24 October 2022

Scottish Law Commission
promoting law reform

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Your ref:
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By email only to: DPLR.Committee@parliament.scot

Dear Stuart,

MOVEABLE TRANSACTIONS (SCOTLAND) BILL

1. Thank you for your letter of 10 October 2022 which I have discussed with Professors Gretton and Steven. We have read the transcript of the evidence session on 4 October 2022.

2. As well as answering your question, we think it would be helpful to set out why consumers were included in the Commission's draft Bill on which the Bill is based. Understandably, at the evidence session on 27 September 2022 the committee wanted to consider the Bill as a whole and there was limited time to consider consumer issues.

Discussion Paper

3. The Discussion Paper on Moveable Transactions (Scot Law Com DP No 151, 2011) was published in June 2011. Prior to that the Commission had carried out significant research on the approach taken in other legal systems. It found consistency that consumers are allowed to grant non-possessory security but subject to special protections. For example, this is true in the USA, Canada, Australia and New Zealand. The Draft Common Frame of Reference (2009), a soft law instrument prepared by lawyers from throughout Europe, takes the same approach.

4. Equally, the Commission was concerned about the logbook loan experience in England. This is lending using bills of sale. The bills of sale legislation does not apply in Scotland. Logbook loans are addressed in detail at paras 16.8-16.10 of the Discussion Paper. In relation to unacceptably high interest rates, the Commission expressed the view that the obvious solution was to ban such rates rather than ban the granting of security rights. It noted also that interest rates on unsecured consumer loans are often higher.

5. The Discussion Paper proposed an approach based on that which is standard in other countries, namely to include consumers but to have special protections. In particular, there should be major restrictions on the type of property over which consumers could grant the new security (subsequently named the "statutory pledge"). Only high value assets such as vehicles, boats, musical instruments and art would come within the scheme. Ordinary household goods would not. In respect of vehicles the statutory pledge would allow the possibility of secured finance where the law makes this difficult namely where the consumer is already the owner. But low value vehicles would be excluded as is the case under the law of diligence. In respect of assignation there would be a ban on consumers assigning future rights such as salary to protect against payday loans.

6. There were certain questions specifically focusing on consumers in the Discussion Paper: 17, 49, 50, 51. A full public three-month consultation took place. This was widely publicised, including via the Commission's mailing list.

Consultation responses

7. The Commission's proposed scheme was supported by consultees. Some doubts were, however, expressed about the inclusion of consumers. This is addressed in the Report on Moveable Transactions (Scot Law Com No 249, 2017) paras 18.68 and 19.33. The Faculty of Advocates expressed concerns in relation to legislative competence given that the Consumer Credit Act 1974 is reserved to the UK Parliament. This was carefully considered by the Commission but the Home Owner and Debtor Protection (Scotland) Act 2010 which gives consumer protections in relation to standard securities was a clear example of the Scottish Parliament legislating in this way. Some other consultees doubted including consumers on the basis of the pressing need for reform in relation to businesses. The consideration of special protections for consumers would mean that reform would take longer. This view was also reflected upon, but it contrasted with the approach taken internationally as mentioned above.

Further consultation

8. The Commission was acutely aware that no consumer organisations had responded to the formal consultation. After provisional work on formulating policy, including the development of the financial threshold proposal, in December 2012 the project team travelled to Glasgow to meet Consumer Focus Scotland (CFS). It was the body which then had responsibility for representing consumer interests. If CFS had taken the approach now urged by Citizens Advice Scotland (CAS) the SLC would have given this considerable weight. But CFS were supportive of the proposals. CFS said that they would contact the Commission with any further thoughts but this did not happen.

9. The policy to include consumers was carefully considered by the Scottish Law Commissioners in early 2013. The project team was asked to obtain further stakeholder input on the issue, in addition to that from CFS. The proposals which had been discussed with CFS were sent to the Govan Law Centre both by email and in hard copy, but no reply was received.

10. The project team did hear from Bruce Wood CVO, solicitor and expert in this area; the Consumer Credit Trade Association; the Finance and Leasing Association; and the Scottish Motor Trade Association. All were supportive of the inclusion of consumers, subject to special protections. The evidence given by Mr Wood reflects that which he has provided in writing to the committee's consultation.

Report on Moveable Transactions

11. The policy to include consumers subject to special protections was agreed by the Commissioners later in 2013 and a draft Bill produced to reflect it. Given the wider complexity of the project, it took four years to produce the final draft Bill which was published with the Report in 2017.

12. There was no change in the policy after 2013 although the Commission kept a careful eye on developments in England in relation to logbook loans. The Law Commission of England and Wales carried out a project on the area resulting in its Report, From Bills of Sales to Goods Mortgages (Law Com No 376, 2017). This is referred to in various places in the Report on Moveable Transactions. The Law Commission did not recommend abolition of bills of sale but their replacement with a new form of security to be known as a "goods mortgage". In 2018 subsequent to the publication of the Report on Moveable Transactions, HM Treasury decided against the replacement of bills of sale with goods mortgages. Its reasons were the decrease in the numbers of bills of sale because of tighter

regulation of logbook loans by the Financial Conduct Authority and more use of personal contract plans.

Economy, Energy and Fair Work Committee consultation

13. Only one consumer organisation, Citizens Advice Scotland, responded to the Economy, Energy and Fair Work Committee's consultation on the Bill in 2020. The Scottish Government specifically engaged with it in its targeted consultation on the Bill in 2020/21. The Minister (Tom Arthur MSP) notes in the annex to his letter of 26 May 2022 to me:

> "the Scottish Government has engaged with Citizens Advice Scotland and, in light of the further background information provided to them, they advised that they would seek to withdraw their previous comments to the Committee. They also acknowledged the strong support that exists for the reforms."

This informed the decision for the Delegated Powers and Law Reform Committee to consider the Bill. We are aware that CAS' position on these issues has evolved since that time.

The Committee's consultation

14. Consumer organisations are now arguing for consumers to be removed from the Bill. Professor Steven intends to write to you separately in relation to this.

Current Commission projects

15. The Commission regularly engages in projects which concern the rights of consumers. An example is the current project on security over land, which began in 2018 and is expected to report in 2025. In many ways this project is of greater importance to consumers because most people require a mortgage to acquire a home. The Commission is keen to engage with consumer groups wherever their interests are relevant to a project. Their expertise is highly valuable and impossible to find from other sources. It must be recognised, however, that consumer groups are often operating with highly limited resources in the face of significant demand, which undoubtedly acts as a barrier to their engagement with bodies such as the Commission. We would be grateful for any recommendations the Committee or its members may have as to how the participation of consumer groups in our consultations might be facilitated whilst minimising the burden it places on them.

Best wishes,

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