Scotland Bill

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Devolving the Crown Estate: clause 31 of the Scotland Bill

I watched the Committee's session on 17 June and write as a retired lawyer in an attempt to clarify some of the legal aspects and dispel some of the Misunderstandings around whether clause 31 is unnecessarily complex or restrictive.

1. What is the Smith Agreement on the CE? - conditionality

If all Smith had said was "The Crown Estate in Scotland will be devolved. Full stop.", there would be a lot of force in the argument that all clause 31 need do is simply repeal the CE reservations in the Scotland Act 1998 (Schedule 5, paras. 1(3) and 3(3)(a)).

But Smith said more than that – it also includes the following paragraphs:-

33. Following this transfer, responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities. […]

34. The Scottish and UK Governments will draw up and agree a Memorandum of Understanding to ensure that such devolution is not detrimental to UK-wide critical national infrastructure in relation to matters such as defence & security, oil & gas and energy, […]

In other words, transfer of the CE to Scotland is not unconditional. This is why clause 31 is more involved than a simple repeal of the reservations. It needs to contain mechanisms to ensure these conditions are duly implemented.

2. Transfer scheme

The mechanism adopted is "The Treasury may make a scheme transferring" the Scottish Crown Estate (SCE). Thus, the Treasury is not obliged to effect the transfer until it's satisfied Scotland has implemented the conditions mandated by Smith.

Note that the scheme must be approved by the Scottish Ministers (section 90B(13) of the SA98 as inserted by cl.31(1) of the bill). So the Treasury can't impose a scheme of transfer on the SMs they don't like.

Of course, you could argue the word "may" doesn't oblige the Treasury to effect any transfer even if Scotland *has* implemented the Smith conditions. That's true as a matter of law. But the counter argument is that, if the transfer were made without first securing the conditions, Scotland could (in theory) welch on them later.

3. Paragraph 33 (sub-devolution) – is it a condition at all?

Watching various parliamentary sessions, it's become clear to me there might be a confusion between whether the Smith Agreement is:-
A. The SCE will be devolved on the strict understanding it must immediately be sub-devolved from Edinburgh to Orkney et al

or

B. The SCE will be devolved and, whilst there's been talk of further sub-devolution which we (although it's none of our business) would not disapprove of, the Scottish Parliament will be at liberty to do – or not do – whatever it sees fit with the SCE (including retaining it fully centralised in Edinburgh).

If the correct interpretation of Smith is the latter, that means there is only one condition to be implemented, para. 34 (safeguarding UK-wide defence, security and energy interests). Therefore, skip paragraphs 4 to 8 below and go straight to 9.

4. If it *is* a condition of Smith, how does Scotland go about implementing para. 33 (subdevolution)?

Clause 31(7) gives the SMs power to make a Scottish Statutory Instrument (Order in Council) subject to affirmative resolution in the SP on the subject. This can be done even ahead of the SCE being transferred and devolved.

(At the risk of straying out of my self-set remit of legal explanation into politics, one can't help wondering if the Scottish Government shouldn't be devoting more energies into working up a scheme of sub-devolution as they're empowered to do under 31(7) rather than fighting a rather sterile battle with London over the structure of the clause!)

5. Myth buster #1 – clause 31 binds the SMs to manage the SCE in accordance with the Crown Estate Act 1961 (CEA61)

It doesn't.

Clause 31(5) applies CEA61 to the SMs' management of the SCE only as an interim default position in the event the transfer takes place at a time when the SMs have not yet made alternative arrangements in an SSI for sub-devolution under cl.31(7) & (8) (for example because London waives compliance with the Smith condition of sub-devolution (para 33) if it transpires there is not, after all, political appetite for it in Scotland).

In this scenario – assumed to be unlikely but it's the mark of good legislation that it covers all angles – the Scottish Parliament would still at a later date have power to amend/repeal section 31(5) if circumstances changed. (This is because the SCE would by then be devolved (see para. 7 below) and s31(5) is neither an amendment of SA98 (which is generally protected from modification by the SP) or included amongst the other enactments in Schedule 4 of SA98 which are so protected).

In any scenario, note also how clause 31(6) explicitly says 31(5) (applying CEA61 to SMs' management of the SCE) is subject to any OIC (SSI) under 31(7) (power of SMs to make alternative arrangements).

6. Myth buster #2 – clause 31 binds the revenues of the SCE to be paid into the Scottish Consolidated Fund (precluding any revenues flowing to local authorities under sub-devolution)

It doesn't.

Clause 31(11) (amending the Civil List Act 1952 (CLA52) to direct the revenues from the SCE into the Scottish Consolidated Fund) is also merely a default position which applies unless and until the SP legislates otherwise.

The SP will have power to legislate because revenues from the SCE will no longer be reserved (see 7 & 8 below) and the CLA52 is not listed as protected from modification by the SP in Sched. 4 of SA98.

The same considerations apply as with para. 5 above (SMs bound into Crown Estate Act 1961 only as a default position) except that, if I were being hyper-critical of the drafting of clause 31, I would have preferred to see cl.31(11) explicitly mentioned in cl.31(6) (default positions subject to alternative SSI made under 31(7)) along with 31(5) (SMs to manage under CEA61).

7. Myth buster #3 – clause 31 transfers the management of the SCE to the SMs but doesn't devolve it.

It does devolve.

Clause 31(2) amends the definition of the Crown Estate for the purposes of Schedule 5 (reserved matters) of the Scotland Act 1998 to become "the Crown Estate (that is, the property, rights and interests under the management of the Crown Estate Commissioners)". After the transfer to the SMs, the SCE will not be under the management of the CECs and thus will no longer be reserved.

This way of expressing matters (as opposed to simply repealing the paragraph (3(2)) of the Sched. 5 of SA98 which declares the reservation hitherto of the CE) has been chosen in order to permit the CECs after the transfer to acquire new property in Scotland on a reserved basis. (I realise that's a controversial point but as it's a matter for political decision I don't propose to comment on it here.)

7A. UPDATE 27 June – But won't the scheme to be made by the Treasury contain the arrangements for sub-devolution?

No. The sub-devolution arrangements will be contained in an SSI to be made by the SMs under cl.31(7) subject to affirmative resolution in the SP (and with the SP having devolved legislative competence to change these arrangements in the future).

It would be quite wrong (politically speaking) for the Treasury to have a hand in crafting the subdevolution, but in his evidence to the D(FP) Committee on 25 June, John Swinney betrayed that he possibly imagined this might be the case when he said:-
There is an important question about whether a function or a scheme is being devolved. If the function is being devolved, it is up to us to design the scheme. If the scheme is being devolved, it will determine the basis on which some provisions are taken forward. It is up to this Parliament to decide how we intend to progress and advance those questions. An open approach is therefore essential in order to give Parliament as much flexibility as it chooses to exercise.

Perhaps the easiest way to look at it is by saying that two things are happening: (1) transfer of management of the SCE from the CECs to the SMs; and (2) devolution from Westminster to Scotland of jurisdiction over the SCE going forward. Step (1) is effected by the Treasury scheme while step (2) is effected by repeal of the CE reservations.

8. A flaw in the bill

Even Andy Wightman now accepts that clause 31 as drafted effects devolution. He has, however, rightly pointed out a possible drafting error. This is that clause 31 contains no amendment of para. 3(3)(a) of Sched. 5 of SA98 which reserves “the hereditary revenues of the Crown [i.e. the Crown Estate], other than revenues from *bona vacantia, ultimus haeres* and treasure trove”.

I suspect that’s a cock up rather than a conspiracy which could be corrected by an amendment to replace the words “other than revenues from *bona vacantia, ultimus haeres* and treasure trove” with “so far as under the management of the Crown Estate Commissioners”. (See para. 7 above.)

9. Paragraph 34 of Smith – condition safeguarding UK-wide defence, security and energy interests

The wording in Smith on this is that a Memorandum of Understanding will be agreed. What happens if the SCE is handed over to Scotland unconditionally by simply repealing the reservations and then such an MoU were not agreed due to intransigence on the part of Scotland?

Clause 31 as presently drafted is a lawyer’s attempt to square that circle so that, if everything falls out of bed, we remain where we started rather than either side having lost its hand – it “fails safe”.

As a matter of law, the clause works (subject to point 8 above). It may betray a lack of trust but that cuts both ways as witness the Devolution (Further Powers) Committee’s recommending that the wording be amended from “may” make a scheme to “shall”.

10. Fort Kinnaird

The Crown Estate doesn’t own Fort Kinnaird.

As I understand it (but by all means ask the CE to confirm) FK is owned along with two other shopping centres in England by a limited partnership called The Gibraltar Limited Partnership (TGLP) which is incorporated in the UK (not Gibraltar) with its registered office in London. The CE is a 50% partner in TGLP along with a specialist retail property unit trust called the Hercules Unit Trust.

In view of the CE's indirect interest in FK (which is a bit like saying just because you own shares in Virgin doesn't mean you own any aeroplanes or record shops) as part of a UK wide portfolio, the view has been taken it wasn't one of the CE's "economic assets in Scotland" (to use the words in para. 32 of Smith) to be devolved.

But that's a bit of a moot point. I bet FK didn't come up in the Smith discussions so it's simply a matter for agreement between the Scottish and UK governments now that it's been raised whether the CE's interest in FK should be devolved along with the assets in Scotland it owns outright.

10A. UPDATE 27 June – more about Fort Kinnaird

Andy Wightman attempted to suggest in his blog that the CE did own an interest in FK because TGLP is an English partnership: as these don't have separate legal personality distinct from their partners as Scottish partnerships have (like a company having its own legal personality distinct from its shareholders), their property, Andy suggested, is owned by the partners themselves (as opposed to by the partnership). This is, with respect, a misunderstanding. Title to an English firm's land is held by trustees (often, but not necessarily, the partners: in the case of TGLP, my understanding is that the CE is not one of the trustees) who hold it in trust for the partnership purposes (Partnership Act 1890, s.20). What this means in practice was summarised in a 1997 Court of Appeal case called Popat v Shonchhatra as follows:

"While each partner has a proprietary interest in each and every asset, he has no entitlement to any specific asset and, in consequence, no right, without the consent of the other partners or partner, to require the whole or even a share of any particular asset to be vested in him. … It is only at that stage [division of partnership assets upon dissolution of the firm] that a partner can accurately be said to be entitled to a share of anything, which, in the absence of agreements to the contrary, will be a share of cash."

That said, there is undoubtedly in lay-person's terms a "Scottish dimension" to TGLP. It occurs to me, though, that, as FK is not one of the ancient possessions of the Crown in Scotland (like the sea bed and foreshore etc.), it may be that Scotland's "moral" claim to FK could be pretty weak if, for example, it emerged that the CE's investment in TGLP was funded from the proceeds of sale of property in England (I'm not suggesting it was). But even if that's a non-point, how does one calculate the share ascribable to FK of the CE's share in TGLP? It just goes to show that things are necessarily more complex than simply deleting the CE reservations in the Scotland Act.