, §67.

whether the use of the prerogative will dispense with one or more statutory provisions.

60. For the same reason, the Maguire J also set the bar too high when he said that:

... it is [not] accurate to say that a cornerstone of the new institutions, without which the various edifices would crumble, is continued membership of the EU. The devolved institutions and the various North/South and East/West bodies do not as their *raison d'être* critically focus on EU law.

61. However, it is irrelevant whether compliance with EU law is the "*raison d'être*" of the devolved institutions (it clearly is not). The question is simply whether one or more provisions of the devolution legislation will be dispensed with. For the reasons set out above, the UK's withdrawal from the EU will hollow out a number of important provisions of the 2006 Act (as well as their Scottish and Northern Irish counterparts).

62. Maguire J also appeared to base his decision upon the fact that it cannot be predicted with any certainty what will happen after Article 50 is triggered. Thus at §107 of the judgment he said "*The reality is, at this time, it remains to be seen what actual effect the process of change subsequent to notification will produce ... Whilst the wind of change may be about to blow the precise direction in which it will blow cannot yet be determined*". In the Counsel General's submission, this 'uncertainty' point is misconceived. All that matters is that the government is claiming a power to bring about the changes to the devolution settlement described above. It would be absurd for the government to suggest that this claim is premature because the consequences of triggering Article 50 (including the possibility of revoking a notice given under Article 50) cannot yet be predicted, in circumstances where (i) the government claims that the power to trigger Article 50 (and therefore necessarily the power to revoke any notification) is within its own gift; (ii) the government has confirmed that it will not, in fact, revoke any notification given under Article 50; and (iii) by the time the Counsel General and any other parties know whether or not the notification has been revoked, it will be too late to bring a claim because the effects of the EU Treaties ceasing to apply will already have been caused.

63. The Counsel General therefore respectfully submits that the judgment of Maguire J does not provide any assistance in this appeal.

v) Summary on the 2006 Act

64. In summary, the Counsel General submits that:

- a. The prerogative cannot be used to dispense with statutory provisions (especially, although not limited to, those contained in constitutional statutes);
- b. The use of the prerogative to give notice to leave the EU under Article 50 would dispense with a number of provisions of the 2006 Act governing the legislative competence of the Welsh Assembly and the powers of the Welsh Government;
- c. There can therefore be no prerogative power to trigger Article 50.

65. As a matter of form, the relevant provisions of the 2006 Act will remain on the statute book unless and until they are repealed. However, as a matter of substance they will be hollowed-out entirely. Any argument that this does not amount to a “dispensation with” statute law would be a triumph of form over substance (especially since the prerogative could never truly be used to strike provisions from the statute book).

66. Of course, the other side of the coin to dispensing with these provisions of the 2006 Act is that Welsh residents will lose a large number of EU law rights. In this regard, the Counsel General respectfully endorses the submissions of the Lead Claimant that the prerogative power cannot be used to remove domestic law rights. However, the Counsel General’s argument is different, and additional, to that of the Lead Claimant because it focuses on the absence of any prerogative power to override *statutory provisions*.

67. Finally, it is important to note that the referendum held under the 2015 Act has no legal relevance to the arguments set out above as to the limits of the executive’s power to dispense with statutory provisions (indeed, a striking feature of the government’s case is that it would have the prerogative power to issue a

withdrawal notice under Article 50, and therefore make fundamental changes to the devolution settlement and people's rights, even without a referendum).

2. There is no prerogative power to circumvent the Sewel Convention

68. In the Counsel General's submission, the fact that withdrawing from the EU Treaties will dispense with certain provisions of the 2006 Act is sufficient to establish that there is no prerogative power to trigger Article 50.

69. However, an additional reason for finding that there is no prerogative power to give notification under Article 50(2) is that this would short-circuit the Sewel Convention, which requires Parliament not (normally) to legislate with regard to devolved matters without obtaining the consent of the Assembly. For the reasons set out below, the Convention is engaged by any legislation modifying the powers of the Assembly.

70. For the avoidance of doubt, the Counsel General is not submitting in this appeal that the Welsh Assembly has a legally enforceable right to veto any Westminster legislation authorising Article 50 to be triggered. He is therefore not asking the Court to enforce the Convention. Rather, he submits that there can be no prerogative power to short-circuit the Sewel Convention which in giving proper respect to, and grounding a process of dialogue with, the devolved legislatures is a fundamental part of the United Kingdom's devolution framework. This is an important distinction from *McCord's (Raymond) Application* [2016] NIQB 85, where the claimant invited the court to enforce the Sewel Convention directly by arguing that there was a requirement to obtain a Legislative Consent Motion from the Northern Ireland Assembly before triggering Article 50 (see judgment, §19(c)).

i) The scope of the prerogative should be interpreted in line with constitutional conventions

71. It is well-established that the common law may be developed and interpreted in accordance with constitutional conventions. In *Attorney-General v Jonathan Cape* [1976] QB 752, the government sought an injunction against the publication of certain cabinet papers on the ground that this would breach the convention of

collective cabinet responsibility. The defendant publisher argued that the court did not have power to enforce the convention because it was “*an obligation founded in conscience only*” (p.765F).

72. Lord Widgery CJ said that he “[*could*] *not see*” why the courts should not find that publication of the information would amount to a common law breach of confidence (p.769H), and that the convention of collective cabinet responsibility was “*not merely ... a gentleman’s agreement to refrain from publication*” (p.770A). The court thus used the convention of collective cabinet responsibility to inform its interpretation and development of the common law doctrine of confidence.

73. *Jonathan Cape* is therefore authority for the principle that existing common law doctrines may be interpreted and applied to give effect to constitutional conventions (even if the conventions themselves may not be directly enforced).

74. The source of the prerogative power is the common law. As Lord Scarman said in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374:

Without usurping the role of legal historian, for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: *Prohibitions del Roy* (1608) 12 Co. Rep. 63 and the *Proclamations Case* (1611) 12 Co. Rep. 74. In the latter case he declared, at p. 76, that “the King hath no prerogative, but that which the law of the land allows him” (p.407C).

75. Similarly, Lord Diplock said:

The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of “the prerogative” (p.409C).

76. The limits of the government’s prerogative powers are therefore a question of common law, which the Court is being asked to interpret and apply in this appeal. The Counsel General submits that the Court should interpret the common law limits on the prerogative in compliance with the Sewel Convention. For the

reasons set out below, that requires the decision to trigger Article 50 to be taken by Parliament, not the executive.

ii) The Sewel Convention requires a dialogue between legislatures

77. The Sewel Convention is an essential part of the United Kingdom’s devolution settlement. It requires the Westminster Parliament not (normally) to legislate with regard to devolved matters without obtaining the consent of the Welsh Assembly. Consent is sought by asking the Assembly to pass a ‘Legislative Consent Motion’ (“LCM”) endorsing the relevant Westminster legislation.

78. Under the Welsh Assembly’s Standing Order 29, a member of the Welsh Government must lay a ‘Legislative Consent Memorandum’ in relation to any “*relevant Bill*” under consideration in the UK Parliament.³¹ Once a Memorandum is laid, any member of the Assembly may table an LCM seeking the Assembly’s agreement to the Bill (SO 29.6),

79. The Sewel Convention is recognised in the Memorandum of Understanding between the UK government and the devolved governments, which states:³²

14. The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

80. If the Wales Bill is passed, the Convention will be placed on a statutory footing. Clause 2 of the Bill provides for a new section 107(6) of the 2006 Act in the following terms:

(5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.

³¹ Standing Order 29 of the Welsh Assembly, paragraph 29.2. For the definition of “*relevant Bill*”, which is significant for the purposes of this appeal, see paragraph 88 below.

³² Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013), §14.

(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly.

81. The Convention has already obtained statutory recognition in section 28(8) of the Scotland Act 1998, as amended by section 2 of the Scotland Act 2016.

82. Crucially, as can be seen from the wording of the Bill, the Sewel Convention is a convention which operates between legislatures. Whilst it only requires the Westminster Parliament to “normally” abstain from legislating on devolved matters without obtaining the consent of the Welsh Assembly, the decision of whether or not to do so rests firmly with Parliament, not the executive.

83. In the Counsel General’s submission, the prerogative cannot be relied upon to simply short-circuit the Convention by removing the decision to trigger Article 50, and therefore the dialogue envisaged by the Sewel Convention, from Parliament.

iii) The Sewel Convention applies to Bills which modify the Assembly’s competence

84. The Sewel Convention is engaged by legislation which modifies the Assembly’s competence. For the reasons set out at paragraph 35 above, the act of triggering Article 50 will affect competence by removing the EU law restriction in section 108(6)(c) of the 2006 Act.³³

85. Such legislation is dealt with expressly in one of the UK government’s ‘Devolution Guidance Notes’, which are documents published by the Cabinet Office setting out advice on the working arrangements between the UK Government and the devolved administrations. Devolution Guidance Note No.17 (“DGN17”) is titled “*Modifying the Legislative Competence of the National Assembly for Wales*”. Paragraph 13 of the Note states:

The UK Government and the Welsh Government have agreed that the Welsh Ministers should seek the consent of the Assembly when such provisions [modifying the Assembly’s legislative competence] are included in Bills. Any such provision should be included in Bills on

³³ In *McCord’s (Raymond) Application* [2016] NIQB 85, Maguire J held that the Sewel Convention as it applies to Northern Ireland was not engaged by triggering Article 50 ([121]). His reasoning was extremely brief and is not accepted by the Counsel General.

Introduction. Further advice on the content of parliamentary Bills which relates to Wales can be found in DGN 9.

86. DGN17 is to be read alongside DGN 9, which provides general guidance about the operation of the Sewel Convention. Paragraph 36 of the Note says:

The UK Government would not normally ask Parliament to legislate in relation to Wales on subjects which have been devolved to the Assembly without the consent of the Assembly.³⁴ The Assembly grants consent by approving Legislative Consent Motions (LCMs).

87. The application of the Sewel Convention to Bills which affect the legislative competence of the Assembly is clearly reflected in Standing Order 29 of the Welsh Assembly, which provides:

UK Parliament Bills Making Provision Requiring the Assembly's Consent

29.1 In Standing Order 29, "relevant Bill" means a Bill under consideration in the UK Parliament which makes provision ("relevant provision") in relation to Wales:

(i) for any purpose within the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Assembly.

(ii) which modifies the legislative competence of the Assembly.

88. Paragraphs 29.2 and 29.3 of the Standing Order go on to require the Welsh Government to lay a Legislative Consent Memorandum ('LCM') before the Assembly, and allow the laying of a motion seeking the Welsh Assembly's agreement to the relevant provision. Whether or not the Welsh Assembly provides its agreement is then communicated by the Clerk to the Assembly to the Clerk of the House of Commons.

³⁴ This would include modifications of Welsh Ministers' functions within the Assembly's competence. See paragraph 50 of DGN 9.

89. It is thus clear that the Sewel Convention applies to Bills which modify the Assembly's competence (as well as those which fall within the Assembly's existing competences).³⁵

90. Finally, it should be noted that the ordinary procedure envisaged by DGN17 for modifying the Assembly's competence is an Order in Council under section 109 of the 2006 Act. Thus, the Guidance Note states that:³⁶

Exceptionally, there may be occasions when it would be more straightforward to modify the Assembly's legislative competence in a parliamentary Bill rather than by a Section 109 Order (for example, if the scope of a Bill covered the subject area in which the UK Government and Welsh Government had agreed legislative competence should be conferred on the Assembly).

91. The norm envisaged by DGN17 is thus that the Assembly's competences will be modified by an Order in Council made under section 109 of the 2006 Act. As set out at paragraph 38 above, such an Order requires the consent of Parliament and the Welsh Assembly. This makes it all the more surprising that the government is claiming a power to modify the Assembly's competences through the prerogative, thereby bypassing both the Sewel Convention process between Parliament and the Assembly and the consent process envisaged under section 109.

iv) Summary on Sewel Convention

92. For the reasons set out above, the Counsel General submits that:

- a. The scope of the prerogative should be interpreted in accordance with the Sewel Convention;
- b. The Sewel Convention operates between legislatures. It requires the Westminster Parliament to consider on a case-by-case basis whether to seek the consent of the Assembly. The convention is that it will normally do so; and

³⁵ An example of an LCM in respect of a Bill modifying the Assembly's legislative competence is afforded by the LCM laid by the Welsh Government in relation to what is now the Wales Act 2014. The relevant letter from the Clerk to the Assembly to the Clerk to the House of Commons communicating the result of the vote on the motion is dated 2nd July 2014. It evidences a vote agreeing that the provisions in the Bill which modified the legislative competence of the Assembly should be considered by the UK Parliament.

³⁶ DGN17, §13.

- c. The Sewel Convention applies to legislation which modifies the competence of the Welsh Assembly. The effect of relying on the prerogative to trigger Article 50 will therefore be to short-circuit the Convention entirely, because triggering Article 50 will modify the Assembly's competence.

3. Summary

93. In summary, the Counsel General submits that the government does not have the prerogative power to give notification under Article 50 for two reasons:

- a. First, the act of notification will dispense with certain provisions of the 2006 Act; and
- b. Second, the use of the prerogative in this way would short-circuit the Sewel Convention.

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25 November 2016