JUSTICE 2 COMMITTEE

Tuesday 30 March 2004
(*Afternoon*)

Session 2

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JUSTICE 2 COMMITTEE
12th Meeting 2004, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Nicola Sturgeon (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

John McNeil (Law Society of Scotland)
Ken Swinton (Scottish Law Agents Society)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 1

Scottish Parliament

Justice 2 Committee

Tuesday 30 March 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:07*]

Tenements (Scotland) Bill: Stage 1

The Convener (Miss Annabel Goldie): I welcome everyone to the 12th meeting in 2004 of the Justice 2 Committee. I have no note of apologies and everyone is here. This afternoon, we propose to start taking evidence on the Tenements (Scotland) Bill. As a matter of propriety, I should declare two interests. I am a member of the Law Society of Scotland and of the Scottish Law Agents Society.

On behalf of the committee, I welcome Mr John McNeil, who is a member of the Law Society of Scotland's conveyancing committee and Linsey Lewin who is the secretary of the Law Society's conveyancing committee. We are pleased to have you with us this afternoon. We have received your submission and the committee has various areas of questioning that it would like to pursue with you. If either of you has any brief preliminary comments, please feel free to make them.

John McNeil (Law Society of Scotland): I have one point to make by way of introduction. One of the concerns that we have expressed in both the papers that we submitted to the Executive is what is supposed to happen under the bill when there is an unresolvable or insoluble dispute between or among three or fewer proprietors in a tenement that has only two or three properties. There does not seem to be any provision for resolving disputes in those circumstances.

The Convener: Thank you. That is a helpful observation. I start the questioning in fairly technical territory. How has the definition of "tenement" in section 23 of the bill been amended since the draft bill was published? Is the Law Society of Scotland happy with the definition as it stands now?

John McNeil: The short answer to that is yes, we are happy with it. We note that it has been changed from the definition in the draft bill appended to the Scottish Law Commission's report by the addition of the provision on "related flats". As I recall, that was not in the draft bill. Section 23(2) contains provisions to determine whether two or more flats are related. It says:

"regard shall be had, among other things, to—

(a) the title to the tenement; and

(b) any tenement burdens,

treating the building or part for that purpose as if it were a tenement."

The Convener: Is there any possibility of confusion, given that section 23(1)(b) is specific about a horizontal division? At a previous meeting, we discussed the situation that might arise in a divided villa, for example, where there is sometimes an amalgamation of horizontal and vertical divisions. One might find a ground floor and a first storey at one end of the villa, which would produce a horizontal division between a ground-floor flat and the flats above it.

John McNeil: Yes. In some circumstances that could be the case; it might not be clear whether the building was a tenement or not.

The Convener: That might need to be considered. The other backdrop is that, as we understand it, the bill is intended to represent the default position—it is to apply in circumstances in which the deeds are ambiguous or silent. I want to explore why the Law Society supports the principle of free variation. Do you feel that it is important to maintain that freedom among heritable proprietors?

John McNeil: We felt that, as far as the title conditions are concerned, free variation should be permitted because—particularly in the case of converted properties, to which you have referred—there might be changes in circumstances; redevelopments of various kinds might take place. For example, a building might be divided into two flats initially and then, if it was a large house, either of those flats might be divided into another two flats. It is clear that one would not welcome a situation in which the new flats would be governed by the provisions of the Tenements (Scotland) Bill, whereas the original flats would be governed by the terms of the title deeds. An ability to change the burdens in the deeds would achieve the kind of flexibility needed in the situation that I have just outlined.

The Convener: Thank you. That is helpful. One of the bill's purposes is to deal with boundaries and boundary features of tenements and to define them by reference to the mid-point. I know that, in its response to the Executive's consultation, the Law Society said that such an approach would cause some practical difficulties. An alternative approach would be to make the boundary features common property. Will you explain why you think that ownership of boundary features to the mid-point is preferable to making them common

property? The default rules on that are covered in section 2.

John McNeil: Whether the boundaries that you mentioned should be treated as being mutual or as being owned up to the mid-point is a fine point. The commission and the draft bill provide for the latter—ownership up to the mid-point of the mutual boundary. We did not feel strongly one way or the other about that point. We thought that it was perfectly logical and that we would therefore support what is in the bill and the commission's draft bill.

14:15

The Convener: An example of where an issue might arise is where the boundary of two flats is the mid-point of a common joist and dry rot is on one side of the mid-point. If we resort to a mid-point definition rather than common ownership, could that affect the right or the ability of the other proprietor to take remedial action?

John McNeil: Irrespective of ownership, that kind of situation could be difficult to deal with practically unless a majority said that the repair had to be carried out. Ownership does not necessarily carry with it willingness to repair at all times. If it did, the bill would not make the provisions that it does for majority decision taking. With respect, I do not think that the issue of ownership is particularly relevant to the kind of situation that you envisage.

The Convener: If we deal with mid-point definitions for boundary points, are you satisfied that the bill will protect a proprietor who might find that his structure was reliant on a piece of the fabric that was half owned by one flat and half owned by him when the half that was owned by the other flat had a problem?

John McNeil: On balance, ownership is not terribly relevant to whether a repair is essential or even urgent.

The Convener: You will be aware that section 3(4) of the bill deals with common parts and applies a service test. That is to say that the costs are reported on the basis of the pertinents that are attached to flats and that serve those flats. The alternative approach, which some respondents to the Executive's consultation favoured, is that ownership of the pertinents by all flat owners in the tenement, regardless of whether they use the pertinents, is preferable. Does the Law Society support a service test?

John McNeil: Yes, we do. We said that in our original submission in response to the Executive's consultation paper. We were asked in point 3 of the paper whether we agreed that the service test was the most appropriate apportionment of pertinents in a tenement. We said, "Broadly speaking, yes."

The Convener: How do you respond to the criticisms of those respondents who thought that the service test could be very complex and lead to disputes?

John McNeil: I agree that that is the case. The question whether the service test or joint ownership of all the pertinents is the more easily workable in practice merits serious consideration.

The Convener: If the bill is to be the default position—

John McNeil: I am sorry to interrupt, but I should add that we had a lengthy debate on the matter before finally coming down on the side of the proposals for the service test in the commission's paper.

The Convener: If I understand you correctly, you are saying that, although the Law Society favours a service test approach, equally it acknowledges that that approach could lead to difficulties.

John McNeil: Indeed.

Karen Whitefield (Airdrie and Shotts) (Lab): The bill proposes that the tenement management scheme be applied in cases where the title deeds are silent. Some people have suggested that the scheme should always be applied, irrespective of whether the title deeds are silent. Has the Executive got that right, or are those who have commented to the contrary correct? If so, why?

John McNeil: That is another aspect of the bill that we debated long and hard. The whole principle underlying the bill is that the scheme is a fallback provision for when the title deeds are silent or are contradictory as regards the apportionment of liability and so on. The tenement management scheme—and indeed the bill's provisions in their entirety—will kick in only when that is the case. We thought that, in those circumstances, it was logical that the same conditions should apply to the tenement management scheme as to other provisions: provided that the title deeds of the tenement—and of all the properties or units within it—are absolutely clear and unequivocal about how common repairs are to be dealt with and paid for, and as long as there are provisions for decision taking, so as to avoid an impasse, the provisions of the deeds should prevail.

Karen Whitefield: With your experience in this area, do you believe that there might be a problem with tenements whose title deeds are not entirely silent, but whose provisions would not offer the same protection as the tenement management scheme would offer those people whose deeds

are silent? If so, might that cause some inequity among tenement owners?

John McNeil: In my experience, the situation is often satisfactory—in fact, it is satisfactory in almost 100 per cent of cases, if we are dealing with relatively modern, purpose-built blocks that happen to be tenements according to the definition in the bill. It is in older properties where we come across difficulties.

Believe it or not, the situation in Edinburgh, on the east side of the central belt, is very different from the situation in Glasgow, in the west. In Glasgow, there has been a long tradition of house factors managing tenements and taking decisions on behalf of the owners, with everybody operating on a majority basis. In Edinburgh, the opposite is the case—the situation is a complete shambles. The burdens within the same building are often inconsistent with one another. There is rarely, if ever, any form of management scheme to be gleaned from the older title deeds. With most tenements built before 1920, there is an apportionment of burdens, which are often shared in accordance with the old rateable values. Even worse, there are sometimes feu duties, many of which have now been redeemed. We do not know how much those are and we certainly do not know whom to approach for information on that.

All in all, the picture on this side of the country is very unsatisfactory; it is not too bad in Glasgow, however. That is strange, given that there are only about 40 miles between the two places.

Karen Whitefield: In that case, do you foresee there being problems because of the uneven—

John McNeil: I foresee the tenement management scheme, and the bill as a whole, operating in the majority of cases in Edinburgh, and probably in Dundee and Aberdeen as well.

Karen Whitefield: Perhaps the fact that tenement owners in the west coast have had the services of a factor, either satisfactorily or unsatisfactorily, will offer little protection.

John McNeil: You are saying that, viewed subjectively, although owners may have all the requisite provisions in the title deeds to mirror the provisions of the bill, that arrangement may not have worked terribly well in practice. I am sure that that may well be the case. I suppose that the thrust of your question is whether the title deeds should be tossed out, whether they should cease to be a fallback and whether the new law should apply in every case. Personally, I do not think that that should happen.

Karen Whitefield: What are your reasons for not thinking that that should happen?

John McNeil: In the past 30 or 40 years—in fact, since the second world war—purpose-built blocks have gone up. I should not say this about my long-deceased colleagues, but solicitors are much better nowadays at dealing with burdens than they were 100 years ago. One usually finds that the title deeds to the more modern properties contain detailed provisions, with regard both to the apportionment of liability and to how the building is to be managed. Many of those title deeds—the majority of them, I would say—have provisions for the appointment of a manager of the tenement and for the collection of contributions towards the costs of routine maintenance as well as of repairs and replacements. In a sense, we would be chucking out the baby with the bathwater if all those carefully worked-out title conditions were to be of no further effect, which would be the position in the circumstances that you have described.

Karen Whitefield: Would there perhaps be a case for saying that the TMS should apply where the title deeds are silent or do not offer the same level of protection?

John McNeil: That is precisely what we were saying and that is what we continue to feel.

Karen Whitefield: I have a question about scheme property. Rule 1 introduces the notion of scheme property. That will mean, in effect, that owners in a tenement block will become liable for the repair of a communal space in the building that they do not own. There is a list of what such spaces might be, including the roof and the stairs. Do you agree with the proposals for scheme property and do you think that the list is comprehensive enough?

John McNeil: We certainly accept and welcome the definition of scheme property. I do not think that we considered whether it was comprehensive enough. We thought that there was enough in the various items, particularly in rule 1.2(c), under which scheme property would not necessarily carry with it any implication of ownership but under which the items of property would come within the ambit of the TMS.

Mike Pringle (Edinburgh South) (LD): You talked about the difference between the west and the east. Under the City of Edinburgh District Council Order Confirmation Act 1991, the City of Edinburgh Council has taken the option of requiring everybody to pay an equal share towards fulfilling statutory notices. From the evidence that we have heard, I understand that that system works well in Edinburgh, unlike in other places. It was implied that the factoring schemes in Glasgow do not work as well and probably have not been as well maintained. Since 1991, the council in Edinburgh has been proactive. How will that square with the new scheme?

14:30

John McNeil: That is a very interesting question. I am aware of the statute to which you referred and of the fact that the City of Edinburgh Council enforces it rigorously. However, the council cannot go round every tenement every two or three years to check whether repairs are required. The requirement for a repair is brought to the council's notice almost always by an aggrieved proprietor who could not persuade his or her co-proprietors to do anything about the repair. The result is that a statutory notice is served on all the owners in a building to order them to have repairs undertaken, failing which the local authority instructs the repairs itself and bills the proprietors for the cost plus 11 per cent. That system works well in practice. If the bill becomes law—as I am sure it will—I do not think that it will alter the status quo for that system.

Mike Pringle: So you think that the City of Edinburgh Council will be able to continue with that scheme.

John McNeil: Absolutely.

Colin Fox (Lothians) (SSP): I will follow up on a point to which you might have referred in your answer to Karen Whitefield's question. On the apportionment of costs in a tenement, rule 4 of the tenement management scheme sets out liability for the costs of decisions that flat owners make. The Law Society does not want title deeds to prevail over the tenement management scheme on the apportionment of costs when they refer to rateable value, feu duty or an equitable share. Why is that? Is it because, as you told Karen Whitefield, you feel that the tenement management scheme is more modern and offers greater protection? Is that your consistent answer?

John McNeil: Yes. The ability to refer to extrinsic evidence under the Title Conditions (Scotland) Act 2003 to determine proportionate liability is nonsense in the case of tenements. We adverted to that in both our papers to the Executive. We said that items such as the old valuation roll are not easily accessible. We also mentioned feu duties, which are difficult, because they involve the examination of umpteen sets of title deeds—up to 28 in a large tenement, for example—to determine the pro rata liability.

Using rateable value is a most inequitable way to apportion liability. Some old tenement buildings, such as those in Edinburgh or Glasgow, have shops or other commercial premises on the ground floor, which continue to be liable for business rates. When liability was apportioned for the maintenance of a building of which a ground-floor shop forms part—it might be a comparatively small shop with just one window, a front shop and a back shop—the shop owner would pay up to five or six times more than the flat owners did, although the flats might be three times as valuable as the shop, if not more.

Colin Fox: I understand that you want to keep a sense of being modern, fair and proportionate. However, you will understand that the picture that has been painted by much of the evidence that we have received so far is that title deeds should prevail when they give clear instructions. In the case to which you referred, the title deeds might be clear, but you still think that they should not be referred to. Is that the point that you are making?

John McNeil: Yes, that is precisely the point that I am making. Such situations are not black and white. They are very difficult, as we mentioned in our submission. On balance, we feel that the title deeds should prevail, but there must be a point at which that ceases to be the case and the bill's provisions come into play. The most obvious situation is one such as I have just outlined, in which apportionment is based on some extrinsic factor or on liability inter se of the proprietors for feu duty, which in 99 cases out of 100 is no longer ascertainable because the feu duty has been redeemed on disposal of the property.

Colin Fox: Rule 4 of the tenement management scheme proposes that the contributions that tenants or flat owners make towards maintenance should be shared equally. That is the default rule, but it would not apply where the floor area of the largest flat was greater than one and a half times the size of that of the smallest flat. Do you envisage any difficulties flowing from the way in which the rules allocate costs and from variations on the basis of floor area?

John McNeil: Again, our working party debated that issue long and hard. The choice has to be arbitrary one way or the other. If relative floor areas are to be brought into play, I guess that requiring that the largest flat be at least one and a half times the size of the smallest is as equitable an arrangement as can be achieved. However, one could argue for a different figure. I believe that some respondents, including the Royal Institution of Chartered Surveyors in Scotland, suggested that the largest flat should be at least twice the size of the smallest before the unequal sharing provisions would kick in.

Colin Fox: What was behind your arbitrary choice of one and a half times the size?

John McNeil: I think that one and a half times the size is fair enough. Of course, there are additional difficulties in calculation of relative floor areas. Some respondents have adverted to the fact that whether particular areas are included or excluded from the calculation of the floor area might depend on the professional who does the measurement.

Maureen Macmillan (Highlands and Islands) (Lab): It is nice to see John McNeil again. The last time we met in committee was probably during consideration of the Title Conditions (Scotland) Bill, the Abolition of Feudal Tenure etc (Scotland) Bill or some other conveyancing-related legislation.

Your written submission states that the Law Society is content with section 5 of the bill, which will allow people to apply to the sheriff to have a majority decision overturned. However, you have concerns about section 6, which is entitled "Application to sheriff for order resolving certain disputes". Your concern seems to be that, although "disputes" appears in the title of the section, the rest of the section makes only a vague reference to "any matter" rather than to "disputes". How would you tighten up the provision and make it less vague without excluding matters that ought to be included? If you were to list every kind of dispute that could be resolved by application to the sheriff, would there be a danger that something might be missed out?

John McNeil: As we said in our paper, there is no reference to "dispute" or "disputes" in the body of section 6. If the section is supposed to provide a mechanism for having disputes resolved by the sheriff, I suggest respectfully that there should be a reference to disputes in the body of that section, rather than only in the section heading. For example, subsection (1) says:

"Any owner may by summary application apply to the sheriff for an order relating to any matter",

but could be changed to read, "for an order concerning"—or "with respect to", or whatever—"a dispute".

Maureen Macmillan: It would be a simple matter of changing a few words in that subsection, so that it referred to "an order relating to any matter"—

John McNeil: "any disputed matter"—

Maureen Macmillan: Yes—something like that. Would you be content if section 6 contained such a reference, or do you want the bill to contain a list of matters that might be disputed? I note that in your evidence you mention that you seek

"clarification as to whether or not section 6 would enable an owner of a flat in a formerly self-contained dwellinghouse which has been sub-divided into two flats to apply to the sheriff for an order".

John McNeil: We would still like to know whether that would be possible under section 6.

Maureen Macmillan: It seems that you are wondering whether that type of building would be a proper tenement for the purposes of section 6. Are you asking whether, for example, a large house that had been divided into four would qualify as a tenement?

John McNeil: No. Such a building would definitely be a tenement, as long as it had been divided horizontally. The convener mentioned that issue at the outset.

Maureen Macmillan: Are you asking for clarification simply about houses that have been divided into two?

John McNeil: Such houses would be classed as tenements. However, the bill provides that there would have to be more than three units in a building—so there would have to be more than three proprietors—before the provisions on majority decision taking would kick in. If there were only two proprietors, the decision would have to be unanimous. That is a recipe for a potential impasse every time—as is the current set-up.

Maureen Macmillan: Is that the matter that you raised with the convener earlier? Would you like such arrangements to be included in section 6?

John McNeil: Yes. Notwithstanding the generality, it should be competent for any one proprietor in a tenement that comprised three or fewer units to apply to the sheriff.

Maureen Macmillan: You suggest that such proprietors should be able to have recourse to the provisions in section 6.

John McNeil: Of course, that would run counter to the general thrust whereby negative orders—in other words, orders that require a person to refrain from doing something—are the order of the day. I am talking about a positive order by the sheriff that says, "Get that repair carried out, chum."

Maureen Macmillan: We can explore the matter further.

John McNeil: I would be grateful if you would do so.

Nicola Sturgeon (Glasgow) (SNP): Section 11 provides that the buyer of a flat in a tenement would become liable for any unpaid debts that related to the tenement, albeit with a right of relief against the seller of the property. I think that that represents a departure from the current position in common law. Do you have a view on that? Do you foresee any practical difficulties in the operation of section 11, if the bill were to be enacted?

John McNeil: I am afraid that there are always practical difficulties, whatever system is put in place, when one person is unwilling to pay and the others say that they must. In principle, we certainly favour the outgoing seller and the incoming owner being, if you like, jointly and severally liable for the outstanding bills. Of course, such matters would be covered in the contract for sale of the property. There would be, if not a statutory obligation, a

common-law obligation on the solicitor acting for the seller to disclose the position to prospective purchasers, which would then be covered in the missives.

14:45

Nicola Sturgeon: What would happen if the seller did not disclose the fact that there were unpaid costs?

John McNeil: There could well be a nasty shock for the buyer. I suppose that in common law he or she might have a right of recourse against the seller for having deliberately concealed a burden or liability affecting the property.

Nicola Sturgeon: If the seller disappears and cannot be traced, what right of recourse, if any, would the purchaser have? Are you concerned that the new provision is a departure from the current position in conveyancing, which puts a lot of faith in what is disclosed in the property registers? Under the new provision, a purchaser would almost be operating in the dark and would be taking it on good faith that a seller was being honest. If the purchaser later found that the seller had not been honest, there would be a right of recourse against the seller if they could be traced. However, in circumstances in which that is not possible, do you foresee any comeback against a solicitor or the Keeper of the Registers of Scotland?

John McNeil: There certainly would not be any comeback against the keeper. In order for someone to be able to get at the solicitor—the purchaser's solicitor—that solicitor would have had to have been professionally negligent in dealing with formation of the contract. In other words, if a local authority statutory notice was outstanding and the solicitor failed to pick that up it would be because the solicitor had not instructed the appropriate searches to be made. That would be—at least theoretically—negligent.

The provision in the bill will not alter the status quo much, if at all. Situations in which sellers abscond are hardly likely; they are selling their houses and moving elsewhere. To lessen the chances of a person's avoiding the effect of the legislation it would be necessary to write into the bill a statutory obligation on the seller to disclose to the buyer a forwarding address. There has been some debate, as the committee will have seen from responses to the consultation paper, about the fact that the bill, as it stands, will put the seller's solicitor in an awkward position, because he or she may have been told by the seller not to disclose the new address. Therefore, that solicitor would be in danger of breaching client confidentiality if he were to make the address known under those circumstances.

Nicola Sturgeon: Is it your view that without even a minor amendment to the section along those lines we might create a situation in which purchasers of properties are—in a rare minority of cases—exposed because they end up being liable for debts that they were not aware of when conveyancing was being done?

John McNeil: That happens now; sometimes the property inquiry certificates that are ordered by the seller's solicitor and which are exhibited to the purchaser's solicitor fail to pick up local authority notices, especially if the notice is an old one and has therefore been deleted from the council's database.

Nicola Sturgeon: I ask you to correct me if I am wrong, but my understanding is that the provision could potentially extend the exposure of the purchaser. If I understand the matter correctly, at the moment, if a seller has an outstanding liability to pay for a roof repair and does not make the payment, the debt stays with the seller; it does not transmit to the purchaser.

John McNeil: That is correct.

Nicola Sturgeon: I accept what you say about statutory notices, which are a different category, but section 11 would extend exposure of the purchaser to debts of which they were not aware at the time of the conveyance.

John McNeil: That is right. What the Executive is really getting at in section 11 is not local authority notices that order repairs but repairs that proprietors have ordered among themselves. In other words, we are talking about a matter of private contract rather than one of authority from above.

Section 11 has the potential to increase the liabilities of an incoming purchaser. It does not in any way, however, erode what exists already; namely, the principle of caveat emptor, or purchaser beware.

Nicola Sturgeon: Under current provisions, such debts would not transfer to the purchaser. Surely the section will therefore extend the principle of caveat emptor?

John McNeil: Yes—I accept that it will.

Nicola Sturgeon: Thank you.

Jackie Baillie (Dumbarton) (Lab): Section 15 of the bill will place on flat owners obligations to insure. Does the Law Society consider that the obligations will be enforceable in practice?

John McNeil: Is the question one of insurance?

Jackie Baillie: It concerns the question of insurance. Under section 15, individual flat owners will be required to take out insurance. Certain caveats are given. I wonder what would happen if

flat owners were unable to obtain insurance. The section also includes a rather strange duty on owners to produce a copy of their insurance policy. Are the provisions of section 15 enforceable in practice?

John McNeil: With respect, one could ask that question about any of the provisions in the bill. The provision would be enforceable in accordance with the general principle that majority decision making will apply. If the majority in the building insist on production of the policy, such production will be required—theoretically, at least.

Section 15 goes further; section 15(5) says:

"Any owner may by notice in writing request the owner of any other flat in the tenement to produce … the policy"

The section goes on to say that the owner who is the recipient of the notice

"not later than 14 days after that notice is given … shall produce to the owner giving the notice the policy (or a copy of it) and the evidence of payment"

and that the duty to effect and keep in force a contract of insurance

"may be enforced by any other owner."

Let us say that I am one of 16 flat owners in a tenement and Jackie Baillie is another. If you were to tell me that you would not allow me to see your policy, I could go to court to have the requirement to see the policy enforced against you. That is what the section says.

Jackie Baillie: It strikes me that the Executive might be using a hammer to crack a nut.

John McNeil: I agree.

Jackie Baillie: In respect of the other parts of section 15, will the effect that the Executive seeks be achieved by the provisions of section 15?

John McNeil: There could be different flats in the same building that had entirely different schedules of cover. I accept that every flat owner has to have cover against the risks that are to be prescribed by Scottish ministers.

That said, some flat owners might include cover for risks that are additional to the minimum prescribed risks, whereas other owners will limit their cover to the prescribed risks. There could therefore be a multiplicity of sets of cover within the same building relative only to the particular flats that the policies cover, which is unsatisfactory but is also what happens in most cases at present, with the exception of the type of building about which we were talking a short time ago; namely, modern purpose-built flats, which almost always have provision for a block policy. The Law Society considers that a block policy is highly desirable for all tenements, whether they are old or new, but it would be impractical to make that a statutory requirement, especially for existing buildings, although it could be done for new properties.

Jackie Baillie: I will pursue the block insurance policy idea for a moment, because we have been given examples of somebody who would not qualify for a block policy because of previous activities—perhaps they had a penchant for burning down buildings in a previous existence—and of a claim that was not successful under such circumstances. Does that alter your view of block policies or do you think that, by and large, such provisions work?

John McNeil: In general, they work. Block policies are valuable because there is no inconsistency in cover, everybody pays an equal share of the premium and everybody knows exactly where they stand in regard to the cover.

Jackie Baillie: What would you do for the minority of people?

John McNeil: For the bad boys and girls?

Jackie Baillie: Yes.

John McNeil: I do not know. It had never occurred to me as a possibility, but I suppose that you are right: there must be some people who are uninsurable.

Jackie Baillie: Indeed. Thank you.

John McNeil: Linsey Lewin has just mentioned to me that such a person would not get a mortgage for a property, because it is always a precondition of a mortgage that buildings insurance be enforced.

Jackie Baillie: As Maureen Macmillan said, such a person might have won the lottery.

John McNeil: That is true.

The Convener: I thank Mr McNeil and Ms Lewin for giving evidence to us this afternoon; it has been extremely helpful.

I welcome to our meeting Mr Ken Swinton from the Scottish Law Agents Society.

We thank you for joining us this afternoon; we are pleased to have you before us. As with the previous witnesses, if you want briefly to make any preliminary points, feel free to do so.

Ken Swinton (Scottish Law Agents Society): I have no preliminary points to make.

The Convener: That is helpful to the committee.

As with the Law Society, members of the committee would like to pursue various lines of questioning. We have received your written submission, which is extremely helpful. I will start off with questions about some of the more technical issues. The Scottish Law Agents Society supports the principle of free variation as

contained in section 1 of the bill. Is it an essential preservation of freedom for the proprietors of flatted properties to have the right to negotiate, agree or vary their title conditions?

Ken Swinton: The bill sets out a series of default rules, which is probably the most appropriate way in which to proceed.

15:00

A set of default rules cannot cover every eventuality; for example, if there were particularly valuable ground-floor commercial premises, it would be right to distort the repair obligations to make the proprietor of those premises responsible for a larger share of repairs. The scheme might be a little awkward for conversions of existing Victorian dwellings because of the way in which conversions have been effected. Free variation would allow people to tailor solutions to particular problems. A set of default rules might not fit every eventuality.

The Convener: So, the flexibility would reflect the different types of property configuration.

Ken Swinton: That would be entirely appropriate.

The Convener: On boundary features, I was exploring with the Law Society the distinction between a mid-point boundary definition and the definition of a feature that is common property. Is that a distinction without a difference or is there anything manifestly diverse between those two situations?

Ken Swinton: The Scottish Law Commission produced a report on boundary walls several years ago. It fixed on the idea of mid-point, which probably does no more than represent the current common law. We are not wedded to any particular scheme with regard to mid-point. That definition has the benefit of maintaining the status quo, but I do not think that it is particularly significant.

The Convener: Does that mean that there is a case for changing the definition, or is there a case for leaving it as it is?

Ken Swinton: It would be more appropriate to maintain the status quo. The definition would also apply to non-tenement situations; the boundary is the mid-point of a wall unless something is done to displace it. If someone does not want that to be the case in the deeds, they can displace the rules of the bill and change them to suit the particular circumstances of any particular building configuration.

The Convener: Do you mean under free variation?

Ken Swinton: Yes.

The Convener: I noticed that you were quite exercised by triangular airspace as mentioned in section 2(7) of the bill.

Ken Swinton: That was an observation rather than a deep point of principle. Under common law—or case law—it is perfectly competent for a top-floor proprietor to throw out a dormer window. The way in which section 2(7) is framed seems to make it slightly easier to form another full storey on a building because the proprietor owns everything up to the apex of the roof. They would therefore be able to develop the whole of that storey rather than just throw out a dormer window from an attic. There is a difference of degree but not of substance.

The Convener: What about the practical possibility that, under the bill, the owner of the top-floor flat could then create another habitable storey? Would that create unfairness in relation to the other flat proprietors?

Ken Swinton: They can create another storey only in so far as it does not increase the burden of support on the inferior storeys.

The Convener: The bill does not say that.

Ken Swinton: We still have duties of support under the bill; the burden of support cannot be increased.

The Convener: Such a situation would, however, put the onus of challenge on all the other owners.

Ken Swinton: It certainly would.

The Convener: They would have to say "What are you doing up there?"

Ken Swinton: Yes.

The Convener: The proprietor would be able to say "I'm implementing section 2(7) of the tenements act".

Ken Swinton: I am convinced that the proposed legislation would make that easier than is the case under existing law.

The Convener: Would all the other proprietors then rush off to the sheriff courts to get interdicts?

Ken Swinton: That is their prerogative, is it not?

The Convener: Okay.

Planning law might have a role to play, because it will still have jurisdiction over what someone does with their airspace, provided that the other flatted proprietors are relaxed about it. Is not planning law really an ancillary regulator that does not interfere with the relationship among flatted proprietors?

Ken Swinton: Planning law must be categorised as a public-law solution, whereas the

bill is a private-law solution to a private-law matter. As I said, there is a difference of degree between the bill and existing law. The question is whether that is appropriate.

The Convener: The Scottish Law Agents Society supports the principle of the service test to decide on responsibility for pertinents, but as I said to the witnesses from the Law Society of Scotland, other respondents to the Executive's consultation thought that the service test would introduce complexity and could lead to disputes. Do you have a view on that?

Ken Swinton: The service test is appropriate. If a pipe that goes down the back of a tenement serves one side of the building, all four proprietors on that side will share it as a pertinent. Given that the four proprietors on the other side of the close have no interest in the pipe, a pertinent test that is based on service is entirely appropriate.

Confusion might have arisen as a result of the proportionality test that would have applied under the draft bill that was appended to the Scottish Law Commission's "Report on the Law of the Tenement". That test would have made the cost of repairs proportionate to the length of the pipe that the person used. The written responses to the consultation showed how difficult it would become to apportion cost in that way. The current version of the bill gives equal rights to all proprietors who have a right as a result of the service test, which means that they are liable to pay equal shares of the cost of maintenance. That is entirely appropriate and will be far simpler to administer. The bill provides a reasonable solution to a slightly tricky problem.

The Convener: On a technical point, if that arrangement is adopted and everyone knows what their pertinents are and what their liability for repair and maintenance is, what will happen if a flat owner makes an alteration to his property as a result of which he is no longer dependent on a pertinent? Will that change the ownership of the pertinent?

Ken Swinton: We asked that question in our written submission. I gave the example of a water tank in a common roof void. If each proprietor were to install their own water tank and disconnect from the common supply, who would be responsible for decommissioning and removing the water tank in the roof void? The pertinent may remain a pertinent notwithstanding disconnection, but if a service test applies on more than one occasion or every time that there is a change, the tank would become unowned as the last proprietor disconnected. The bill could be clarified to provide a solution on that issue. It should be clear whether there is to be a single application or a multiple application of the service test. On the other hand, would a person who connected to an existing pipe become liable for it? If there is only a single-step test, that person would not be liable if the test had already been carried out.

The Convener: So you are saying that there is a void in drafting that needs to be considered.

Ken Swinton: The matter could be clarified.

Karen Whitefield: My questions are similar to those that I asked the Law Society of Scotland. Under section 4, the tenement management scheme will be applied if the title deeds are silent. Has the Executive got the balance right or might some tenement owners fall foul of the system?

Ken Swinton: To be consistent with the principle of free variation, it is appropriate that the tenement management scheme should be a background or default scheme.

In some tenements, the existing title deeds might be deficient in some way. A proprietor might buy a flat on an intermediate floor knowing that the top-floor proprietor is currently exclusively responsible for the roof. Such proprietors will end up becoming liable for a share of maintenance costs, because the roof will become scheme property. There are bound to be winners and losers when we are changing existing law. We have to determine whether what we are doing is a proportionate response to a problem. I suggest that it is, because where the title deeds provide inadequately or inequitably for repairs, that might result in proprietors not wishing to do repairs because of the cost that they would incur. It seems to me that this is a case in which the swings are worth the roundabouts. The bill will encourage more proprietors to engage actively in repairs to the tenement and surely improving and maintaining the housing stock is one of the bill's objectives.

Karen Whitefield: You said in your submission that you had made representations to the Executive because you did not believe that the list of scheme property was exhaustive. Are you now satisfied that the list that is set out in the bill includes everything that should be included? Are you satisfied with the definition and use of the term "scheme property"?

Ken Swinton: Scheme property is defined in rule 1.2. We are pleased that beams or columns that are load-bearing have been added to the list of scheme property, which would accord with more modern building practices.

We are still of the view that there is not a principled approach to definitions of scheme property. The Scottish Law Commission report was clear that the idea was that scheme property would comprise structural elements and those affording shelter to the tenement. A modern tenement building might have an entire glass front,

which is non load-bearing. Is it considered a window or a wall? That makes a difference. If it is a wall, it is part of scheme property; if it is a window, it is part of the individual flat, in which case the maintenance obligations would change. If the court was confronted with such a case, what mechanism would it use to decide whether the glass front was a wall or a window? If we have statements of general principle that say that scheme property relates to the parts of the building that offer support or shelter, the courts can look to those statements and say, "This glass front is a wall and not a window and therefore falls within the definition of scheme property." We would like statements of principle to be included.

Colin Fox: I will ask you the question that I asked the Law Society of Scotland witness about the apportionment of costs and the exception to the general rule that the bill suggests. Rule 4 of the tenement management scheme proposes that flat owners make an equal contribution to the required maintenance except when the floor area of the largest flat is one and a half times that of the smallest flat. What do you think of that? What difficulties do you see being caused by the introduction of that exception?

Ken Swinton: We have to remember that the rules will be a set of default rules. I expect that, in most situations, the title deeds will make express provision for the shares of maintenance costs. As John McNeil said, any rule of that nature is bound to be arbitrary. In effect, one and a half is the figure that the Law Commission plucked from the air, and it seems to be just about appropriate.

I suspect that, if the draftsman of deeds—the person who is constructing the tenement—has a view on what the proportions ought to be, they will make provision for that in the title deeds. To answer your question, whatever decision is made, it is bound to be arbitrary. There will be certain practical difficulties about measuring everyone's floor area, but some solution has to be offered, and the proposed measure seems as good as any other that could be thought out.

15:15

Colin Fox: Am I right in thinking that, if the largest flat is one and a half times the size of the smallest flat, for example—or twice, three times or four times as big—that is the ratio that would apply to the apportionment of costs?

Ken Swinton: It would be based on the proportion of the floor areas, yes.

Colin Fox: It strikes me that it would be uncommon for one flat in a tenement to be three or four times bigger than another flat in the same building. Is that the case?

Ken Swinton: There are quite a few Victorian tenement blocks in which one side of the close has three-roomed flats and the other side has two-roomed flats. I suspect that the idea of a flat having one and a half times the floor area of another flat was designed to cover such situations. I do not have statistics about the proportion of tenement stock that falls into that category.

Colin Fox: That is what I was getting at: the proportion of one and a half times the area would seem the most likely.

Ken Swinton: I have no information that would usefully serve the committee on that, however.

Nicola Sturgeon: I return to section 11, which I explored with the witnesses from the Law Society of Scotland. You commented at length in your written submission about the provision in that section. What do you think the main practical problems are of a situation in which debts may transmit to the purchaser of a tenement?

Ken Swinton: There are two competing policies. One is a public policy, whereby tenements ought to be maintained and encouragement ought to be given for that. As section 11 is drafted, factors and contractors will be winners. On the other hand, according to the other public policy, purchasers should not get nasty surprises when they buy properties. That idea of nasty surprises was brought out by the housing improvement task force in its report of last year, "Stewardship and Responsibility: A Policy Framework for Private Housing in Scotland".

If we stick with section 11 as it is drafted, the responsibility remains with the seller, but the purchaser becomes equally responsible for the payment of outstanding repairs accounts. If I am acting for a purchaser, I can ask the factor, if there is one, whether there are any outstanding repair costs. However, many tenements have no factor; as John McNeil mentioned, that is more common on the east coast than on the west coast. In that situation, I must rely on what the seller says. The seller might say that there are no repair costs, or they might say that there is no factor, whereas in fact there is. Under section 11 as it is drafted, there is nothing that I can do to protect the purchaser.

I will give one example from my own experience, which dates from the 1980s, before the David Watson Property Management case was finally decided. I was instructed by a client to buy a flat in Glasgow, and we fixed on a price of £24,000. It was quite clear that the seller and his agent were not disclosing information to us. Eventually, just before settlement, we discovered that there were £22,000-worth of repair costs outstanding per flat in the block, because considerable works had been done to underpin the foundations. If the

provisions in section 11 had been in effect, my client would have paid £24,000 and would then have been faced with a further £22,000 of repair costs, which would have been transmitted. That would have been a terribly nasty surprise.

There might be a right of relief against the seller, but people have to be able to trace the seller. If the seller cannot be traced, or if the seller has become bankrupt, then that is the end of the story—the purchaser has no right of relief. The purchaser would have no right of action against their solicitor, because the solicitor would have done everything that they could reasonably do, so the purchaser would be stuck with that cost.

That situation was considered by the Scottish Law Commission, which says in paragraph 8.13 of its report that it is not attracted to real liability. The Executive, in the policy memorandum, suggests that there is some difficulty with regard to registration of title. However, I do not see either of those things as a problem. It is easy to trace the proprietor of a flat by searching the registers—as the policy memorandum says, that can be done for £2 or £4 using the registers direct service—so if the other proprietors have difficulties with an owner, why should they not register a notice against the property of the outstanding repair costs? The recording dues on that would be £22.

If a substantial amount of money was outstanding, the option for other owners to record a notice would be not unattractive and would solve the problem. The purchaser's agent would find the notice on any search, be alert to the situation and ensure that appropriate arrangements were in hand. At present, purchasers cannot do that. Acting as purchasers' agents, we cannot guarantee that there will be no nasty surprises.

Nicola Sturgeon: Is it your contention that owners should be obliged to register these matters and that, if they do not and the matter does not appear on the registers, the purchaser who gets the nasty surprise should not be liable for the outstanding amount?

Ken Swinton: Yes. There should be no nasty surprise. The onus should be put on the other proprietors or the factor to register a notice. If a proprietor has to pay substantial outstanding repair costs, another £22 for a notice is not a substantial amount to lay out.

Nicola Sturgeon: So, the obligation would be shifted to the other owners.

Ken Swinton: They could put themselves in a position to do something about it. At the moment, a purchaser cannot do anything about it other than ask nicely, and they might be misled.

The Convener: You raise an important point, Mr Swinton. I infer from your remarks that you feel that the bill should be a little more explicit on this point. You think that there is something inequitable about a seller having a contractual obligation to some contractor somewhere but not having a statutory obligation to tell the purchaser, who has no contractual relationship with the contractor but who finds himself or herself liable, about the repair costs. I also infer from what you have said that you think that a way round that might be to provide that it would be up to the other proprietors to do that. I presume that not every repair would be suitable for recording a notice. If eight proprietors of a tenement have a repair done for £500—

Ken Swinton: It would not be worth while.

The Convener: Exactly. Whereas, if each flat was liable for a bill of £10,000, that would be an entirely different matter. Is your suggestion that the bill should try to incorporate that facility by requiring the owners of the other parts of the tenement to agree to register a notice, if they are so minded and if the repair bill is large enough?

Ken Swinton: Yes. The default position might be to put the onus on the proprietors. For small amounts, as you suggest, it might be different. I do not think that a purchaser would have a problem with paying an eighth share of £500. A compromise could perhaps be reached, whereby the bill would contain the current provision relating to amounts below a certain figure and then a provision that, if the amount went above that figure, a notice would have to be registered.

The Convener: That is helpful. Thank you.

Maureen Macmillan: It strikes me that it would be simple for the purchaser to write to the owners of the other flats in the tenement, asking whether there was outstanding money to be paid before the deal was concluded. Under the Title Conditions (Scotland) Act 2003, something different happens when someone wants to vary the conditions—

The Convener: That is assuming that the purchaser knows who the other owners are.

Maureen Macmillan: I presume that they will know their addresses.

Ken Swinton: But would they get a response from them?

Maureen Macmillan: I do not know, but what has been proposed seems like using a sledgehammer to crack a nut.

The Convener: Flats could be rented.

Maureen Macmillan: Yes, I myself have rented flats.

The procedure in the Title Conditions (Scotland) Act 2003 was that people should get in touch with the owners of the houses around them when they

wanted to have conditions or burdens varied. I do not know why the same thing could not be done in this instance.

Ken Swinton: That provision relates to a situation in which there is an existing owner, not to one in which a purchaser is coming in. No matter what is done, additional work will be placed on a purchaser's agent. They will have to get a picture of how many flats are in the tenement and try to trace all the owners and get a response from them. In effect, the cost of every flat purchase will be increased.

Maureen Macmillan: That is exactly what solicitors argued about the Title Conditions (Scotland) Act 2003.

Ken Swinton: You want to tailor a solution that does not involve additional cost and which provides an appropriate mix of getting repairs done and protecting the purchaser.

Maureen Macmillan: Yes, but I wonder whether people would register the repair.

Ken Swinton: If the repair is substantial enough, people will register it.

Nicola Sturgeon: At the moment, under section 11, the purchaser relies totally on the honest and accurate disclosures of the seller. The weakness of Maureen Macmillan's position is that the purchaser would become reliant on the honest and accurate recollections of a range of owners. It might be that a contractor has done a major repair that has been paid for by seven of the eight owners, none of whom knows that the eighth owner has not paid. They might not have the information to fulfil that responsibility.

If there is a breakdown in the system, where does the responsibility lie? If owners do not register an outstanding repair, it is perhaps more reasonable to say that that is their problem than it is to say that an innocent purchaser who has no way of knowing that the money is outstanding should be liable for it.

Ken Swinton: I agree with everything that you have said.

Maureen Macmillan: I am not arguing particularly that that is the way in which it should be done.

The Convener: Have you a further question on that point?

Maureen Macmillan: I am still not sure how the system would work. If there is an outstanding repair, it would be registered. However, if only one of the owners of the flats in the tenement had not paid their share, how would you know which one that was?

Ken Swinton: It would be registered against the title of an individual flat.

Maureen Macmillan: It would be registered against the flat rather than against the tenement?

Ken Swinton: Yes.

Jackie Baillie: Section 18 relates to the use and disposal of the site when a tenement building has been demolished. In your submission, you talk about problems relating to definition, particularly the fact that the bill defines the tenement as simply the solum and the airspace above it but is silent on the garden grounds to the front. What would you change to make that section more effective?

Ken Swinton: The problem is that the definition in the bill results in the creation of a ransom strip—a strip of garden that is owned by the proprietors or former proprietors of the ground floor—that could be used to prevent access to the site. The definition needs to be changed to incorporate the whole building stance on which the tenement was originally erected.

Jackie Baillie: If we did that, would we also have to change the part of section 18 that reflects the sharing of the proceeds of sale? Again, the bill is silent on the issue of garden space.

Ken Swinton: That is assuming that the garden space has a value that is independent of the flats. I like to think that the flats have the value rather than the garden space. If that means that proprietors of ransom strips do not get any premium, that is a positive side effect. We do not want them to have an additional benefit.

15:30

Jackie Baillie: Section 20 deals with the sale of abandoned tenement buildings. As I understand it, there are two tests, the first of which is that the property has been unoccupied for a period of six months and the second of which is that it is in such a state of disrepair that it is unlikely that anybody would return to it. I know that you have objections to the use of the word "return". What would you change about those tests to make the system more appropriate and more effective?

Ken Swinton: It is a question of playing with the word "return", omitting it and saying that it is unlikely that anyone would wish to occupy the tenement or any part thereof in the future. That would take care of the current problem.

Jackie Baillie: Are you happy that the test is based on one flat owner rather than on a majority?

Ken Swinton: I could envisage a situation in which someone might buy into a tenement and seek to use section 20 to have the property sold. If other proprietors had been working for some time towards a refurbishment scheme, they could

suddenly find that the property had to be sold because section 20 had come into operation. On the other hand, being locked into a tenement in which the other proprietors are neglecting the building and do not wish to proceed to refurbish is an equally great problem. Again, it is a question of striking an appropriate balance in the bill. Perhaps basing the decision on one flat gives too much power to that proprietor to force the debate and proceed with the sale. I have no solution to that problem, but it is a question of balance.

Jackie Baillie: I have a question on section 15. I understand from its earlier evidence that the Law Society of Scotland came out in favour of block insurance. You cited in your written submission the intriguing case of Hooper v Royal London General Insurance Co Ltd and the case of the arsonist who could not get insurance afterwards. What is your answer? Given that example, what protection would there be in such circumstances if you did not favour block insurance?

Ken Swinton: I know that you have agreed to hear evidence from representatives of the Association of British Insurers in future, so perhaps part of your question should be addressed to them rather than to me. The risks are quite numerous. We already have the problem of the arsonist or fraudster who cannot obtain insurance. He is in the enviable position of being able to force other proprietors to exhibit their policies, but not having to do so himself either because insurance is unavailable to him or because the cost would be unreasonably high. There seems to be something wrong with that formulation. Whether a block policy will help is not clear, because the Hooper case concerned Alliance and Leicester's block policy, non-disclosure of the conviction in that specific case and no cover being afforded in those circumstances.

A couple of other things occur to me. If a property is vacant for 30 days or more, insurers will apply an endorsement to the policy and remove most of the cover, so most risks are not covered once a flat has been vacant for more than 30 days. I have personal experience of that in an investment property that I own, where a substantial claim was not met because the property had been vacant for more than 30 days. Difficulty might also arise if someone brings a portable gas heating appliance into the premises, and that voids the policy because certain insurance policies do no not allow the use of such appliances. Someone might have paid a premium and produced a policy, but it could be void.

Although the sentiments in section 15 are laudable and the section does no harm at all, whether it can be enforced, whether it is workable and whether it produces effective solutions in all cases are clearly matters for considerable debate. I am not convinced that it offers solutions to the problem.

Maureen Macmillan: In your paper, you are quite exercised about sinking funds. At present, it is possible to include a condition in the title deeds of a flat to provide for a sinking fund to meet the costs of future expenditure that would not be dealt with by current repairs. As your submission mentions, expenditure on a lift would be an example of that. Another example might be a tenement in which the close and the stairs were carpeted, where one might want a sinking fund for renewal of the carpet at some future date. However, I cannot think of many other things that would not be kept up by constant maintenance. Why are you concerned that sinking fund burdens will be mentioned only in the Executive's planned guidance rather than in the bill?

Ken Swinton: The housing improvement task force report came out strongly in favour of the use of sinking fund burdens and the Executive response to the consultation document also came out in favour of them. When the Scottish Law Commission considered the issue, it provided only for traditional repair burdens, which require people to maintain the property as they go along to keep it in good repair.

Sinking fund burdens provide for items that have a limited lifespan by putting away money for the capital cost of their replacement. That is like capital spending as distinct from revenue spending. Under the typical procurement mode, capital expenditure will be paid either from existing cash assets or by borrowing to cover the cost. A sinking fund means that big lumps of money do not need to be found when, for example, a lift needs to be replaced. To that extent, they are an excellent idea.

One gap in the thinking behind the bill is that it is framed in favour of the traditional repairs burden. If we were to go down the sinking fund route, we would need to know whether the money in the fund would transmit automatically when the flat transmits, so that the purchaser would get the benefit of it. Rule 3.4(g) of the tenement management scheme states:

> "such sums as are held in the maintenance account by virtue of rule 3.3 are held in trust for all the depositors".

The rule provides only for traditional repairs burdens because it states that the money belongs to the people who deposit it, rather than to the owners of the flats. Therefore, the money in a traditional repairs burden would not transmit to the new owners.

Another issue to consider is what would happen if an owner became insolvent or had debts. Could creditors attach the debtor's part of the pool of

money or would that stay with the property to cover future maintenance? If the money could be attached by creditors, that would defeat the object of the exercise because there would then be a gap in the sinking fund.

We would like the bill to provide solutions to those questions. We do not want the bill to require that sinking fund burdens be created but we want it to provide default rules for sinking fund burdens, where those exist, as well as for normal repairs burdens.

Maureen Macmillan: In other words, the bill should give protection to sinking funds.

Ken Swinton: We want the bill to ensure that any sinking fund that exists transmits with the property and is available for the purposes for which it was intended.

The Convener: Before we lose Mr Swinton—whom we shall be very reluctant to lose—I want to return to sections 18 and 21, which deal with the situation in which a tenement building has been demolished. Section 18 will allow any owner of a former flat in such a tenement to be entitled to require that the entire site be sold. The bill provides a similar provision for abandoned tenements and it narrates how the proceeds of such sales are to be divvied up. Are you satisfied about the way in which that statutory right of any owner is linked to the completion of missives and grant of title, or do you think that there are some technical gaps?

Ken Swinton: Initially, we had some concerns about outstanding securities, but on further reflection we are content to leave the provisions as they stand.

The Convener: Who do you anticipate would instruct sale and conclude a missive?

Ken Swinton: A majority of the proprietors would have to be in favour of doing so. No one would accept instructions from anything other than a majority of the proprietors.

The Convener: But there is no specific provision on that in the bill.

Ken Swinton: No, there is not.

The Convener: It is one thing to say that someone has a right to require a property to be sold, but it is another thing to put that right into practice and to proceed to the point of ingathering proceeds of sale and granting a title.

Ken Swinton: I suspect that in such cases it might be appropriate to seek an order from the court to appoint on behalf of all proprietors an agent who will sell the site at the best price.

The Convener: Should the bill be more explicit in that area?

Ken Swinton: It might usefully be made more explicit.

The Convener: I am grateful for your comments on that.

If there are no further questions, on the committee's behalf I thank Mr Swinton for appearing before us. He has been extremely helpful to us in our consideration of the bill's provisions and I thank him for being with us this afternoon.

I am minded to suspend the meeting for five minutes.

15:40

Meeting suspended.

15:47

On resuming—

Constitutional Reform Bill

The Convener: A paper on the bill from the clerks has been circulated to members. We took most instructive evidence on the bill. The clerks have prepared a helpful paper that gives us the background at the time when we undertook the task and the situation as it has been altered by the change in proceedings south of the border. I am happy for the committee to consider what it wants to do about the bill.

Karen Whitefield: The committee took interesting evidence and it would be a shame if we did not complete the process. I suggest that we restrict ourselves to focusing on specific issues and on the need for amendments. It is important that we hear from Lord Falconer or, if he is unavailable, from the Lord Advocate. I suggest that we wait to find out the Executive's position on the Sewel motion and whether either of or both those ministers is willing to give evidence to the committee, so that we can conclude our deliberations and complete a report, which will allow our views to be taken into account.

The Convener: That is helpful.

Nicola Sturgeon: I agree with Karen Whitefield and I say for the record that it is essential for us to complete our report so that it can be considered by the House of Lords Select Committee on the Constitutional Reform Bill. Given the process that is being followed, that is the obvious way for our views to be taken into account.

I will simply repeat the comments that I made in a previous discussion: I appreciate that Lord Falconer might be difficult to pin down, but it should be our preference that he appear before us. We know the Lord Advocate's views. Lord Falconer is in charge of the bill and can tell us from the horse's mouth about amendments to protect Scots law.

The Convener: The committee is unanimous about the proposal. Members will see from the clerks' note that we are in the grip of one or two timescales that are made a little more pressing because of the intervening recess. If we are to take evidence from Lord Falconer or, if he is unavailable, from the Lord Advocate, we will need to make contact immediately.

If the committee agrees, I will ask the clerks to write to the Minister for Justice to confirm that the Executive knows what is intended for the Sewel procedure. Concurrently, we should ask the clerks to make overtures to Lord Falconer with a view to his giving us evidence. Members will see from the fairly tight timeframe that we will have to take that evidence in the week commencing 10 May. We need to make initial progress on that. We will have that meeting and aim to draft a report towards the end of May, although that will depend on what we find out. Is that course of action acceptable?

Members *indicated agreement*.

Adults with Incapacity (Scotland) Act 2000

15:50

The Convener: Fairly voluminous submissions on the act have been received and all of them are extremely interesting. I am grateful to the clerks for preparing a helpful summary of that evidence. Members will see that common and recurring themes are emerging. What does the committee think that we should do now? I am happy to welcome contributions.

Karen Whitefield: The clerks' report is helpful and highlights common themes. The committee might have to return to the act, but I am not sure whether now is the time to do that. I would prefer the committee to note the evidence, pass it on to the Executive and ask the Executive to consider it.

We should await completion of the work on the act's implementation that Alzheimer Scotland—Action on Dementia is undertaking on the Executive's behalf. I understand that the Executive will receive a report on that in September, when the committee will be in a better position to assess the work that we need to do on post-enactment scrutiny. That might ensure that any work that we do is effective and would avoid our grasping at some of the themes that are apparent from the written evidence. I do not think that we will want to concentrate on or pursue all those themes.

The Convener: That proposal is constructive. I am conscious of our time commitments from now until the end of June. Even if we wanted to do something, it would be difficult. As Karen Whitefield was correct to say, Alzheimer Scotland is preparing a report for the Executive. It would be sensible to draw all the threads together.

Maureen Macmillan: I agree with the convener and Karen Whitefield. Some of the concerns that have been expressed were debated when the then Justice and Home Affairs Committee considered the Adults with Incapacity (Scotland) Bill. I would not like to provide just another occasion for people on different sides to rehearse the same arguments—I am thinking in particular about the question whether a sheriff or a tribunal should be involved in decision making. Other matters that the then Justice and Home Affairs Committee raised have been mentioned, such as availability of legal aid, training and awareness raising. I would like to follow up those matters, but not to engage in the debate that was dealt with when that bill came to Parliament.

The Convener: That point is valid. The debate at that time was not uninformed—it might have taken place against a backdrop of the best information available. However, what has happened since the statute was enacted can inform the debate.

Does everyone agree with Karen Whitefield's proposal?

Members *indicated agreement*.

The Convener: We will ask the clerks to proceed on that basis.

Subordinate Legislation

15:54

The Convener: We have three statutory instruments to consider. They are all subject to the negative procedure, so I remind committee members that they will come into force unless we deploy technical procedure to stop them.

Police Grant (Scotland) Order 2004 (SSI 2004/120)

The Convener: As no one has any comments on the order, do we agree to take no action on it?

Members *indicated agreement*.

Police (Scotland) Amendment Regulations 2004 (SSI 2004/121)

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2004 (SSI 2004/126)

The Convener: The second instrument is—

Members: Agreed.

The Convener: Can I just read out the details for the *Official Report*? We need evidence of the fact that we have read the instruments.

Jackie Baillie: But we have read all of the instruments, convener.

The Convener: Yes, but as far as the *Official Report* is concerned, we do not want to be seen to have skipped over the detail of the item. I am prepared to take a collective agreement that we will take no action on the two remaining instruments. Is that agreed?

Members *indicated agreement*.

Procedures Committee Inquiry

15:55

The Convener: The final item is the Procedures Committee's inquiry into the timescales and stages of bills. I have received a letter from Iain Smith, that committee's convener, which sets out the background to the inquiry. I forwarded the letter to our clerks with the suggestion that they circulate copies to members.

Given that conveners have until 5 May to submit a paper to the inquiry, we have quite a bit of time in hand. If members are agreeable, I suggest that we ask the clerks to draft a letter. I will be delighted to take into account any points that members might raise today. Subject to the draft letter being acceptable to the committee, we can despatch it to the Procedures Committee. Does any member have a point to raise?

Karen Whitefield: I would like included in the letter a point concerning lodging of amendments. The timescale for lodging amendments can be pretty difficult for members, so it would be helpful for that issue to be examined, as it can be difficult for us to meet the deadlines.

The Convener: I echo that.

Mike Pringle: It is a very good suggestion.

The Convener: The burden that is placed on clerks when there is a large bill with numerous amendments is absolutely oppressive. I do not know how they cope with it. I agree that that is a very good suggestion.

Maureen Macmillan: Sometimes it is only at the end of the evidence-taking sessions that one knows what the questions are that one should have asked three weeks previously.

The Convener: Would you like the amendments to be lodged first, Maureen? [*Laughter.*]

Maureen Macmillan: I am sure that all of us have had the experience of suddenly realising what the meat of the matter is and that one had been just pottering about in the first evidence-taking session. Sometimes it would be helpful to have earlier witnesses return so that we can question them again. Perhaps there should be a mechanism by which we could recall witnesses.

Jackie Baillie: That is absolutely right. Given that we have no revising chamber, it is appropriate that we should positively scrutinise legislation. I support some of the comments that have been made about amendments. I think that the timetable for the lead committee at stage 1 is fine, but our experience shows that it is much more difficult for the secondary committee. I wonder whether we could do something to accommodate

that suggestion. My last point is that the overall timetabling of bills should be determined by Parliament as a whole.

The Convener: Those are helpful suggestions. In relation to the Antisocial Behaviour etc (Scotland) Bill, I am aware that the timetabling for us was acute. I think that the Communities Committee also felt it to be acute because it had a huge body of evidence to take. I propose that the letter be drafted and brought before the committee for approval before being despatched to the convener of the Procedures Committee.

I thank members for their attendance today. Our next meeting, which is to be held on 20 April, has a very full agenda. All of us will be in sparkling form after the recess, so we will crack through the business.

Mike Pringle: We are grateful to the convener for pointing out the extent of the agenda.

Meeting closed at 15:59.

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