



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 25 October 2022

Session 6



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DELEGATED POWERS AND LAW REFORM COMMITTEE
26th Meeting 2022, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)

*Oliver Mundell (Dumfriesshire) (Con)

*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Colin Borland (Federation of Small Businesses Scotland)

Cat Haig (Registers of Scotland)

Jennifer Henderson (Registers of Scotland)

Jon Hodge (Registers of Scotland)

Mirka Skrzypczak (NatWest)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law
Reform Committee

Tuesday 25 October 2022

[The Convener opened the meeting at 09:32]

Decision on Taking Business in
Private

The Convener (Stuart McMillan): Welcome to the 26th meeting in 2022 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch mobile phones to silent. We have received apologies from Oliver Mundell.

The first item of business is to make a decision on whether to take items 7, 8 and 9 in private. Is the committee content to do so?

Members *indicated agreement.*

Moveable Transactions
(Scotland) Bill: Stage 1

09:32

The Convener: Under agenda item 2, we will continue to take evidence on the Moveable Transactions (Scotland) Bill from two panels. The first panel is online. I welcome Colin Borland, who is director for the devolved nations at the Federation of Small Businesses, and Mirka Skrzypczak, who is the head of working capital and trade products at NatWest. I remind both attendees not to worry about making us aware of when you want to speak, because we will bring you in automatically.

I will start with a question for the FSB. Something that has come up in evidence so far is cash flow, which can certainly be an issue for all businesses, and especially for small businesses. Can you provide a bit more background information on that, Mr Borland? I think that it is fair to say that, since 2008, the financial and trading conditions for the small business sector in particular have been extremely difficult in Scotland and across the United Kingdom. We are also currently in a situation that is clearly financially challenging.

Colin Borland (Federation of Small Businesses Scotland): Thanks very much. You are absolutely right. We make the point in our written evidence that

“There is a maxim that it is not a lack of profitability that kills businesses, but a lack of cash. And small firms’ cashflow is often interrupted by”

things like

“the late payment of sums owed to them.”

We go on to say that that is a particular

“perennial, long-standing problem”

and that

“the Policy Memorandum quotes our original evidence to the Scottish Law Commission that”—

at that time—

“3,500 small businesses in Scotland fold each year because their invoices remain unpaid.”

As we note, it is true to say that more recently the situation has become worse. Our latest small business confidence index, which was published just last week, shows that over half of all small businesses in Scotland continue to be beset by late payments, and that a third have seen an increase in late payments over the past few months.

Our written evidence also says that

“Over one in ten”

small

“firms (12%) say late payment is now threatening the viability of their business.”

That is against a backdrop—which members know about, so I will not detain the committee by telling you loads of stuff that you already know—of prices and inputs going up, and revenues, which are—*[Inaudible]*—or thereabouts, are beginning to fall. We are seeing that if businesses have any profit left, it is going completely. There really is, therefore, a reliance on shorter-term solutions that can help cash flow.

If it would be helpful, I can give the committee a quick snapshot of how businesses tend to fund their operations at present. I will go back to 1 March 2020, simply because that was before all the Covid emergency loans came in. Those loans amounted to about £4 billion in Scotland and make up quite a chunk of businesses’ debt. If we look at the overall picture, we see that on 1 March more than half—56 per cent—of small business owners had some form of debt. Of those, 46 per cent were using their business bank account overdraft, 38 per cent were relying on business credit cards and 30 per cent were relying on personal credit cards.

The top three forms of finance are all pretty flexible and are typically used to help with the daily costs of running a business. As is still the case, the most common forms of finance that have been acquired by small businesses in recent years—leaving aside the Covid loans, which have their own rules—are overdraft facilities, credit cards and asset finance. That strongly suggests to me that in the market as a whole, flexibility in financing is the most important thing for small business borrowers. That means that the bill, which could be seen as quite dry and technical, will potentially be quite significant if it succeeds in its aims of broadening access to that type of financial solution.

Was that helpful?

The Convener: It certainly was helpful. Thank you. Are you aware of any particular difficulties for the small business sector in accessing invoice financing in Scotland? If so, what impact does that have?

Colin Borland: Things like invoice factoring and raising money by selling debt obligations have largely lost the stigma that they had in the past, but that remains a relatively expensive form of finance. I saw just yesterday some guidance that suggests that we could see annual percentage rate highs of about 48 per cent. Of course, the business accepts less than face value for the invoice, but at the same time trader control is outsourced, which can be a costly and time-consuming drag on business.

The industry would probably be better placed than I am to offer a view on whether there are particular issues in Scotland. Nonetheless, the cost of administering invoice financing being brought down can, we hope, drive more competition in the market and produce crisis-free business. One of the stated aims of the proposed legislation is to reduce the burdens of time, processes and everything else around assignment. If it succeeds in doing that, there is definitely an opportunity to get costs down and to make that a better option for more people.

The Convener: I move to questions for Mirka Skrzypczak. From a lenders’ perspective, how does the current law in Scotland impact on your lending options?

Mirka Skrzypczak (NatWest): Good morning. The Scots law regime currently presents particular challenges, which in some instances present significant obstacles to provision of finance, and in other cases significantly add to costs, including for workarounds. That reduces the quantities of finance, which might be available under alternative regimes.

Colin Borland is absolutely right that overdrafts are the most common financing instrument for businesses that are trying to manage their working capital. The purpose of the bill is to look at security, in effect, and at how we protect security rights against an asset.

Invoice finance has been mentioned. It is not one thing—there are multiple forms of invoice financing. The most common one that is currently used across the United Kingdom is invoice discounting, rather than invoice factoring. The use of invoice discounting is not disclosed to the debtors. Invoice factoring—use of which is significantly declining—is, indeed, more expensive, because it includes a credit control element and the lender takes on the duty to chase debt on behalf of their customers. At NatWest, we recently exited our invoice factoring product, because our customers were moving and switching to invoice discounting.

In invoice factoring, the current regime does not necessarily pose too many challenges, because factoring facilities are fully disclosed to the debtors: the debtor intimation happens under the factoring agreement, because we step in to chase the debt on behalf of our customers. Therefore, there will always be more pricey factoring facilities in business accounting.

As I said, the industry is moving away from providing factoring, because market demand for it is vanishing. Companies are using, for example, various new accounting software companies that chase debt on their behalf. We can see that the rise of invoice discounting is pushing out factoring.

The current regime in Scots law presents challenges to invoice discounting. In many instances, invoice discounting is cheaper than using overdraft facilities; it is also undisclosed to debtors. When a business tries to raise money through its invoice discounting facility, it operates on the whole ledger and the sales are balanced. That is notified to the lender, which gives the business information about availability against the sales ledger balance. We do not look at any invoices. The process is quite straightforward—it is far simpler than factoring.

However, under Scots law, I must make the intimation to debtors; under the current regime, I have to notify debtors to pass the title of the debts to the bank. What do we do now? We have an expensive workaround in which we create a trust mechanism and use trust language with our customers. That is a problem because it is costly: third-party lawyers must be involved in drafting agreements and in helping our customers to really understand what the trust mechanism means to them. Also, from a lender's perspective, that presents huge challenges because the mechanism has never been tested. Therefore, we are sort of operating it in order to provide finance.

We tend to provide invoice financing facilities—that is, risk discounting—to bigger businesses rather than to smaller ones because of the cost challenges and the untested nature of the workaround. That gives us challenges.

Those are reasons for the proposed changes to the law on assignation in Scotland, which will definitely be welcome from an invoice financing perspective.

However, the matter goes way beyond invoice finance. Supply chain facilities are also very important, and their use is on the rise, including by companies that have concentrations of big blue-chip debtors, for example.

Currently, I rely on, under English law, the receivable purchase agreement. That allows me to take security for current and future receivables. There is no ability to do that under Scots law, so we cannot take an assignment of all present and future receivables; those are not valid. The bill will change that and will make such an assignment far easier to execute. Currently, I must create a collaborative assignation and transfer of receivables into trusts on every notification of debt, which is admin heavy for businesses.

I will pause there in case there are questions, unless the committee wants to hear now about the impact of the changes to the law on pledges.

The Convener: It would be helpful if you could do that now.

09:45

Mirka Skrzypczak: That is no problem. Pledges are most often used for what we call fixed assets—plant or machinery, for example, or other assets that a lender can evaluate, and based on which it can provide businesses with financing. Under Scots law, the concept of chattel mortgages is not recognised, and obtaining a pledge and possession of assets is very impractical and limits companies' access to finance. In order to provide financing against plant and machinery, for example—which, under English law, constitute fixed assets—I can, in effect, only use a floating charge. That means that I must put a number of reserves in place, which again squeezes the availability of funding that a business could raise in order to satisfy working capital requirements. The more reserves that I have to put in place to ensure that, at the exit, the value of the asset versus the funding of the asset is safe from a risk perspective, the less money there is available to businesses. The proposal in the bill creates the ability to have an effective fixed charge against plant and machinery. Those are the key impacts on businesses' access to finance.

We need to think about administrative ways of managing such registers, because they need to be accessible and effective. However, the proposed changes to the law on assignations and to the law on pledges will definitely increase access to finance and create the ability to do that at lower cost.

The Convener: The issue of floating charges will come up in our questions shortly. I would like clarification on your final point about access to finance. With regard to invoice financing, does the bill present opportunities to open up new sources of funding for small businesses?

Mirka Skrzypczak: Yes—absolutely. A result of the bill will be that small businesses' access to financing will be far better. They will not need to worry about workarounds and the trust mechanism, which is hard for some of them to understand and results in some businesses deciding not to proceed. As I said, invoice discounting, which is entirely confidential—the debtors are not aware of our involvement—will allow businesses to access those facilities without the need to intimate that to debtors.

The Convener: Are you aware of any advantages for larger businesses in Scotland that will result from the reforms to invoice financing that are proposed in the bill? You have touched on a couple of points already.

Mirka Skrzypczak: Yes. The costs exist for larger businesses, as well. We might think about the fact that we can perfect our security interest far more easily for bigger businesses, which means

that we can provide better advance rates against their sales ledger balances. It is also true of small businesses, but seasonality in large businesses is very visible and impacts their operating and profit generation. Most businesses are seasonal, actually. Therefore, if there is huge volatility and seasonality, I would be very cautious about the maximum advance rate that I can put against sales ledger balances, because, under the current regime, I have limited decision-making powers as to when I can perfect my security. Under the bill, I would, in effect, have fixed charge rights. I rank ahead of the insolvency practitioner—only Crown preference ranks ahead of me—and can perfect my security at the optimal point. That preserves the value for us as well as for the business.

The Convener: As a result of the bill and the proposals, do you foresee business transactions taking place in Scotland that would have—as we have heard in evidence—taken place under English law, as some transactions have?

Mirka Skrzypczak: Do you mean in terms of there being more in Scotland versus more under English law, or more than in Scotland currently?

The Convener: I mean more in Scotland than there are currently. We have been told that some transactions have taken place under English law because it has been easier to deal with.

Mirka Skrzypczak: I apologise—I did not fully understand the question.

Yes—in some instances, businesses deliberately take a decision to have a facility under English law, as opposed to one under Scots law, in order to access finance. We would see businesses registering their facilities under Scots law.

Bill Kidd (Glasgow Anniesland) (SNP): You have covered a wide range of issues. Thank you very much for doing so.

Supporters of the reforms have stated that they are likely to make access to credit cheaper. Do you agree that that will be the case in practice, or is that a smokescreen for the new legislation?

Mirka Skrzypczak: From NatWest's perspective, given the extra legal costs associated with workarounds, eliminating the need for workarounds will present lower legal charges for customers. That means that access to credit will be cheaper, for sure.

Bill Kidd: In your view, businesses in England and other countries have access to a wider range of finance options than we have in Scotland at present. As you mentioned earlier, people take up the advantages of running things under English law. Will the bill open up options and mean that people will be able to concentrate their options here in Scotland?

Mirka Skrzypczak: Yes, I believe so. We still provide financing under Scots law for some of the bigger companies in Scotland, as well as some medium-sized ones, but even they face challenges with the availability of finance.

Let me answer the question by looking at a practical case study and the law of pledges in the context of asset-based lending, where we leverage plant and machinery to provide financing.

We may have two businesses with identical characteristics—one operating in Scotland and one operating in England. Under English law, other than Crown preference, nothing runs against me. If I am dealing with that asset in England, I can give a full evaluation of the money available to the customer against the asset. Let us say that the asset is worth £100,000 and I can give £60,000. Obviously, we evaluate the asset not as a going concern but as an accelerated sale. I do not need to put in any other reserves, which are required under Scots law.

Here in Scotland, I do not have a fixed charge, but there is the concept of a floating charge, which means that there are other creditors that may rank against it ahead of me. The availability against the £100K might go as low as £20K. Although the company in Scotland may have exactly the same asset, it therefore could not benefit from the same amount of financing because of all those extra things that have to be considered from a lender's perspective before we give it the money. The business would then need to think, "What is the point of me even raising the money that way?" A lot of businesses decide that it is not worth it.

That puts a lot of businesses at risk of unnecessary costs when the answer might still be no, because it would not be commercially viable. As a lender, we of course avoid that. We understand the market and we would know straight away from the value of the asset whether it had any legs. However, a lot of providers may take advantage and still charge a business an evaluation charge simply to give it the answer that the asset is worth very little for the purpose of financing. We could therefore also eliminate the unnecessary cost of evaluations, which often result in a "no" answer.

Bill Kidd: That is very helpful. Thank you very much for that, which has answered my question.

The Convener: Before we move on, I invite Colin Borland to come in on any of the points that have just been raised.

Colin Borland: Mirka Skrzypczak gave a neat summary of where we are, and it was interesting to hear the industry's view on that.

Should the proposal make access to credit cheaper? Yes, if it goes the way that we want it to

go, it will do that. As Mirka Skrzypczak outlined, the workarounds seem disproportionate, particularly when we consider the amount of credit that might be at issue.

Another one of the big advantages that we see is that people would not lose access to business assets under the statutory pledge. The oft-quoted example involves someone who has a van that is worth £10,000 and wants to raise £500 against it, but it is completely impractical for them to lose access to that van. Under the proposal, they would have use of that vehicle until the loan is repaid. That will certainly open up a lot more options, and the more people who we can encourage into the market to exploit those new market opportunities, the more we will be able to drive a bit of competition, which will, hopefully, make it cheaper to get credit.

I would also like to make a point about the floating charge and some of the limitations around that. It is important to bear in mind that that can be granted only by incorporated debtors, such as companies, limited liability partnerships and so on. That means that it is out of reach of the likes of sole traders and partnerships, who account for about 50,000 or so of the 172,000 registered small businesses in Scotland and, obviously, all of the 165,000 unregistered businesses. I think that it is going to be quite important that the statutory pledge is applicable to other businesses, because that is where a lot of the acute short-term cash-flow issues arise, and where solutions like this might be the most useful.

The Convener: Before we move on to the next round of questions, we will suspend briefly to deal with a minor technical issue in the room.

09:57

Meeting suspended.

09:58

On resuming—

The Convener: Jeremy Balfour will ask the next question.

Jeremy Balfour (Lothian) (Con): Good morning. My question leads on from what we have heard already. I ask Colin Borland to answer first, and others can come in if they want.

At the moment, under Scots law, small businesses, individuals and partnerships cannot grant floating charges. I think that they are a bit of a blunt instrument and are perhaps not used as much as they were previously. Are your members saying that they would like the opportunity to grant floating charges over their assets, or will the proposals replace that?

Colin Borland: I would think that, given the limitations around floating charges, it would be better if we could replace that with something like what is proposed, which, on the face of it, looks incredibly straightforward and would appear to provide the sort of finance that, typically, businesses in that set of circumstances are telling us that they need. My instinct would be to go with the latter suggestion.

Jeremy Balfour: Mirka Skrzypczak, among the partnerships and individuals you deal with, is there any appetite for allowing floating charges to be granted by them?

Mirka Skrzypczak: We have not seen that. As Colin Borland said, there are challenges associated with floating charges for small businesses. If you can allow the assets to be utilised by the business and allow the funder to have the quasi-fixed charge against the assets, that would be better for all parties involved.

10:00

Jeremy Balfour: I want to move on to another area. Perhaps one or both of the witnesses will want to take this question. At the moment, the bill does not deal with shares and other assets such as that, because of the Government's view that it does not have the legal competence to grant that. Do you have a view? Should the bill be extended to cover shares?

Mirka Skrzypczak: I understand the challenges with charges over shares. As a lender, we tend to take those in complex structured finance transactions only. These days, lenders do not want to take charges against the shares of small or medium-sized businesses.

From the NatWest perspective, I do not think that that will make any difference to how businesses access finance. We have not seen demand from businesses saying, "Hey, I want to stake up my company for you".

The issue might have different implications for investors, whose view might be different from those of banks. Obviously, they take equity stakes in businesses to propel the growth agenda, so that question is probably better directed to investors as opposed to traditional lenders.

Jeremy Balfour: The other area that I want to cover is how the new registers will work in practice. This question is for both of you. Are you satisfied that the registers that are set out in the bill will provide the information that is needed by lenders and those who will grant charges? Do you have any suggestions for how they could be improved?

Colin Borland: We do not have any firm views on that. I think that it will be one of those situations

in which, if the overall package makes this option more attractive than the alternatives, people will go for it and use it, and the bill's aims will be delivered.

I am not sure about how best to design the registers, the appropriate fee structure and what information should be recorded—we certainly do not have firm views on that at this stage. However, if there are specific questions that you think might have particular relevance to small businesses, I am more than happy to take them away and take soundings.

Mirka Skrzypczak: As I alluded to earlier, it is important that the registers are effective and accessible—also from a cost perspective. A balance has to be struck between the amount of information that would be useful to get in search results when searching the registers and the administration that is involved in ensuring that accurate information is included. I suggest an approach with limited mandatory data fields in the registers but with the functionality to allow clicking through to other documents with further information. That is my suggestion: a limited number of mandatory fields in the registers. At the time of adoption, the registers will become the preferred form for registering security interests.

Jeremy Balfour: I have a follow-up question, which, again, is to both of you. At the moment, the bill suggests that information updates to the register of statutory pledges will be voluntary. That means that, when a pledge is paid off, it will not necessarily show up automatically, because someone has to do it. Is that realistic for businesses? Will people do it, or will we end up with lists and lists of pledges that have been paid off but have never been taken off the register?

Mirka Skrzypczak: It is a fair challenge. I can comment on how it is done in English law. Currently, it is a statutory requirement for us to remove the pledges—which are used as security interests—when the loan has been repaid, and banks are notoriously slow to remove those security interests. Either way, financial institutions should have their own code of conduct on that and should promptly remove security interests from facilities that have been repaid. It can be made statutory, but that will not necessarily work; we can see the challenges of removing security interests in a timely manner using English law. Making it statutory will not cause harm, and it will help small businesses to show that they are free of any pledges, but whether the legal construct will have the desired effect is yet to be seen.

Colin Borland: Making it as easy as possible to do will drive traffic and make people do it. From a borrower's point of view, if a person has £500 left to pay on their van, which is essential to their work, the day that they pay that off they will be

pretty keen to have the pledge removed, because they might want to raise other finance and be able to demonstrate that they are not carrying any charges on the van. There is quite a strong motivation for the borrower in those circumstances. We do not have to make it statutory with everything that then goes with that.

Paul Sweeney (Glasgow) (Lab): Thanks very much for coming along this morning. I want to touch on one area that we have discussed with other witnesses. It might not exactly be part of your portfolios, but it will be interesting to get your insights nonetheless.

The main area of controversy is how the bill will relate to consumers. The committee has heard concerns from witnesses that the bill could facilitate for consumers a high-cost lending market—basically, virtual pawnbroking—through the statutory pledge, with comparisons being made to the logbook loans that exist in England.

There is no definition of what a consumer is in consumer legislation, but I note that there are definitions covering sole traders in both the Consumer Credit Act 1974 and the Consumer Scotland Act 2020. That is because, when buying goods and services outside of their area of expertise, sole traders can be at risk of the same sort of information imbalance as individual citizens. Bearing in mind the issue of additional protections for sole traders, do you think that there is a risk that the reforms proposed in the bill will open up a high-cost lending market for consumers and sole traders, with loans secured on both household items and business items that might be critical to a sole trader? How likely is that?

Colin Borland: You are absolutely right to bring up that issue. When we spoke to the Scottish Law Commission about all of this years ago—and notwithstanding the question of sole traders—we talked about ensuring that individuals themselves could access the remedies that have been put forward. We asked how we could stop someone seeing their three-piece suite being marched out of their house, simply because they had raised money against it.

It is not my area of expertise, and we have not looked at this in any great detail, but as I recall, the commission at the time of that conversation seemed to have thought about it in a lot of detail, and it seemed to think that a lot of statutory protections and safeguards would go into the bill. We all know what we are trying to avoid, which is making this a loan shark's charter; at the same time however, we do not want to exclude the kinds of microbusinesses that it might be difficult to differentiate from individual consumers.

One thing about a small business is how much of it is built on the personal finances of the

individual who owns it. How many people use credit cards and other personal finance options to keep their business going? That applies particularly at the micro level and at the start-up stages of a business, but it raises the question of what is a household asset and what is a business asset. It is really tricky to reflect that and capture it in statutory text. We need to be clear that one of the big advantages here is that we will be opening up a form of finance to unincorporated bodies, which is definitely a major prize, but we are also very keen to safeguard against the situation that you have mentioned.

Mirka Skrzypczak: I agree with Colin Borland: it is for sure a fair challenge. This is not my strong area of expertise, but I think that the Consumer Credit Act 1974 protections will stand and the consumer duty, which we will have shortly, will provide further protections. I think that the overall legislative framework for protecting businesses such as small traders, with the CCA protections as well as the consumer duty, will make it harder for people to exploit what is a welcome change in the law.

Paul Sweeney: Just to be clear, would you be particularly concerned if consumers were excluded from the ambit of the bill?

Mirka Skrzypczak: As someone who operates in the business sector and is a business lender, I would not have an opinion on that. I am not aware of any NatWest plans to expand the level of financing through these means; we have other options for providing consumer finance that have so far proved to be successful. I think that that is as far as I can go with my commentary in that respect.

Paul Sweeney: Colin, do you have any thoughts?

Colin Borland: I am sorry—everything froze for a moment. Can you repeat the question?

Paul Sweeney: Would you have any particular concerns if consumers were excluded from the ambit of the bill?

Colin Borland: I suppose that it depends on the definition of “consumers”. It is a difficult question for us, given how much depends on that definition, particularly in relation to early-stage businesses. That is the issue. At the same time, however, I have absolutely no interest in making things easier for loan sharks or unscrupulous operators, particularly at the current time, when we know how hard pressed finances are and that people will be looking at every option to keep things together as we try to get to the other side of the inflation crisis.

We would have a strong concern if it looked as if the bill would limit access to business finance for

the smallest firms. After all, at the end of the day, that is where the interest in the bill lies.

Paul Sweeney: On the issue of limiting access to finance for small businesses, I note that sole traders are excluded from the bill’s consumer protections. Do you agree with that approach? Mirka, you said that there are other legislative remedies or protections that could be applied. I am interested to hear from both of you your thoughts on that exclusion from the consumer protections in the bill.

Colin Borland: I am not sure that we have any firm views on that.

Mirka Skrzypczak: I think that the consumer duty will help in that respect; indeed, that is exactly why regulators have pushed for it. Sole traders are at the heart of that legislative change.

Colin Borland is right: sole traders should not be excluded from accessing finance. Equally, however, they should be under the protection of certain remedies that are available under the CCA. I know that the consumer duty goes beyond that and will provide those remedies in future.

Paul Sweeney: I want to get your thoughts on a problematic scenario that the bill would create. A lender would not need to get a court order to seize items that had been pledged by a sole trader or small business in the event that they missed repayments on their loan. Are you happy that greater protection—which might consequentially come with a higher interest rate—would not be needed? I suppose that it is a question of striking the right balance.

10:15

Colin Borland: That is a really good and interesting question, and I would probably need to take the kind of practical example that you have highlighted away and consider in a bit more detail how exactly it would work and how the various rights and protections would fit together in it. I am happy to explore it in more detail if you think that that would be helpful.

Paul Sweeney: That would be appreciated, and if you had any proposals for appropriate or proportionate protections—with regard to, say, when a seizure could take place—that would be helpful, too. Mirka, do you have any thoughts on that?

Mirka Skrzypczak: From a mainstream bank—and not just NatWest—perspective, I have to say that we would never do that, but you would need to ask yourselves about independent providers. Would this create an opportunity for some third-party companies to act as aids to independent third-party providers in seizing assets? I do not really have an answer to that, but you could put

that challenge to yourselves. Would that sort of thing happen if there were no protections? A parallel financing market could exist alongside mainstream finance; indeed, that is definitely a challenge that we have seen in the past. Without protections, such things are sometimes exploited.

Paul Sweeney: That is really helpful, particularly with regard to the best practice from mainstream lending institutions and what we could design to ensure that nothing could outflank it. Any further thoughts on that would be really helpful.

Mirka Skrzypczak: We already have evidential standards. For example, we have to provide reasons as to why customers receive fair value for money from the facilities that we provide. It is absolutely the case that all of those things are already part of the regulatory regime.

Some of the legislation is not necessarily as far reaching with regard to independent providers, but the Financial Conduct Authority is definitely trying to combat that through addressing the financial conduct of those providers. Again, the consumer duty is looking to address the issue across the whole spectrum, but the question is whether there will be some time lapse that could be meaningfully exploited. Perhaps not, but that might be an issue for consideration.

Paul Sweeney: Thanks very much for that. I appreciate those thoughts.

The Convener: It would be very helpful if Colin Borland could come back to the committee on Paul Sweeney's question before next Tuesday, as that is when we will have the minister before us.

Colin Borland: Certainly, convener.

The Convener: I have a couple of final questions. The financial memorandum suggests that the fees for using the registers will be in the range of £10 to £80. Will setting fees at that level encourage their usage?

Colin Borland: I do not have any views on that. The overall package is cheaper in the round. I think that, in terms of the pounds that they will spend and the time that they will invest, businesses will see using the registers as a reasonable option; if not, they will not use them. I suppose that the challenge for Registers of Scotland will be to keep the fees under review and make sure that they hit the right balance between covering costs and not discouraging use. However, I do not have any opinion on where that line should be drawn.

Mirka Skrzypczak: Please remind me what the upper rate was. Was it £18 or £80?

The Convener: It was £80—eight-zero.

Mirka Skrzypczak: Again, this is all about comparisons. Colin Borland is right to ask about

the cost of the facility in the overall scheme of things. From memory, Companies House charges far more than that. The last I remember, the charge was around £150 and it did not prevent any business or usage from happening. The range that you are talking about is probably realistic and should not be a hindrance to using the registers.

The Convener: My final question is for Mirka Skrzypczak. I do not expect an answer at this point and she might want to come back to the committee on it.

The bill is going through the parliamentary process. If it were to be passed and its provisions rolled out, would NatWest consider having, even for a short time, a favourable set of lending conditions and financial conditions for people and organisations in Scotland to assist with the roll-out?

Mirka Skrzypczak: The short answer is yes, but we would do so in compliance with all the other financial conduct rules and codes of conduct by which we play. In that situation, if we had a Scottish client, we would make it compulsory for such a customer to be aware of recent changes in legislation and to have options for how they wish to proceed.

The Convener: I thank the witnesses for their time and their written submissions, and I suspend the meeting briefly so that we can change to the next panel of witnesses.

10:21

Meeting suspended.

10:23

On resuming—

The Convener: I welcome our second panel of witnesses. Jennifer Henderson, the keeper of the registers of Scotland, is accompanied by Jon Hodge, the policy lead for the register of movable transactions—RMT—and Cat Haig, the product lead for the RMT at Registers of Scotland.

I remind the witnesses not to worry about switching on their microphones during the session, as they are controlled by broadcasting. If they would like to answer any of the questions, they should just raise their hand to indicate that.

The financial memorandum suggests that the registers established by the bill will be operational by mid-2024 at a cost of around £8.2 million. Is Registers of Scotland still on track to deliver that?

Jennifer Henderson (Registers of Scotland): Thank you for having us today, convener. Yes, we are still on track but we note the timing of the passing of the bill and the timing of the

regulations. From our experience of developing other registers, we need a gap of a year from knowing exactly what we have to deliver to it being fully operational. We are on track with the timetable as we understand it for the price to which we are working.

The Convener: What consultation have you done with potential users to ensure that the registers will meet their needs?

Jennifer Henderson: I will hand over to my colleague Cat Haig, who is leading on product development and will talk about our work on user experience.

Cat Haig (Registers of Scotland): We carried out a broad range of user research during our discovery and alpha periods—I can talk about what those are. We have spoken with a range of solicitors and lenders who we identified as being our top users. We are also working on the assumption that individual citizens are included in the scope of the legislation and it is our intention in the next stage of the project, which is the beta phase, to do some research with private individuals and citizens.

We have undertaken a number of individual interviews with users, as well as carrying out prototype sessions in which we have shown users what we have built and have tested concepts and ideas with them to get feedback. We then iterate and amend the prototypes, based on the feedback that we have received. To date, we have spoken to around 50 different users, including not only solicitors and lenders but academics, industry experts and valuation firms that work with assets. We have also done some work with the Law Commission and the Law Society of Scotland.

The Convener: You have had dialogue and consultations with a range of organisations and individuals. Have you been able to get a clearer picture of the likely demand for registering assignments and statutory pledges in the registers?

Cat Haig: Our usage estimates are similar to those suggested by the business regulatory impact assessment in 2017. We have had to do some work to make people aware of the legislation. We have spoken to financial counterparts in England to make them aware that the legislation is coming. As that awareness grows, that will increase awareness of the scope of what people can do under the legislation, and as that grows there will be greater demand to use the registers. We may not reach the estimated figures in the first year, but I think that the numbers will grow over time—that seems to be borne out by our research.

The Convener: The committee has heard from the money advice sector that searches of the

registers should be free. Is that feasible within the current budget, or could there be a two-tier system so that money advice experts could have free access while others might pay?

Jennifer Henderson: It is for ministers and Parliament to decide how to set the fee structure. Registers of Scotland would expect to be able to cover our costs for running the register from the totality of fees charged. If there were to be a different fee structure in which certain people had free access to search, we would have to take that into account in the overall funding. Ultimately, if there is a gap between what it costs us to deliver the registers and the fees that we have coming in from those registers, it would be for the Scottish Government to cover that funding gap as it sees fit. We do not have an explicit opinion about how the fee structure should be set up, other than that it should cover our costs.

Bill Kidd: When the committee put out a call for views, some stakeholders suggested that there should be links between the registers in the bill and Companies House. You obviously know about that—I can see you nodding. That would avoid a need for companies to register financial arrangements twice. Some of those who would have to register would not wish to register with more than one body, which would be a complication for them. Will you consider that?

Jennifer Henderson: There are two parts to that. Currently, there is no provision requiring us to put in a link. My colleague Jon Hodge will expand a bit on that. Cat Haig can come in on whether it is technically possible for us to do it. If there were provision in the bill that required us to put the link in, we could do that. However, we are not considering it at the moment because there is no such provision in the bill.

10:30

Jon Hodge (Registers of Scotland): Good morning. It is something that we would like to do but it would require an amendment to the Companies Act 2006, which is not devolved, by an order under that act. I understand that the bill team in the Scottish Government has made contact with the UK Government on the issue but, as yet, no information has been forthcoming. As the keeper says, it is something that we would like to do and, if it is provided for, we can accommodate it.

Jennifer Henderson: Cat, could you explain briefly how we could do that?

Cat Haig: We are also looking to build application programming interfaces into our service, which would allow the two software systems to talk to each other. Technically, it is possible, but as Jennifer Henderson said, we have not yet scoped out that work because it is not part

of the bill as it currently stands. We have not had those conversations yet, but we have a good relationship with Companies House, so it is something that we can investigate.

Bill Kidd: Thank you for that. All three of you have said that it is something that you would want to consider. What benefits would such a link bring to Registers of Scotland?

Jennifer Henderson: As you have suggested, the primary benefit would be that people who have to register twice would not need to do that but could copy the information across. From a Registers of Scotland point of view, that would remove the possibility of people introducing errors through not getting it quite right in both places—when that happens we have to put time and effort into making corrections. If provision were made to enable people to register something once and, as Jon Hodge says, if that could be done legally, it would make the quality of the data better overall.

Bill Kidd: That makes a lot of sense. Thanks for that.

The Convener: Am I right in assuming that there would be no issues regarding data protection or the general data protection regulation in respect of the two separate organisations if the information was input once and then transferred to the other register?

Jennifer Henderson: Jon Hodge might wish to come in on that. When we take data from other organisations, which we do for other things, we have appropriate data sharing arrangements in place at both ends and their customers know what is provided. That all gets sorted out.

Jon Hodge: It is exactly that. The order that would need to be made under the Companies Act 2006 would cover that. As Jennifer Henderson says, we would have agreements and memorandums of understanding that would cover the specific details.

The Convener: Thank you.

Jeremy Balfour: Good morning. You will have heard that I asked the first panel of witnesses about the voluntary nature of updating the register when a pledge has been discharged. Will that happen or will the register just build up more and more? Do you think that the voluntary approach will work, or would you like to see some statutory element to it?

Jennifer Henderson: I will start and then let Jon Hodge come in on the technical detail. The way in which the legislation is currently drafted means that the removal of a pledge is voluntary: either the lender would request to remove it or—much more likely, in my opinion—the person who has given the pledge would want it to be taken off because they would not want it recorded.

Standard securities mortgages work in the same way: when you have discharged the mortgage on your property, you request to have it removed from the register, where the lender has signed up and we have registered that deed. We could do that. That is also a voluntary arrangement.

Jon Hodge will come in on how the legislation would need to be amended to make provision if registration were to be compulsory.

Jon Hodge: The Scottish Law Commission wrestled with the issue of the balance between having a register that has utility and not being a clog on business—I think that that was the term used by the Law Commission—by requiring discharges to be registered every time that a pledge has expired. As it stands, the bill would mean that pledges stand in perpetuity.

We have no views on what the position should be. We intend to monitor how the register matures over time and whether the number of entries starts to affect the searchability and usability of the register. We would feed that back. Ultimately, it will be for ministers to make a decision on that, based on a balance between the utility of the registers and the ease of doing business.

Jeremy Balfour: It is several decades since I practised law, but, when I was practising, we discharged a standard security, or put the document forward to do so, only when we were selling a property. Often, a mortgage would be paid off but it would only be years later that the discharge would be done.

On Jon Hodge's final point, my fear is that we end up with a register that is so large that it is almost impossible to find anything. Is that a danger?

Jennifer Henderson: It could be a danger. There is provision in the bill for ministers to make secondary legislation that could introduce changes to how updates on statutory pledges must be made. We could supply data about how the register is being used and how many pledges are on it that we think might have expired so that ministers can decide whether they want to introduce a compulsory element at a later stage, if they do not do so by amending the bill now.

Jeremy Balfour: The Scottish ministers will have the power to set the duration of registration for statutory pledges. In its submission, the Faculty of Advocates has suggested that asking creditors to set the timescale when they register would be a better approach. If the bill were changed, could you facilitate that?

Jennifer Henderson: Jon, do you want to come in on that?

Jon Hodge: Yes, absolutely. As Jennifer has mentioned, the bill as it stands allows ministers to

make regulations to expire securities and to facilitate renewal applications. We could accommodate both of those things in the system, which will be largely automated. If there were a time period that could be set at the point of application, we could ensure that securities were removed on an automated basis.

Paul Sweeney: I thank everyone for coming along. I want to cover privacy and consumer issues around the protection of information.

The registers will put personal information such as the name and address of an individual assignor or pledge provider into the public domain. An assignation record will also contain the assignation document, which will contain the details of the assignation. In some cases, that might enable individual customers to be identified, and anyone will be able to search the registers if they pay the required fee.

The Government has acknowledged that there are privacy issues. Paragraph 107 of the policy memorandum suggests that the Scottish ministers might consider limiting some search options or keeping certain information confidential in particular contexts to protect privacy. In evidence that we have taken, consumer and money advice organisations have highlighted concerns that the registers might contain information that is prejudicial to the interests of consumers. For example, there are frequently disputes between individuals and creditors about the accuracy of the information that is held by credit reference agencies.

Advice Direct Scotland raised concerns that the information in the registers could be used to make it easier to take debt enforcement action or that it could be used by credit reference agencies in a way that had a negative impact on consumers. ADS also raised concerns that the registers could contain out-of-date information about the loans that had been taken out by an individual. It called for clear and effective processes to correct errors and settle disputes. It would be possible to use the process that is set out in sections 96 and 97 of the bill to force a correction of the register of statutory pledges. However, if a creditor disagreed, the dispute would go to court. There is no process set out in the bill for making corrections to the register of assignations.

I want to touch on those issues, which have been raised in evidence that we have heard from other contributors. The registers will contain significant amounts of personal information. What measures are planned to protect individuals' privacy?

Jennifer Henderson: The balance between the public interest of having the registers and the privacy of the individuals who are on them is

obviously a matter for ministers, as is where they set exactly what goes on the registers, what is searchable and so on.

In the way in which we are building the registers—Cat Haig will be very happy to expand on this—we are protecting people's information, in the sense that people will only be able to access the register in the prescribed manner, they will only be able to search against the things that are prescribed and they will only get returns on the information that matches their search criteria. Someone will not be able to go into the register, scroll through the entire thing and see everything in it. From a cybersecurity point of view, we will build in excellent protections to ensure that information is held securely.

Furthermore, we are building registers that meet the requirements under the bill about what information is provided to people when they search and what they can search against. If there are adjustments to those requirements between now and when the bill is passed, Cat and her team can accommodate changes to the search fields and so on, so that they match exactly what we are supposed to supply.

The emphasis is that my role as registrar is administrative, in setting up and delivering the registers and making the information in them publicly available, as prescribed in the bill—nothing more and nothing less.

Paul Sweeney: A similar example might be in how insurance companies can check the Driver and Vehicle Licensing Agency's database for people who have points on their licence and have not declared that in their insurance applications. That might involve a similar concern to the one that Advice Direct Scotland has raised, about information on the registers being used in a way that could be detrimental to individuals, not necessarily with their knowledge—for example, on debt enforcement by credit reference agencies. Have you considered how access to the registers can be controlled so that individuals have sovereignty over their information?

Jennifer Henderson: We have considered it in the sense that we are building a register that meets the requirements of the bill. That allows anyone who wishes to search the register to do so. There is no limitation on the types of organisation that can search.

However, to go back to the question about a fee for searching, one of the elements of having such a fee is that it discourages people from spending their days looking up the names of the neighbours in their street, for example, to find out about their financial affairs.

Our overall view is that we are delivering what is in the bill. Jon Hodge may want to come in some more about the policy aspects.

Jon Hodge: I will touch on a couple of points that Jennifer Henderson has mentioned. The bill makes some mitigations to address privacy concerns. Registration is a policy solution that, by definition, involves publicity, so those mitigations are important.

Searching has been mentioned. Applicants have to provide a date of birth, but that cannot be searched for in isolation; it can be searched for only in conjunction with a name—and, even then, only the month and the year—so that prevents parties from potentially scraping the register for information. In addition, the assignee or the creditor cannot be searched for. That prevents people from scraping the register, for example to build up customer lists of lending institutions.

However, most of the mitigations will lie in the regulations that will follow the bill, which will set out most of the framework of how the registers operate. There is provision to allow rules to make unnecessary the submission of certain parts of the document that applicants upload. For example, applicants could redact parts of the documents that they upload. That would be fine. It would not affect the effectiveness of the registration.

The rules can also provide that certain information that is contained in the register does not necessarily need to be disclosed in a search or in extracts. Date of birth is perhaps a good example of that. It will be captured for identification purposes and to enhance searchability but, when someone searches the register, date of birth will not be returned.

Certainly, as we develop those regulations, we will consult with parties on what other pieces of mitigation we can put in place to satisfy everyone.

Paul Sweeney: Another concern that was raised was about making sure that the data that is held on the register is accurate and can be updated easily. There are concerns that registers might contain disputed or out-of-date information, which could have a negative impact on individuals. Is there a need for more user-friendly corrections and dispute resolution processes, as exist for credit reference information?

Jennifer Henderson: The bill as drafted sets out a correction procedure, whereby people can apply to me to have the record corrected, and it stipulates who those people might be. It is important to emphasise that I do not have a judicial role. In a dispute between two parties, it cannot be for me to determine the accuracy of the record that I hold. I will not be able to take a view on that.

I ask Jon Hodge to come in a little more about the policy side.

Jon Hodge: Each of the two registers has its own correction regime. The register of assignments is in effect a snapshot in time. The only way in which an inaccuracy can be created is if the information that is input by the applicant is incorrect or if our information technology system makes a mistake, in which case people can contact us and we will correct it.

The register of statutory pledges is slightly different. As I referred to, there is in the bill a system of correction applications, which relate to things such as restriction, assignment or discharge, which are of most interest. The way in which those applications will be made will be very similar to the way in which the original registration application is made—they will be automated and pretty streamlined and quick. We will certainly look to make the correction processes easy for people so that, for example, discharge can be done quickly and cheaply.

Paul Sweeney: Thank you—that is helpful.

10:45

Bill Kidd: I thank Paul Sweeney for asking that question, because it raised an issue that I was thinking about. I want to ask about the security of information, not in terms of keeping it from people but in terms of how people will prove that they are the correct person to alter information that is held. I am concerned that somebody could mess around with and change somebody else's information. How will you ensure that the process is handled correctly?

Jennifer Henderson: With our other registers, we have a verification regime that applies to people who go into and request updates to the registers. I ask Cat Haig to say how we are addressing that aspect.

Cat Haig: Our professional users such as lenders and solicitors are authenticated users and have accounts with us, so we verify them. They have access to our online services, and they can carry out registrations and make amendments and that sort of thing. At the moment, we are investigating how, if individuals are included in the legislation, we would verify them and how they would safely, and in an authenticated way, make changes to the registers. We want to ensure that we do not get into a situation in which anybody can access information and make changes.

I ask Jon Hodge whether he has anything to add.

Jon Hodge: It is worth noting that the correction applications that I referred to can be made only by

the secured creditor—they cannot be made by other parties.

Bill Kidd: So that is being addressed. Thank you.

Jeremy Balfour: I want to come back to a point that Jennifer Henderson made, just to clarify what powers you have. When the land register was rolled out initially, there were arguments about whether the right piece of land was being registered, who owned what and where the boundaries were. With the registers under the bill, if somebody said that they did not take a security over something or that there had been fraudulent behaviour, would you have powers to investigate that or would you refer it to another body?

Jennifer Henderson: I do not have the power to investigate that. The test of my ability to correct, as defined in the bill, is that something is manifestly inaccurate and I know what I need to do to correct it. If there is any dubiety about that—for example, if there is an allegation of fraud—we would refer people to the police as the appropriate authority to deal with that. That is what we do with our other registers. If somebody tells us that they think that a fraud has happened, we do not have powers to investigate that.

I ask Jon Hodge whether he has anything to add on the policy side.

Jon Hodge: The keeper's role in relation to the registers in the bill is a bit different from that in relation to the land register, in that it is almost entirely administrative. That is reflected in the liability provisions in the bill, which are clear that the keeper is entitled to rely on the information that applicants provide to her and does not interrogate it in the way that we interrogate land register information.

Jennifer Henderson: Cat Haig alluded to the professional users, who will primarily be involved and who will tend to be people in regulated roles who have a duty of care to the people whom they are supporting. Those professional users will have rigorous fraud regimes and will check things like that. We anticipate that the due diligence around all of that will absolutely be done upstream. That does not mean that fraud cannot happen, but it is not for us to investigate if somebody comes to us and alleges fraud—we can just signpost them to the right place to have that looked into.

The Convener: I have a final question, which follows on from an earlier line of questioning from Jeremy Balfour. If, at some point in the future, you felt that the registers were not being updated and people were not being removed from them, what would be your process to contact the lenders to ask for particular examples of individuals who are potentially still on the register but should not be?

Jennifer Henderson: I ask Jon Hodge to come in on what we could do under the current provisions and what would happen if a new regime came in as a result of an amendment or the minister taking powers.

Jon Hodge: Certainly, there is no current power that would allow us to contact lenders. However, in addition to allowing correction applications by the secured creditor, the bill allows the provider to ask the secured creditor to correct an entry and discharge it. In all likelihood, if the creditor does not comply with that, the provider will come straight to the keeper and ask us to remove the entry. The bill sets out a process that we can follow and that involves notification of the creditor.

If the bill was changed or if there was subsequent amendment to the act once it was in place that gave correction applications a statutory basis, we could accommodate that. However, it is worth noting that, although registration of a statutory pledge is required for it to have effect, other changes such as discharge or assignation do not require registration to have effect. Therefore, a significant change to the bill on the effect of registration would be required.

The Convener: As members have no more questions, I thank Jennifer Henderson, Jon Hodge and Cat Haig for their help. As I said to the first panel, the committee may follow up by letter with any additional questions stemming from today's session.

I suspend the meeting briefly to allow the witnesses to leave.

10:51

Meeting suspended.

10:53

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 3, we are considering two instruments, on which no points have been raised.

Pavement Parking Prohibition (Exemption Orders Procedure) (Scotland) Regulations 2022 [Draft]

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2022 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

10:53

The Convener: Under agenda item 4, we are considering two instruments, on which no points have been raised.

Feed Additives (Authorisations) (Scotland) Regulations 2022 (SSI 2022/288)

Education (Listed Bodies) (Scotland) Amendment Order 2022 (SSI 2022/294)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

10:53

The Convener: Under agenda item 5, we are considering two instruments, on which no points have been raised.

Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022 (SSI 2022/289)

Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) (No 2) 2022 (SSI 2022/295)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Document subject to Negative Procedure

10:54

The Convener: Under agenda item 6, we are considering a document that has been laid before the Parliament for approval, on which no points have been raised.

Environmental Standards Scotland Strategic Plan (ESS/2022/03)

The Convener: Is the committee content with the document?

Members *indicated agreement.*

The Convener: Before we move into private session, I would like to take a moment to place on record the committee's thanks to Andy Proudfoot, who will be leaving the Scottish Parliament at the end of this week having supported the work of the Delegated Powers and Law Reform Committee over the past four years. Andy's enthusiastic and dedicated approach to his work has won him the respect and appreciation of all those with whom he has worked during his time in the Scottish Parliament. Andy, on behalf of the members of the Delegated Powers and Law Reform Committee in this session and the previous one, I thank you for your excellent hard work and wish you all the very best for the future. [*Applause.*]

10:55

Meeting continued in private until 11:50.

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