JUSTICE 2 COMMITTEE

Tuesday 20 April 2004
(*Afternoon*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 20 April 2004

JUSTICE 2 COMMITTEE
13th 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:

Ron Ashton (Convention of Scottish Local Authorities)
Ian Donald (Royal Institution of Chartered Surveyors in Scotland)
Martyn Evans (Scottish Consumer Council)
Alan Ferguson (Chartered Institute of Housing in Scotland)
Jack Fulton (Property Managers Association Scotland Ltd)
Councillor Sheila Gilmore (Convention of Scottish Local Authorities)
Dr Douglas Robertson (University of Stirling)
Neil Watt (Property Managers Association Scotland Ltd)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 3

Scottish Parliament

Justice 2 Committee

Tuesday 20 April 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:03*]

The Convener (Miss Annabel Goldie): I formally constitute the meeting. The usher has gone to get the witnesses for the first agenda item, which is the Tenements (Scotland) Bill.

Nicola Sturgeon (Glasgow) (SNP): I raise a matter that we cannot discuss today, but I request that it be placed on the agenda for next week's meeting. The matter is the Reliance Custodial Services prison escort contract and whether there might be any aspect of that that the Justice 2 Committee would want to consider, if it could factor it into its work plan.

The Convener: You are right that we cannot deal with that matter today. We have a published agenda, from which I do not propose to depart. I am, of course, aware that the minister is making a statement on the Reliance matter in the chamber tomorrow afternoon and it might be helpful to consider what she has to say. As convener of the committee, I have a degree of discretion over what appears on the agenda. It depends how tomorrow's statement unfolds. Obviously, I cannot pre-empt what the committee will discuss. However, if I believe that the committee should discuss the statement, I am certainly prepared to include it on next week's agenda, in the most general sense, for suggestion or comment to be made. The committee can make a decision at that time. Is that agreed?

Members *indicated agreement*.

The Convener: I should also formally note Colin Fox's apology for being unable to be with us.

Tenements (Scotland) Bill: Stage 1

14:05

The Convener: On behalf of the committee, I welcome to our meeting Dr Douglas Robertson, of the University of Stirling, and Mr Alan Ferguson, a director of the Chartered Institute of Housing in Scotland. We are pleased to have them with us. I am sorry about the warm room temperature; it is a bit of a hazard of this venue. If we open the windows, we cannot hear one another. Many would deem that a blessing, but it might obstruct the process of getting through the work of the meeting. We hope that the fan might make a difference to the temperature.

I am happy for either or both of the witnesses to make preliminary comments. However, the bill is fairly technical and we have seen the witnesses' written submissions. Therefore, with the witnesses' agreement, the committee will proceed straight to questions. Karen Whitefield will start the questioning.

Karen Whitefield (Airdrie and Shotts) (Lab): Good afternoon and thank you for your written submissions. Both mention the proposed tenement management scheme—which the committee has touched on in previous evidence-taking sessions—particularly the proposal that the TMS would be a default scheme that would come into operation only when the title deeds of flatted accommodation are silent. The CIHS has a particular view on that, but I wonder whether the witnesses would care to comment on whether they believe that a default scheme is an appropriate road for the Executive to go down.

Alan Ferguson (Chartered Institute of Housing in Scotland): The institute's view is clear from the written submission and other information that we put together, which I hope that members have had a chance to look at. Our view is that what the Executive proposes is not the best way to have done it. I recognise that the majority of respondents to the consultation on the bill were in favour of the TMS. However, our view is that the bill is a missed opportunity to get a more consistent approach across the board, as there would still be a lot of inconsistency with the TMS. For example, a TMS could recognise that a roof is common. However, if it were so recognised, it should be common anyway. Our view is that the scheme property should apply to all. Therefore, the roof should be common to all.

Karen Whitefield: Do you believe that there is an issue around the European convention on human rights in that forcing somebody to be

covered by the TMS might potentially be a breach of the ECHR?

Alan Ferguson: There are two points to consider. First, we are already doing what you suggest we might. By accepting that the TMS will exist where the deeds are silent or inadequate, we are already imposing on certain individuals. On the one hand, we are saying that that is okay; on the other hand, we seem to be saying that it is not okay.

The second point is about what is in the public interest. Our view is that the bill is an opportunity to change the culture of owners who do not take responsibility for maintaining their property and for thinking, planning and saving for the long term. It is in the public interest for us to bring about a culture change in how we deal with owner-occupier or private sector property in this country.

Dr Douglas Robertson (University of Stirling): It comes back to the issue of free variation, which the committee discussed at its previous meeting. My written submission tried to make the point that basic principles are required so that people buying into tenement properties have a clear understanding of what they are getting into. The committee spent a lot of time considering that at its previous meeting.

If, for all new property, you have a system that incorporates the key elements of the proposed legislation—and it has taken 20 years of public investment to get to this stage—and if that system becomes the cornerstone for all new property, people who have less successful deeds because of drafting or historic problems will be encouraged to update their deeds. For a long time, I have been arguing for more standardisation. The bill seems to suggest more standardisation, but because of the right of free variation, standardisation will be limited and constrained.

I have difficulty with the view that all modern title deeds are great. The majority of new flats are under 20 years old and their deeds have not yet been tested under the circumstances of major repairs. It may be that those deeds will have as many problems as the old ones that we hear so much about. Problems arise constantly with title deeds; people do not know exactly what they are buying into. This bill gives you the opportunity to sort things out, at least for new properties. That would create a template that would allow businesses—property managers and the like—to know what they were going into; would allow solicitors to know exactly what they were doing in the conveyancing context because the broad parameters would be there; and would allow the public to understand things. From my research in other countries I know that that is a pretty standard package and could be so in a Scots law context.

Karen Whitefield: That would be very helpful for all new accommodation that is built; my concern is that the vast majority of accommodation in Scotland is older and will not fall into the new category. How can we ensure protection for people who live in properties whose title deeds are not necessarily silent—they say something—but fall short of what is being offered by the tenement management scheme? Those people may be the ones who lose out; they are the people who often come to see their MSPs because they are experiencing difficulties.

Dr Robertson: But you would accept the argument that, if we start tomorrow, or in 2005, all new properties would be covered, which might encourage other people to switch. Because of the pace of development in some parts of Glasgow at present, old flats will soon be in the minority.

Nicola Sturgeon: I think that you appreciate, Dr Robertson, that we are trying to find out whether the tenement management scheme could be applied not as a default scheme but as a scheme of minimum standard. I take your point that we should start by applying the scheme to new properties.

Can you think of any obstacles to applying the scheme retrospectively—as a scheme of minimum standard rather than as a default position? Leaving aside whether or not that would be desirable, could it be done in practice, or would existing property owners have to do what you are suggesting and voluntarily amend or update their title deeds?

Dr Robertson: The problem is whether people will actually use any of the provisions in the bill. What will enforce the use of the tenement management scheme if people choose not to use it? Much in the bill leads back to the sheriff court but, in my research with property managers, owners, local authorities and housing associations, I have not yet found anybody who has ever taken a case to court to solve a problem—because of the time and expense and because things do not get resolved. It is difficult to see how a voluntary scheme would have an impact; and although a statutory scheme might have a bit more clout, I think that the same problem would remain.

Nicola Sturgeon: I might be asking you to go beyond your remit, but if the Executive decided to amend this bill to make the tenement management scheme apply as a minimum standard rather than as a default position, and to make it apply retrospectively to existing properties as well as to new properties, is there any reason why it could not do so?

Alan Ferguson: Our position is that the scheme should apply to old and new properties, because it

is about setting a standard and about trying to tackle disrepair in housing. Several obstacles exist, and Karen Whitefield mentioned one. I am sure that issues arise from human rights legislation. Owners need to be persuaded that they will not lose out. Some might lose out, but some will lose out even under the proposed scheme. Education will be needed to get across the reason for the scheme. Some opposition would be expressed, but our view is that if the scheme is just a default system, we will not tackle the existing disrepair in the private sector or change the culture to make people recognise that buying a property makes them responsible for its long-term maintenance and is not just a short-term investment.

14:15

Karen Whitefield: Will the operation of the scheme as proposed in the bill present difficulties with who is responsible for assessing whether title deeds are insufficient and with amending title deeds? How will we engage with owner-occupiers so that they take up that right? If the scheme applied to everybody, perhaps the situation would be addressed.

Dr Robertson: There are some lawyers in the room who will know that amending title deeds in a tenement block would be nigh on impossible. Obtaining the agreement of all the owners and all the lenders to a new set of conditions or procedures would be a difficult task. The Title Conditions (Scotland) Act 2003 allows some conditions to be left to lapse, which leads to the default situation. That is where the default situation's strength lies. Amending title deeds in a tenement block after they have been set would be extremely difficult.

Alan Ferguson: Who defines inadequacy, and what an individual can do to deal with that are difficult matters. As Douglas Robertson said, our evidence is that people are not resorting to the sheriff court, so what process will we use? The problem with the proposed system is that it does not go far enough and that it raises many questions about how it will be put into practice and about what an unhappy individual can do.

Karen Whitefield: My final question is about the proposed default rules. Are you confident that they will cover every eventuality?

Dr Robertson: Probably not.

Karen Whitefield: Will the rules cover most likely eventualities?

Alan Ferguson: I will put aside our principled position to say that the rules need to be made to cover those situations.

Maureen Macmillan (Highlands and Islands) (Lab): Could we explore dispute resolution? Dr Robertson has said in his written evidence and today that he does not consider the sheriff court a useful mechanism and that people seldom take cases to the sheriff court because that is expensive and time consuming. You have suggested an Australian system.

Dr Robertson: It involves title commissioners.

Maureen Macmillan: Will you explain how they work?

Dr Robertson: The legal context is slightly different, but the system in Australia is similar to the commonhold system that was recently introduced in England. In Australia, all flats are held in commonhold. If disputes arise between owners or between owners and managers, the commissioner in the states where the system operates, such as New South Wales, has a time limit to deal with those disputes. If a more complex legal dispute is involved, the commissioner will pass that to the court to deal with.

The notion is that if a dispute arises over who is responsible for a repair and water is streaming through the roof, following sheriff court procedures might result in the issuing of a dangerous building statutory order to replace the roof. The Australian mechanism allows disputes to be dealt with rapidly and decisions to be agreed. Similar systems exist in the United States of America. England is going down that road because the leasehold valuation tribunal will amend itself into such a dispute resolution mechanism. It offers a means of dealing with small cases and getting a resolution quickly, as opposed to going through the full legal panoply of the sheriff court. That is not to say that the sheriff court or the Lands Tribunal could not be used in particular cases.

Maureen Macmillan: You would have to ensure that the decisions were followed. How would a decision be enforced?

Dr Robertson: The parties agree to have the decision bound upon them.

Maureen Macmillan: So it is a bit like mediation, is it?

Dr Robertson: Up to a point. Some states in America insist that mediation take place before dispute resolution. I should emphasise that this is not my view; it is based on the evidence. I think that you are to hear from Neil Watt and others later this afternoon. I am sure that, if you ask them whether they have experience of taking people to court to deal with disputes over title provisions, they would say—as did the people to whom I spoke—that they would never contemplate using the courts.

The Convener: There are two matters that I wish to clarify. In tenement title conditions, it was generally a standard provision for there to be an arbitration clause, and an arbiter would usually be appointed. That could be someone from the faculty of procurators or some other recognised individual. It has certainly been known for referrals to arbitration to be made in order to try to resolve things.

Dr Robertson: At the Lands Tribunal for Scotland?

The Convener: No—before that. Many older tenement titles contained arbitration provisions for when there was a dispute.

Dr Robertson: Do you mean in the deed of conditions?

The Convener: It could be in the deed of conditions, and it could be repeated in each individual tenement conveyance, but be binding on all the proprietors. That might explain why we do not necessarily find a great deal of evidence of proprietors invoking sheriff court actions.

Dr Robertson: That is probably why factors have said that people do not use that route.

The Convener: I turn to the second point that I wanted to make to you. There is of course no guarantee that an alternative dispute resolution would be swifter or less expensive than a sheriff court action.

Dr Robertson: No, there is not. The concerns that were expressed to us in the course of our research related to the fact that the expertise of the sheriff in dealing with some of these matters, based on the existing law at the time, meant that decisions were often not what was expected. It was an expensive matter to go the sheriff court, and it took a great deal of time to get to that stage.

The Convener: If nobody ever goes to the sheriff court, how do we know that?

Dr Robertson: Very few people have used the sheriff court recently but, taking into account the build-up of case law, the reason for the proposed legislation is to try to clarify the results of common-law decisions that have been made in the sheriff court. Those have been at variance—which is probably why it has taken 20 years to reach this stage.

The Convener: I am anxious to ascertain exactly why you are supportive of an alternative dispute resolution mechanism. It was a sad fact of life that, in some areas of legal practice, people agreed to resort to arbitration to resolve various disputes, not just in conveyancing but elsewhere, because that was deemed to be cheaper and quicker than going to court. Subsequently, it transpired that, by the time people had paid for the time of the arbiter and of his clerk and for the necessary administrative and secretarial structure to support the arbitration, they had actually ended up with a more expensive alternative than going to court.

Dr Robertson: I can only give you the example of Australia, where there is a time limit for the title commissioner to deal with the matter. The parties are obliged to agree with their decision. If the decision is of a more serious nature, it is passed on to a court to deal with. That is built into the Australian system. As I said earlier, we are effectively dealing with two different legal systems. The issue is to do with getting a decision quickly, with people being comfortable about the decision being resolved within a short time. In most disputes, over who is responsible for a particular repair, if the matter is not resolved within a short time, then the nature of the repair usually becomes bigger and the costs become more problematic to all concerned. There is a case in Edinburgh in which a problem over getting such a matter resolved resulted in somebody trying to murder his neighbour. That person is serving time in prison. That is an extreme example, but it shows that frustration over trying to get decisions made under the existing system can be a problem.

Maureen Macmillan: Are you trying to tell us that, at present, there is no de facto dispute resolution?

Dr Robertson: There is in theory. From what I gather from my research—I can only go on what people have told me—it is very rarely used.

Maureen Macmillan: But you feel that going to the sheriff court should be a last resort, and that a more user-friendly mechanism ought to be in place.

Dr Robertson: As you suggest, mediation may be an excellent way to try to resolve the situation. The issue is situations where neighbours are at each other's throats, or where one person refuses to pay for work, while eight or 16 others are waiting for that person. It would be more than useful if a mechanism could be found to resolve such situations quickly. From what I was told in conducting the research, I know that the sheriff court is not an option to which most property managers or owners would necessarily resort. They may resort to it in a minority of cases, but that does not mean that some of the longstanding problems are resolved.

Maureen Macmillan: The Executive has not made any provision in the bill.

Dr Robertson: It has stuck with the standard provision, which is to pursue matters through the sheriff court. The issue is whether people feel there should be another mechanism that could allow disputes to be resolved, so that the public

purse does not end up having to serve notice and then carry out work on default, then charge everybody else. There are other ways—as you discussed last week in relation to the City of Edinburgh District Council Order Confirmation Act 1991—to resolve matters, but the cost to the public purse is astronomical.

Maureen Macmillan: We have few mediation services at the moment.

Alan Ferguson: The sheriff court should be the last resort. We should look at a number of different options, such as arbitration and mediation. We should have in place a number of other mechanisms that individuals can use to resolve disputes before going to the sheriff court. It is recognised that mediation can play a role, not just in resolving disputes, but in tackling antisocial behaviour and doing all sorts of things.

The difficulty for people on the outside who are trying to regenerate mixed-tenure estates, and who are dealing with problems day to day, is how to deal with owners who will not pay or who cannot pay. How should disputes be dealt with? It is frustrating that the Executive has just stuck with what is there, rather than exploring some other options. We do not know whether the options would work. They have almost been ruled out by not being explored.

Maureen Macmillan: That is useful.

The Convener: I am conscious of time. I ask members to be as brief as possible. If the witnesses feel that they can, it would be fine for them to speak alternately, instead of duplicating answers. If they have different views to express, we are happy to hear them.

Mike Pringle (Edinburgh South) (LD): Dr Robertson, in your research you refer to disputes and how they seldom go to the sheriff court. Did you find out how often there is a dispute when people are trying to perform a repair in a building? My experience as a local councillor is that that occurs very frequently.

Dr Robertson: The problem with the nature of the research is that we were talking to people who operate the system, as opposed to people who receive the service. However, you are completely right. You could not talk to anybody who has lived in a tenement without hearing about some problem that has had to be resolved one way or another. Often, other neighbours pay the costs of the individual who is not chipping in, just to get the work done. There may appear to be no way of resolving the situation, but it has to be resolved somehow. Most people find a way of doing that. That may be better, but not for the other neighbours.

Mike Pringle: I have a question on insurance. The CIHS submission states that it supports

"compulsory insurance based on a common policy for new flatted developments."

Why do you say that?

Alan Ferguson: Because it would be a better way of dealing with the situation. Lenders say that a borrower should have an insurance policy. The difficulty is that there is no policing or monitoring of that. The borrower can say that they have a policy, and they may have to show it once, but they never have to show it again. The issue is how we ensure that property is properly insured. Our view is that block insurance would be a better way of ensuring that. That was also the view of the housing improvement task force.

Mike Pringle: If there is common insurance, everyone will have to pay their share. What happens if one person does not pay their share?

Alan Ferguson: That would be about the policing or the monitoring of the process. How could we ensure that people paid their share? One answer would be for lenders to play a greater role in ensuring that the property that they lend on is insured. Others, such as property managers, could have a role in ensuring that insurance is in place. There is an issue about what we do about an individual who does not come up with the money—but that relates to all the matters that we are discussing.

14:30

Mike Pringle: If there is a common policy and one person does not pay their share, the whole policy is negated.

Alan Ferguson: That is the argument against having such a policy. However, our view is that the housing improvement task force is right to recommend a common policy. Given that we accept that, we must work out how such policies can be enforced.

Another difficulty is that the Executive has just gone with the idea without exploring how it might be made to work.

Mike Pringle: Do you agree that such policies could not apply retrospectively to properties that had already been built, such as old tenements?

Alan Ferguson: We could make a start, in relation to new properties.

Dr Robertson: It would depend on the arrangement. Block insurance policies are standard throughout the United States of America, because of the nature of the system. Owners associations are required to take out a block policy. Such policies might be a mechanism for the

reinforcement of owners associations, which would be required to take out the policy.

The current situation is equally problematic, because some people in a block have individual policies, some are under-insured, as has been noted already, and some have no insurance. In a sense, the block policy would be better, as it would involve more people. Individual policies do not currently seem to operate in a way that meets the requirements of the bill.

Mike Pringle: Tenements are often above shop properties. If a shop property is part of a chain, the chain will have insurance, but the shop will be responsible for repairs to the property. There would obviously be various situations, but in such situations, how would shops be involved in a block policy?

Dr Robertson: I am sure that that would not be beyond the insurance industry, given its commercial ingenuity.

In America and Australia, insurance is the big business that drives a lot of the issues—the insurance money that is generated is fundamental to owners associations, in terms of the deals that they can get. I am sure that if such a requirement existed in Scotland, the insurance industry would be well able to meet it.

Nicola Sturgeon: The submission from the Chartered Institute of Housing in Scotland mentions long-term maintenance funds and suggests that in existing tenements buyers should be obliged to pay into such a fund every time a flat changes hands, but that such payments should be discretionary for existing owners. Would that be equitable in practice? Would such an approach mean that new owners in effect subsidised the existing owners who had opted out of the system? Could the same end be achieved in a different way?

Alan Ferguson: In an ideal world, as we have argued in a number of reports, maintenance or building reserve funds should apply to all properties, old and new. We recognise that there is a mixed response to that view: there is opposition but some people are convinced that the system could be made to work.

In order to make the system work, we suggest that it could apply to new buildings and to new residents. Nicola Sturgeon is right to say that that would mean that an individual would come into a block and pay money that other residents were not paying, but we have to start somewhere. Research indicates that owners do not save for large repairs or improvements. We have to consider how to encourage people to save, so that in the long term, if there is a problem with the roof or whatever else, the resources are there. I suppose that we are saying that it might be difficult to create an ideal world, but that we could start to change the situation by focusing on new properties and on flats that change hands.

Nicola Sturgeon: I take the point that we have to start somewhere and that anomalies will inevitably be thrown up.

One of our previous witnesses—I cannot remember who—said that if maintenance funds were to be established, the bill would have to state expressly how they would operate. Would those funds attach to the property or would they remain the property of each individual owner and then be attached by creditors of that owner in, for example, a bankruptcy? Do you have any views on that?

Alan Ferguson: We have tried to set out in our reports a basic way in which the system would work, but the issue is about working out the detail. The difficulty is that no one has said what would make a building reserve fund or a long-term maintenance fund work. We have tried to say that the resources would stay with the property, so that an individual coming into that property would pay for the property as well as for the individual amount of the building reserve fund, although there might be other ways of doing that.

Dr Robertson: We have had experience of this matter, which is why, up to a point, I disagree with the idea of sinking funds. In theory, they are a great idea, but under the old co-ownership arrangements—some of you might remember those—the difficulty lay in whether the fund was attached to the property or to the individual. As a result, when the fund was attached to an individual, as in co-ownership, people had to put in money to replace what was coming out. That became quite muddy.

In France, people have discovered that it does not take very long for the sinking fund to have a substantial amount of money in it—imagine some of the large blocks in Paris—and that, without proper legal control, the property managers have sometimes disappeared. There is no provision to protect people who are being forced to save into a system. How will the property managers invest the money? There is too much working with other people's money and the notion of sinking funds in the context of the bill is ill thought out: it should be much clearer.

A good system, which operates in America, allows the owners association to become a body corporate. Instead of having a sinking fund, the associations borrow money on the income stream of the fees from the owners. That is a major means of carrying out maintenance work and perhaps we should be considering such a mechanism in the long term.

Jackie Baillie (Dumbarton) (Lab): That takes us neatly on to owners associations. The housing

improvement task force recommended that such associations should be compulsory and I note that the Chartered Institute of Housing in Scotland is also supportive of that view. However, we cannot legislate for them. Is there an alternative way of encouraging them?

Alan Ferguson: They can be encouraged through the use of draft constitutions. The Executive could ask Communities Scotland to draft constitutions that would be available for owners associations to use. Those associations could be encouraged if resources were found to fund them initially. Our research has shown that, where associations exist, owners take more of an interest in the maintenance of their property and the common property. If associations cannot be legislated for, however, we need to consider what would encourage individual owners or groups of owners to set them up.

Jackie Baillie: Apart from the obvious enhanced interest of the owner, what would the other advantages be of owners associations? I know that we covered the ability of the owners association to take out a common insurance policy, but what other advantages would there be to that approach?

Alan Ferguson: Our starting point is that we have to deal with existing disrepair and ensure that there is long-term maintenance of private sector property. That is in the public interest and in the interests of the Parliament and the Executive. Owners associations could play a role in changing the culture so that owners accept that they are responsible for their property. Along with the single survey, property maintenance logs and regular surveys, owners associations could help to change the prevailing culture in the private sector.

Jackie Baillie: If owners associations were legislated for, how would we go about enforcing the obligation and what sanctions would there be if somebody refused to comply?

Dr Robertson: We have to try our best—and I hope that through the bill we will be able to do our best—to encourage owners associations, because there are many spin-off benefits, particularly in the governance of local areas. More people would become involved in thinking about how their area is managed and in interfacing with local government and other bodies to improve things—that is fundamental and goes much wider than property management. However, forcing someone to join an owners association is like forcing them to become a member of a community club or bowling club—I do not think that we can really force people to join. That is why I am a bit hesitant about the idea of compulsion.

We can do a lot to encourage people, especially by showing the benefits of owners working together. As Alan Ferguson said, owners associations result in things getting done. However, they can also result in the most vicious and appalling disputes between people. Anyone who has been involved in any organisation or club—a number of you will have had this experience—will know that forced membership can result in quite a lot of bad feeling, which can become exaggerated. Owners associations are not the be-all and end-all, but they should be encouraged.

Jackie Baillie: That is helpful, thank you. My final question is on surveys. I was slightly nervous when I read that the CIHS was proposing that tenements should be surveyed every five years. What kind of survey did you envisage, given that they vary in scale and scope? Did you consider that there could be a substantial financial impact on home owners in tenements who are perhaps on low incomes?

Alan Ferguson: We suggested those surveys for the same reason as we welcomed the idea of a single survey for buyers, not necessarily because it would deal with those who go after a number of properties and are not successful, but because it would set out the property's energy efficiency rating and condition and detail what works were required. The owner would therefore be transparent about their property when a prospective buyer came along. They would be able to show that they had surveyed the property and what work was required, what was outstanding and what was being done. The prospective buyer would have a lot more knowledge of the property's maintenance history.

You are right that the concern is the cost of the surveys. However, housing associations and other organisations will know the condition of their property and will plan for it, which is partly because they have carried out surveys. Why should owners not also regularly inspect their property to know what the problems are and what they need to do so that they can plan for its long-term maintenance and be transparent when someone comes along to buy it?

Jackie Baillie: Would you make those surveys compulsory or would you just encourage them?

Alan Ferguson: In an ideal world, where we were committed not just to tinkering with the legal system but to changing the system of property management and maintenance, we would make them compulsory. On the other hand, we might well try to encourage them. That depends how far we are prepared to go and whether we see the bill as an opportunity to start changing things in this country.

Dr Robertson: The fundamental point is about the owner's rights and the responsibilities that flow

from them. The bill will push those responsibilities a bit more, which is fundamental, but there is a danger in going too far and, in effect, determining how people spend their money. The difficulty is that, as a society, we might not want people to say, "I'm not putting any money into maintenance. To hell with it. If it falls apart, it's not my problem. The grants will come along and bail me out." We have moved away from that, but there is a danger of moving too far in the other direction and becoming too prescriptive. If the surveys are made compulsory, I might retrain as a surveyor.

Jackie Baillie: I was going to suggest that myself. A surveyor might be a better option even than a plumber.

The Convener: I have two short questions to ask before we leave the survey aspect. I suppose that it is possible that in two years six out of eight flats could change hands. Purchasers will have had their surveys carried out, so is it reasonable to impose a further cost on them for a whole property survey?

14:45

Dr Robertson: People do not get a survey; they get a valuation. That is not a survey.

The Convener: It is called a building valuation.

Dr Robertson: It is just a valuation for the lender's purposes; it bears no relation to what most people would consider to be a survey.

The Convener: Yes, but depending on the advice that the individual purchaser receives, they may in fact get a house buyer's inspection, which is far fuller. An increasing number of people have opted for that, because it is a fuller report.

Dr Robertson: Only 5 per cent of purchases in Scotland—and less than that within tenement properties—involve that option. In the main, there is a valuation survey.

The Convener: Even if we go back to the valuation basis, the surveyor is still under a professional obligation to know why he arrived at the valuation figure. Clearly, if there is implicit within the tenement building an outstanding obligation for extensive repair, that would be reflected in his valuation comments. All that I am getting at is that a valuation still costs a purchaser money. If six out of eight people in a close have paid that valuation fee, bought their properties and are content, would a further survey not be another financial burden on them all?

Alan Ferguson: I do not accept that a valuation survey is okay. That is one of the things that a single survey will help to turn round. We need to get away from the notion that it is okay just to get a valuation survey done and not to know the condition of the property.

If someone gets a more detailed survey when they purchase the property, at what point will they need to resurvey? That matter is up for discussion. We suggest five years, but it could be seven or eight years—we are not wedded to five years.

The Convener: The other expense that the Chartered Institute of Housing in Scotland has in store for flat owners is the mandatory appointment of a factor. Should it not be left to the proprietors to decide whether they want a factor?

Dr Robertson: I concur with that.

Alan Ferguson: I take issue with Dr Robertson on that point. It is important that, as part of changing things around, someone should be there as the property manager. The owners might decide to take on that role, which would be fine. Equally, if someone is not prepared to take on the role or if the development is too big, a property manager can play a part, which would also have advantages. Although those of us who live in tenements get frustrated by the factor's bills that come through the door, the reality is that factors pull things together, co-ordinate them, chase matters up and get a contractor to come out to do work. At times, those tasks can be a pain, so there is a role for a property manager in trying to deal with that. As Dr Robertson said a few minutes ago, part of the issue is about ensuring that the property managers are accredited and come up to a standard, which is why we welcome the development of accreditation for property managers.

Dr Robertson: The housing improvement task force produced an interesting statistic. It indicated that a majority of people who had had a valuation survey carried out had then had to have subsequent work done, the average cost of which was of the order of £3,000 to £3,500. I cannot remember the exact figures, but I will dig them out and send them to the committee. That statistic suggests that, although most people thought that they were getting a survey, when they got into the property they discovered that all that they had got was a valuation.

If a single survey is a proper survey—as I think it is—the convener's point is extremely valid. If those documents were electronically logged, as is proposed should happen in England, there would very quickly be a complete survey of property. Having that type of information publicly accessible would get over some of the problems that have been mentioned. That is where some elements of legislation could produce a major change in the information that consumers have when they make the most important purchase of their life.

The Convener: As there are no further questions for our witnesses, I thank Dr Robertson and Mr Ferguson for coming to be with us this afternoon.

On behalf of the committee, I now welcome to our meeting Mr Jack Fulton, the president of the Property Managers Association Scotland Ltd; his colleague Mr Neil Watt, who I think is the past president of the association; and Mr Ian Donald, who represents the Royal Institution of Chartered Surveyors in Scotland. I have seen all the witnesses before in a different life and in different guises and it is a personal pleasure to welcome them to the meeting this afternoon.

I know that the committee wants to ask a fairly extensive set of questions. Given that we have already received your submissions, I suggest that, unless you have anything particularly pressing that you want to say, we will proceed straight to questions.

Karen Whitefield: In evidence this afternoon, the Chartered Institute of Housing in Scotland and Professor Douglas Robertson from the University of Stirling both made the case that the tenement management scheme should not necessarily be based on default but should apply to everyone with title deeds. After all, the fact that the deeds might be silent on a matter would not provide the same level of protection as a tenement management scheme. As that point of view differs from your position, I am interested to find out why you think that the CIHS might have got it wrong and why you think that you are right to suggest that a default scheme should be introduced.

Jack Fulton (Property Managers Association Scotland Ltd): There should be a default scheme. The most important thing is to ensure that all properties have a form of management. It is essential that properties are properly maintained. After all, if we do not have a scheme to fall back on, we will end up back in the present situation, in which it is difficult to make repairs to buildings.

Karen Whitefield: Do the other witnesses agree with that?

Neil Watt (Property Managers Association Scotland Ltd): Yes. In fact, I would probably go one stage further and suggest that the existing deeds of conditions for modern properties—by which I mean anything built after about 1985 or the early 1990s—contain a set of management conditions that are superior to the tenement management scheme's provisions and work very well. However, I, too, think that we should have a default position.

Karen Whitefield: What would you say to owners who have title deeds that are not silent but that perhaps do not offer the owners the same level of protection that they might have enjoyed if their deeds had been silent and the default scheme had been introduced? The tenement management scheme would have been able to offer those people some protection. Might they face problems in that respect? We heard from Dr Robertson that, although title deeds that have been written more recently might be more prescriptive, there is no real evidence that would allow us to assess how effective those title deeds are when it comes to ensuring that any major refurbishment or repairs that might be required to flatted accommodation are undertaken. What is your response to that?

Neil Watt: The tenement management scheme is less about providing protection than about providing an opportunity for proactive maintenance by owners. It is clear that there are grave deficiencies relating to the absence of conditions in deeds and that that is stifling maintenance and repair to some extent. However, I am not convinced that what is proposed is protection for owners. My view is that it is the catalyst for owners to move forward.

Karen Whitefield: Surely it is protection for those owners who want to do something about the necessary repairs to their properties but find that other people in the building do not want to have the repairs carried out. The scheme ensures that those repairs can be undertaken. As well as ensuring that there is maintenance of the property, which is good for everyone in that flatted accommodation, it offers some protection for those owner-occupiers who have encountered difficulties.

Neil Watt: There is a danger in thinking that the Tenements (Scotland) Bill and the management scheme are a panacea for problems relating to care and maintenance. You have said that the management scheme will ensure that repairs will be carried out. Clearly, however, that is not the case. The bill will ensure that there is a process by which decisions can be made if those owners choose to make decisions. Further than that, it provides a framework whereby those owners can fund the maintenance of the property should they choose to do so. It would be wrong to assume that what we have before us will ensure that maintenance is carried out. It will enhance an owner's ability to maintain the property, but I am somewhat sceptical that it will ensure property maintenance to a much greater degree than happens at the moment.

The Convener: Mr Donald, would you like to comment on the two issues that are being explored? What do you think about the principle of free variation of tenement management schemes with the title deeds, which I think is the RICS position and which Mr Watt and Mr Fulton have commented on?

Ian Donald (Royal Institution of Chartered Surveyors in Scotland): It occurred to me that it is always open to the owners to agree among themselves that, in the absence of a proper scheme of regulation in the title, they could write themselves a deed of conditions. That is perhaps to hope for the best rather than to expect the worst of people in a close.

The opportunity to have more information up front seems to be an important point. When someone buys a flat, they are generally short of knowledge about how the affairs of the building are regulated. The information deficit can be quite startling on some occasions. I visit tenement properties almost daily and have found that, frequently, people have no idea who the factor is, what their share of repairs is and what their common obligations are. If people were aware to a greater degree than they are currently of what the titles said before they made an offer for the flat, that might help to prevent them finding themselves in the unfortunate position of being at some disadvantage when compared to people who live in a tenement in which a management scheme is up and running.

The Convener: Mr Watt talked about the nature of a tenement management scheme. Do you agree with his view that, although the scheme might be a mechanism to make decisions, it is not an instrument to deliver repairs?

Ian Donald: I am no longer a property manager, but I am aware that the real problem that faces people who want to do work to their tenement is reaching agreement and, more important, collecting the money that is required to pay for the work. In my view, the management scheme provides a lot of assistance to people who want to look after their buildings, but it does not have any draconian fallback position where the future of the building is definitely assured; there is no mechanism for compelling people to do more than the bare minimum, which is often not enough. The management scheme seems to be a great improvement on the present position. Although I would have liked something that went a bit further than that, there is a limit to what is possible as a change to the existing situation.

15:00

The Convener: Section 3 of the bill deals with pertinents, which are essentially common parts. It provides that pertinents should be owned by the flats that they serve. I know that the RICS felt that flat owners should have an equal share in the pertinents; it preferred that to the formulaic approach of ownership being determined by which bits of the tenement the pertinents serve. Will you expand on why the RICS opposes a service-test approach?

Ian Donald: I have not been the RICS's main mover in the discussion; I am here as a substitute and my knowledge of the Institution's thinking on the matter is therefore not complete.

The idea that a pertinent is common property to some flat owners but not to all of them will cause confusion, particularly with items such as chimney heads. A divided villa could have a chimney head with two or more flues in it. If no one has a fireplace any more, who owns the chimney head? There is uncertainty about whether it is a pertinent of one, two or three flats—or no flats. There is a certain simplicity in saying that a feature such as a chimney head should always be regarded as a pertinent of the whole rather than of only a part.

The Convener: If all owners had an equal share in common parts, could there be a difficulty in getting a majority to support repair to a part that served only one flat? Using your chimney stack example, let us assume that one flue to one part of the divided building remained operative and that the other flues were defunct.

Ian Donald: If it was the law that that chimney head was common property, surely it would just be the bad luck of the person or persons who found themselves having to contribute to a repair to an item for which they had no use and the good fortune of the owner who still used the chimney flue.

The Convener: Okay. Would you like there to be any changes to what is included and what is excluded from the definition of scheme property, which is covered by rule 1 of the tenement management scheme?

Ian Donald: I am quite happy with the general thrust of what is common and what is not common. In my view, there does not seem to be much wrong with what is proposed.

Neil Watt: I agree with that.

Jack Fulton: I would say the same—I agree with what Mr Donald says. To use the same example again, in most instances the chimney head, which is built out of the external walls, is part of the structure of the building. The case was mentioned in which there was one remaining flue. Under the proposal in the bill, if all the fireplaces were shut off, no one would own the chimney head. That would not be possible; someone must take responsibility, so the feature should be treated as common property.

Karen Whitefield: Continuing with the theme of the tenement management scheme, we will move on to rule 3.4, about which both organisations expressed concerns in their written submissions. Under that rule, once owners have taken a collective decision to undertake a repair, they will be required to make a payment in advance for it.

They will be asked to contribute their share of the money on the understanding that the repair work will commence within 14 days. If that does not occur, an owner will be able to ask for the money to be repaid to him or her.

In your written evidence, you express general concerns about the operation of rule 3.4. Can you explain to the committee in some detail why you have those concerns and whether you think that any amendments are necessary to make it work effectively once owners have agreed that a repair is necessary?

Jack Fulton: I will deal first with what is required once the decision has been made and look at the actual cost. We are concerned that, if owners decide that a repair of a nominal value—for example, the cleaning of a gutter or the repair of a downpipe—requires to be done, it could be unnecessarily costly and time consuming for them to have to obtain three quotations. The association considers that a limit should be set—for example, £75—as a minimum figure for that requirement for quotations.

As far as the timescale is concerned, we know through our members' practices that 14 days is insufficient. That may well be because of the difficulty in obtaining quotations during a busy period for a particular type of contractor or because people are on holiday. We know through practice that it can sometimes take many months to obtain the funds to deal with the repair. We might end up with people trying to frustrate the matter by holding on until the last minute, and money would end up being returned to owners on a regular basis only for people to have to start the whole process over again.

Karen Whitefield: Do you think that having some deadline is preferable to having no deadline at all? I appreciate the fact that you would not want people constantly to have to start the process again and to give money back; however, although 14 days might be too restrictive, perhaps imposing a deadline of 28 days or six weeks would be better than leaving the process open-ended so that it might never reach a conclusion.

Jack Fulton: I agree that a timescale should be set, but it would need to be a minimum of eight weeks—preferably three months.

Ian Donald: I am not sure that there needs to be a timescale at all. If the money was contributed by all the owners for the purpose and if there was some reason why the work was delayed, all the owners would be aware of that reason. If time went by to an excessive extent, an owner who was aggrieved about that delay and felt that the repair was never going to happen could possibly make some other provision by going to law for the recovery of the money that they had contributed for a repair that was no longer going to take place. I would ask why there should be a time limit on the repair at all. I do not think that a time limit is strictly necessary. Elsewhere, the management scheme allows the sheriff to determine whether money should be returned.

Karen Whitefield: An owner who has entered into an agreement and taken a decision in good faith might want to regain the money that they paid out voluntarily on the understanding that repair work would be undertaken. If the only option open to them is to seek redress in the court, that will incur an additional financial cost. I am sure that they would much rather see the repair undertaken, with the guarantee that they would get their money back if it was not undertaken.

Ian Donald: The position is circular. If the good payer pays in first and the bad payer pays in last, the good payer's patience might be exhausted before the bad payer makes a move. The good payer would wish to give the repair scheme every opportunity of success rather than be worried about the contribution that they have made, but perhaps that depends on the amount of money that is at stake.

The Convener: I ask Mr Fulton and Mr Watt what the procedure is at the moment if a repair scheme is contemplated, raised with the owners and agreed, and contributions are invited. What happens? On what basis are contributions sought?

Neil Watt: I am tempted to say that it is horses for courses, as it depends on the arrangement for the particular property. As a rule of thumb for property managers—although you should bear it in mind that we could be talking about owners who self-factor and owners associations that might also be in control of funds—there would be a limit of something like £50 per flat beyond which the property manager might try to collect funds in advance to safeguard the payment of the invoice to the contractor. Timescales are fully dependent on the wishes and requirements of the owners. Some of them may become frustrated at laying out their £50 or £100 for two or three months and, because property managers are ultimately only custodians of the owners' funds, if owners ask for the funds to be returned at any time during the process, we have an obligation to return them. I am not giving you a clear answer, other than to say that it is at the discretion of the group of co-proprietors.

Jack Fulton: I am inclined to agree with Mr Watt. Trying to obtain funds from non-resident owners can be a major problem, particularly in some larger developments. Although we can get the funds together in the end, that may take several months, and we do not want to end up having to return funds only to find that the money

comes in from the non-resident owner a month or six weeks later.

The Convener: Would instruction of the works be delayed until you were in funds for the total cost?

Jack Fulton: That would depend very much on the amount of money that was outstanding, because once we contract with a contractor to carry out the work, he expects to be paid for it, and if we do not have the funds, we cannot contract with him.

Ian Donald: There may be circumstances beyond anyone's control—I am thinking of bad weather, for example, such as a big freeze, or a demand for tradesmen with which they cannot possibly cope. The tradesmen may have a date in their diaries to start the work, but circumstances may arise that are beyond anyone's control. Outside forces could easily cause a delay in a timescale of 14 days and if there was a history of trouble with the collection of funds, the door would be open after 14 days under the current proposals for someone who wanted their money back to ask for it.

Karen Whitefield: Rule 4 of the tenement management scheme proposes that contributions to the cost of maintenance and repair should be equal, except in tenements in which the floor area of the largest flat is greater than one and a half times that of the smallest flat, in which case costs should be divided in proportion to floor area. Does the Property Managers Association Scotland agree with the views of local authorities, which have said that the Executive's approach is bound to lead to disputes between neighbours over access to calculate floor space? From your experience, do you think that such difficulties are likely?

Jack Fulton: I can see the potential for difficulty, particularly over getting access to measure floor area, but that is not insurmountable. What concerns me more than anything is the fact that a cost is involved in taking measurements, because a surveyor would have to be employed to measure the building and calculate the floor space. The surveyor would not necessarily need to get access to the flats to work out the floor area, but there would certainly be an additional cost.

Karen Whitefield: Who should be responsible for that additional cost?

Jack Fulton: At the end of the day, the additional cost will be borne by all the residents in the property.

15:15

Karen Whitefield: Is the problem not so much one of access as one of cost, which people will need to be made aware of so that they can factor it in?

Jack Fulton: Yes.

Karen Whitefield: Does the RICS agree that the one-and-a-half-times rule could cause problems, given that the surveying profession has no agreed method of calculating floor area?

Ian Donald: Yes. There is obviously a problem in defining a property's floor space. The practicalities of measuring a tenement with precision should not be underestimated, particularly if the tenement is at the magic margin, where it has one flat that has one and a half times the floor space of another. I would not like to be the person who, on a regular basis, is responsible for working out the area and being dogmatic about the size relationship.

The method of calculating the area requires three things: the taking of the size, the drawing of the plan and, thereafter, the calculation of the area. Errors and differences can arise in those three areas. No two surveyors who measure the same room will come up with the same answer—I hope that I have not shocked you too much by saying that. Variations will arise from the technique that is used and whether the surveyor rounds up or rounds down. Measuring the size of this committee room might be simple enough, but some tenements have boxed-in cupboards and chimneybreasts that have been plated over to give them a flush finish, which hides the space behind. All those problems could come to the surface when a flat is at the critical margin that was mentioned.

Karen Whitefield: How often will that problem affect properties? Is it likely that there will be many cases in which the floor space of one property is one and a half times greater than that of the smallest flat in the tenement block? Have we any idea whether the floor spaces of tenements are generally similar in size?

Ian Donald: The traditional tenement building that we all picture is a building of four or five storeys with two or three flats per landing. The one and a half times rule is not likely to be triggered in such a tenement. However, if a house is divided, with a larger flat upstairs and two smaller flats downstairs, that might be a more difficult case. Such non-standard tenements will be in the problem category. By implication, there should not be a huge number of such cases, but there will be some. I do not know how many, so I cannot answer that question.

Karen Whitefield: How might the problem be overcome?

Ian Donald: Way back when the Scottish Law Commission considered the matter, it was

suggested that it was unnecessary to have any rule. Every owner has an interest in the building, so one might ask why every owner should not contribute equally. However, if one flat is much larger than another, that encourages the belief that it is fairer that a size relationship should kick in at some point. I cannot advise what the appropriate mechanism should be. If people have made up their minds that there should be a size relationship, they have to pick a number and one and a half is a perfectly good number. I cannot say more than that.

Karen Whitefield: Following on from my questions about floor space, I have a question about how attic space is dealt with when floor space is being measured. What impact might attic space have on the frequency with which the one-and-a-half-times rule will be used? How likely is it that attic space will trigger the one-and-a-half-times rule?

Ian Donald: I do not know, nor do I know whether anyone could give a clear answer to that question, but I can picture the kind of building that you are talking about, in which there is a ground-floor flat and a first-floor flat with an attic. There must be many such properties. If they were formed by conversion, one would hope that there would be something in the titles, but I think that we are talking about cases in which there is nothing in the titles. I do not know the answer.

Karen Whitefield: My final question is to both the witnesses from the Property Managers Association Scotland. If you were to pick a figure, would one and a half be the right figure to choose?

Jack Fulton: As Mr Donald said, one must pick a figure, and one and a half times is not an unreasonable figure, considering the traditional nine or 12 flats in a tenement block; however, whether it is the right figure is another question.

Neil Watt: I agree. I would like to add that we believe that the difficulties that will inevitably be encountered with gaining access and with two surveyors coming up with different measurements—to which Mr Donald referred—are worth the risk to ensure that a conclusion can be reached, rather than there simply being an equal share of costs. I think that we all feel quite strongly that an equal share is not entirely right where one flat is larger or a number of flats are larger. The starting point should be that there must be a mechanism to achieve a conclusion. There will be difficulties along the way, but such difficulties and risks are worth taking to achieve the result.

Maureen Macmillan: Would the witnesses from the Property Managers Association Scotland say something about dispute resolution? Previous witnesses thought that straightforward recourse to the sheriff court was perhaps not the best way to solve problems relating to disputes between owners about the cost of repairs and so on, and that there might be a role for mediation. In its evidence, the RICS said that it is quite happy with the use of the sheriff court, but do you have anything further to say about that matter?

Jack Fulton: The use of mediation would be ideal, but, unfortunately, we do not live in an ideal world and there will always be referrals to the sheriff court. As practising property managers, we try as much as is humanly possible to achieve agreement between owners, but there will always be disputes. If we can persuade owners to use mediation and it works, that is fine. The aim is to try to keep costs down, if that is humanly possible. Additional costs do not help when people have to spend their money on repairs and want to keep costs down.

Maureen Macmillan: Do you see your association as a mediator?

Jack Fulton: We try to mediate, as much as is humanly possible. In many ways, we are successful in that respect, as we get many repairs carried out to properties in which there are disputes. However, at the end of the day, there will always be people who will not be prepared to work with us, or even with a mediator.

Neil Watt: I am not as strongly in favour of mediation because I presume that such disputes will arise out of the necessity or obligation to carry out maintenance and repairs and such obligations will be set out clearly in title deeds. More often than not, things will be in black and white and either people will have an obligation to maintain or they will not. If the obligation does not relate to maintenance, it might relate to incidental maintenance or improvement, which is another matter. When an owner signs his or her title deeds, they are agreeing there and then to maintain their property. I am therefore not convinced that mediation is necessary to convince someone that what they have signed up to do is what they should do—they will have already committed themselves to doing that.

The Convener: I would like to clarify something. A previous witness—Dr Robertson—said that in his research he had found that nobody goes to the sheriff court because it is too difficult, time consuming and expensive. What is your experience as property managers of situations in which you have not managed to resolve disputes with owners within the property management structure? What happens? Where do such disputes go at the moment?

Jack Fulton: Let us take a situation in which a repair is required to a building. At the end of the day, there may well be a majority in favour of repair work, with a minority against. In some

instances, the work might go ahead, but then the case is referred to the sheriff court because outstanding money requires to be recovered.

The Convener: Have you had experience of that?

Jack Fulton: We certainly have.

Neil Watt: Yes.

The Convener: If the dispute is because the owners genuinely cannot agree on what should be done, given the title deeds, and you cannot get a decision at all, how is it determined?

Jack Fulton: Regrettably, in a lot of instances it is not a matter of disagreement; it is a matter of parties just not responding—full stop. That is probably the biggest problem. If we cannot get a response from certain owners, at the end of the day we have to go along with the majority.

The Convener: At the moment, if all else fails, the parties go to the sheriff court. In your experience, has that happened?

Jack Fulton: Yes.

Neil Watt: To be clear, we are discussing the payment of charges, and I think that Mr Fulton was talking about a dispute over the property manager's charges, rather than a dispute between owners as to what maintenance is required, which may have been your point, convener.

The Convener: That was part of my question.

Neil Watt: To return to my earlier point, if the title deeds are adequate or the measures in the Tenements (Scotland) Bill kick in, the issue will be clearly black and white. There should be no grounds for dispute: it is either a repair and maintenance item agreed upon by a majority or it is not. There should not be a case for debate as to whether work is carried out. The timing or the extent of the work and the level of specification may be a matter for debate, but not the principle of whether the work should be carried out. I am not often aware of two proprietors or two groups of proprietors taking such a dispute to the sheriff court. Apathy prevails, and the repair falls away and does not get carried out.

Jack Fulton: I agree. People do not generally take disputes to the sheriff court. It is when work has been carried out that the matter is referred to the sheriff court for the recovery of moneys.

The Convener: But you said earlier that usually you can find a path through the difficulties, in terms of getting the proprietors' agreement to the repairs.

Jack Fulton: There is a path when there is majority agreement, and the minority then has to go along with the majority. As Mr Watt said, in most instances the title deeds lay down that if a repair requires to be carried out, it can be done with majority agreement, in which case the work will go ahead if the funds are available. In some instances, the work will still go ahead even if the funds are not available.

Maureen Macmillan: I want to go back to section 17 and the demolition of a tenement building. That section makes provision for how the costs of partial demolition of a tenement building should be allocated among owners, and provides that the costs should be borne equally, but only by the owners in the part to be demolished. Both sets of witnesses have expressed concern about that. Why are you unhappy about that provision, and how would you like section 17 to be amended?

Ian Donald: The RICS's evidence is reasonably clear on that point. The proprietor who benefits from a demolition could well be the proprietor who is unaffected by it, if the bit of the tenement that needs to be demolished is the problem. There is an automatic conundrum if the benefiting proprietor does not have to contribute to the cost of removing the problem. The idea of a benefit arising out of a demolition does not seem to have been included as a concept—a demolition is always seen as a catastrophe.

Maureen Macmillan: Could you give us a concrete example of what you are talking about?

The Convener: Demolishable concrete.

Maureen Macmillan: Yes—concrete or brick.

15:30

Ian Donald: When Glasgow was full of tenements with pubs on their ground floors, a proprietor of such a public house would often wish the public house to remain on the site. He was usually willing to pay substantially to have the tenement removed, provided that he could keep the site, because the benefit to him was that his trade would continue. Although the homes would be gone, his property would remain. I was not in practice when that was being done seriously all over the place, but that is an example of how the proprietor of the bit that is left could be the end beneficiary of the process of removing the disrepair in the rest of a tenement.

It is hard to imagine a case today of a tenement of which only part would need to be demolished. We cannot be talking about a conventional close with six, eight or 10 flats. We must be talking about a different sort of tenement from the sort that we usually imagine, such as a divided house with a subsiding wing that needs to be demolished. If the wing was so heavily affected by subsidence that the market value of the remaining flats in the main house was severely depressed

because surveyors saw the settling wing and thought that the building had a problem, those who lived in the main house would benefit from a decision to demolish the wing, because the blight would be removed, yet they would not be expected to pay. That would be completely wrong.

Maureen Macmillan: That is unlikely to happen.

Ian Donald: You asked for an example. I thought of that example in this room this afternoon.

Maureen Macmillan: A tenement is unlikely to be partly demolished.

Ian Donald: Yes.

Maureen Macmillan: I had imagined that a tenement's top storey might be removed because of some problem. I understand the argument about the benefit to others who live in the tenement; perhaps they should pay part of the cost.

Ian Donald: Is the concept not also one of common property and scheme property? We are talking about what is part of the scheme. Why should everyone not contribute to that cost?

Jack Fulton: I agree with Mr Donald. In the past 10 years, I have encountered a similar situation, in which a fire occurred in a tenement's upper floors, which had to be demolished because the building was old and refurbishing it would not have been economical and because the upper floors' structural stability was in question. The commercial people on the ground floor still had the benefit of the existing premises and continued to trade, and they will probably continue to trade for the next 10 to 20 years. They had the benefit and they contributed to maintenance, too. Such owners should have a share in the obligation and the right.

The Convener: As members have no further questions, on the committee's behalf I thank the three witnesses for giving evidence, which has been extremely helpful.

I declare a short comfort break of five minutes.

15:33

Meeting suspended.

15:38

On resuming—

The Convener: I reconvene the meeting by welcoming Martyn Evans and Jennifer Wallace from the Scottish Consumer Council. I am gazing anxiously at your nameplates to ensure that they correspond to what I have in front of me.

With the other witnesses this afternoon, we simply proceeded to questioning unless they wanted to express any particular points. After all, we have already received your extremely helpful submission. Are you content to proceed to questions?

Martyn Evans (Scottish Consumer Council): Yes.

The Convener: I will kick off with a general one. I was interested in your suggestion that it would be a good idea to introduce an information strategy. What should be the main components of any such strategy?

Martyn Evans: We require such a strategy because the bill's definition of "tenement" is far wider than common sense might suggest and because the bill itself contains quite substantial changes in rights and responsibilities. As other witnesses this afternoon have pointed out, there is very little understanding and knowledge about this area of law.

As a result, the issue goes two ways. First, we need a system in which the Law Society of Scotland and the Executive can come together to encourage lawyers in the conveyancing business to make more explicit the title deeds that they convey to their clients. Our research has identified that people do not know what they are buying into.

Secondly, we need to encourage other advice agencies to know more about this issue. For example, the Executive could commission and widely distribute leaflets that set out people's new obligations or rights to change their obligations. Indeed, the Executive has a long tradition of doing that with reasonable effectiveness and we think that such an approach is required to ensure that people understand these important new rights.

Jackie Baillie: As the Scottish Consumer Council was represented on the housing improvement task force, I am sure that the witnesses will provide us with valuable insights.

On finance for low-income flat owners, the task force made some robust recommendations about what it wanted to be set out in legislation. However, you will acknowledge that providing financial assistance is not necessarily a matter for legislation. If we leave that issue to one side, what type of financial support should local authorities and the Executive provide for low-income flat owners?

Martyn Evans: That is a very wide question. There is a significant problem with disrepair in our private housing, which is partly a product of the current system's complexities. The bill simplifies those complexities to ensure that making decisions is more straightforward.

That said, even if we had such a system, there would still be occasions when people would not be able to meet their obligations, which would result

in a clash between private interests and the public interest in maintaining properties. It has been very difficult to achieve such a balance. If we knew more about what motivated owners, we could answer your question more clearly. Indeed, Tony O'Sullivan carried out some background work for us that shows that no evidence about what motivates owners exists. If we do not know what motivates them, we do not know what financial incentives to provide for them.

I cannot answer your question clearly, apart from saying that, according to prior research, if we knew what motivated owners, we might be able to set financial systems in a way that increased the motivation of low-income owners.

Jackie Baillie: Would you change or build on the current system of improvement and repair grants and, if so, how?

Martyn Evans: We would build on the existing system of grants. The housing improvement task force, on which I represented the SCC, made a series of quite complex suggestions about bridging the gap between affordability and obligation.

Jackie Baillie: That is very helpful.

I accept that we cannot legislate for owners associations, as that matter is reserved to Westminster. However, what kind of encouragement and support would you expect local authorities to provide so that such associations can be set up?

Martyn Evans: Communities Scotland might be the more effective vehicle in that respect. In any case, we want to build that capacity in owners associations. For example, we have been seeking to support and find funding for an embryonic group called the Scottish tenements group which, if it could work, would be a national voluntary organisation and would offer necessary services, build the necessary guidance and support local developments where it could do so.

As part of the information strategy that we have suggested, Communities Scotland should be encouraged to tell people how to organise themselves into voluntary associations, how to ensure that they did not expose themselves to unnecessary risks and how to fund their associations through insurance schemes and other requirements that will apply to tenements.

Local authorities have a role to play in this respect, because the issue of owners' collective interest in property ownership and maintenance has not come through very clearly in, for example, finance debates. As those interests have not been well represented, such debates have been lopsided. However, as members well know, local authorities are already overstretched.

15:45

Karen Whitefield: In the fourth paragraph of the summary in your written submission, you helpfully explain your position on the tenement management scheme. However, in paragraph 18 you suggest that the Executive should consider in more detail how the mechanisms will be enforced to ensure the effective implementation of the tenement management scheme. I am interested to know your views on the application of the TMS. Who should be responsible for its application and, particularly, what sanctions should be imposed on those who do not comply with the TMS?

Martyn Evans: You touch on a very complicated subject. The mechanisms of the scheme set a framework by which owners can better agree to fulfil their collective obligations. If those owners cannot agree or are in dispute in some part, enforcement and sanctions become a moot point because they would be enforcing the sanctions against themselves.

We repeat that we are very much in favour of mediation. There has been much discussion in favour of mediation. The evidence from our research on access and paths to justice shows that a significant number of people have a judicial dispute, but the adversarial system of enforcement does not suit them because they have to maintain a relationship with their neighbours after the process has been undertaken. Mediation can help to maintain relationships while a dispute is resolved.

However, the problem of the small number and highish cost of mediation services remains. We suggest that local authorities could look at mediation in their emerging role of promoting well-being so that people who have such problems with one another can go through a mediation process—we have been very keen on that idea and have written about it.

Our criticisms of the current civil justice system through the sheriff court—about cost, delay and complexity—are well known. We have evidence from other jurisdictions. We went to Maryland last year with a large number of people and found that mediation services can make a significant difference in the area of personal disputes between people who wish to have a continuing relationship.

Karen Whitefield: Do you think that local authorities have the skills and the resources to provide a mediation service? I am slightly concerned that if we go down the road of accepting the proposals for the TMS and introduce legislation, it is possible that local authorities will then be left with the difficulty of trying to provide mediation and not being able to deliver it.

Martyn Evans: I agree. I did not mean that local authorities should provide the service themselves; they should facilitate it.

There are few mediators in Scotland and some of them are rather underemployed because getting the mediator together with those who wish to have mediation is a difficult process. A mediation scheme is attached to the in-court advice project that I helped to set up at Edinburgh sheriff court in a previous job. The local authorities could be the facilitators who bring together the mediation services. Some of the mediators will also do pro bono work to get experience. Building that capacity of mediation, just as one builds the relationships between tenement owners, is something that local authorities can do. I agree that they cannot do it themselves and that it would be a mistake for them to set up their own mediation services.

Karen Whitefield: Section 4 provides that rule 2 of the TMS should apply—that decisions should be taken by a majority. You suggest that, even where title deeds give some owners a greater say in decisions, that should be put to one side, all decisions should be taken on a majority basis and everybody should have an equal right to be part of the decision-making process. Do you think that there are any problems with that breaching the ECHR?

Martyn Evans: We see clearly that there is an argument that that might be the case. In this area, the argument is fairly overwhelming against changing ownership and payment relationships, but we think that there is an argument in favour of considering the balance of interests in decision making. Under the Title Conditions (Scotland) Act 2003, as we understand it, a majority of owners can apply for a change in their title conditions anyway, so if there is an ECHR issue with what we suggest, there must be such an issue under that act already. There is an argument for what is proposed, but our argument is that, as is pointed out in the policy memorandum, the unanimity rule is the fundamental cause of many of our problems of disrepair, and that aspect of the tenement management scheme should therefore apply to all. Of course, there is a counter-argument, and people can make that argument. However, after careful consideration of the balance of interests, we believe that majority decision making should be made a requirement in all cases.

Karen Whitefield: I appreciate that you understand that there is a counter-argument, but it strikes me that when title deeds are not silent on the issue but are explicit, somebody may have a greater say when it comes to the decision because they also have to pick up a greater cost for any repairs, particularly if a commercial property is included in the tenement. How do you address that potential imbalance to ensure that the property owner who might have to bear a larger burden than other property owners does not feel that he or she is being unfairly treated in the decision-making process?

Martyn Evans: They may feel that that is the case, but there are other provisions in the bill—relating to the apportionment of roof space, for example—which change relationships. The bill itself does not take a consistent approach to not changing existing obligations. Somebody could feel aggrieved, but the public policy issue is whether the repair will be done at all in the circumstances that you have described. We are trying to find a reasonable mechanism for such cases, with the caveat that people can appeal against an unfair decision to a judicial body. We suggested that there could be mediation, but the bill says that appeals would be made to the sheriff court. If an owner felt that it was unreasonable to proceed, and if that owner was in a minority, he or she could still take action.

In the specific circumstances that you described, that is more likely to be done by a commercial owner. On balance, however, we believe that the minority interest should be overridden by the public interest of the majority of people living in a common property, who should be able to make decisions on repairs without being held up by one person saying, “No, I don’t want to do that.”

Maureen Macmillan: Quite a lot of the things that I was going to ask about have already been covered in your answers to Karen Whitefield. However, I want to be clear about how you see the role of mediation. Should it be used only when there is a dispute about the management of the tenement and not at the other end of the process, when it comes to the matter of payment once the repairs have been made? Do you think that it would be perfectly appropriate to go to the sheriff court if a repair had been done and six out of eight owners had paid up but the last two had not, or do you see a role for mediation there as well?

Martyn Evans: We see a role for mediation there. Our experience in other jurisdictions and our observations in Maryland in America have shown us that mediation can work. We are not saying that we should cut out the sheriff court. We are saying that mediation, if offered, can often be successful in maintaining relationships between people who live and work in close proximity. People still have to agree either that they will give up their right to go to the sheriff court or that, if they cannot resolve the dispute or are not happy with the resolution, they will take it to a point of decision making where neither party can get out of the result. We would not rule that out at all, because we have seen it operate successfully in complex relationships involving significant amounts of money.

Maureen Macmillan: We heard evidence from previous witnesses who said that, because it was usually perfectly clear in people's title deeds what their responsibilities were, it would not be extremely complicated to take matters to the sheriff court. They said that decisions could be made quite easily in the sheriff court and they asked what the point of an alternative course would be.

Martyn Evans: Our evidence suggests the opposite. People are fearful of going to the sheriff court because of cost, delay and complexity. Even if those problems do not really arise, there is a perception that that is the case, so people will not go easily to a court—to the sheriff court in particular—to resolve their disputes. The consequence is a high amount of disrepair in properties. The evidence is not to be sought in the number of people who go to the sheriff court, but in whether there is significant disrepair in private homes in Scotland. The housing improvement task force said that they were in a very poor state.

If we had a system that allowed people to have their disputes mediated, they would be able to understand the reasons for decisions that were made and to understand and argue about the costs. Our evidence is that people are much happier about being involved in a slightly less adversarial system, in which they can discuss their views with their opponents or neighbours and reach a reasonable conclusion. That will not happen in all situations—some cases will go to the sheriff court.

Maureen Macmillan: It has been suggested that mediation could be just as time consuming and expensive as going to court.

Martyn Evans: I have heard that that is the case for arbitration. We have evidence that mediation is not as expensive as going to court. Of course, it can be expensive, long, delayed and complex. However, that is very much in the hands of the parties. I can speak only of the evidence that we have published, which indicates that people have found mediation extremely valuable. We can say that with some confidence, because more and more businesses are using mediation to resolve their disputes. If businesses found it more costly to use mediation, they would not do so. They find that mediation helps them to maintain their business relationships and is more efficient. That is not true in every case. I am not saying that mediation is a panacea, but it is an option that should be pursued and supported as a more appropriate way of resolving civil disputes.

Mike Pringle: In your evidence on insurance, you welcome the general position that has been taken in the bill. However, you want the Executive to provide further guidance on what insurance should cover. Can you give us examples of the sorts of things that the Executive should include in further guidance notes on insurance?

Martyn Evans: We are not in favour of common insurance, which was the position of the housing improvement task force. We think that mitigating risk is an individual responsibility. This is a very complicated area. As members well understand, if someone does not mitigate their risk in a common tenement, the risk may be higher. We do not suggest that guidance should be included in the bill, but it should indicate the kind of circumstances in which owners should ask insurance companies to mitigate risk. Such circumstances could include the risk that one of the common owners is not insured or is underinsured or that a co-owner has falsely declared something on their insurance that may invalidate it and increase the risk of other co-owners.

Ordinary consumers who are living busy lives will not be able to work out such risks with an insurance company, but if there is guidance or best practice—which could come from the insurance industry, working with the Executive—people will at least have a template that enables them to determine whether five or 10-point criteria had been met and whether the reasonable risks of living in common property may be mitigated.

We are very much in favour of compulsory insurance. The most worrying situations are when other owners are fraudulent in what they say or when premiums are not paid on time. In those circumstances, people think that they have mitigated their risk, but someone else's action has increased it considerably. I have set out the kind of framework that we seek.

The Convener: As there are no further questions for the witnesses, on behalf of the committee I thank them for their evidence.

Martyn Evans: I would like to make one quick point, which concerns the issue of costs to owners—the transfer of costs from an existing owner who sells their property to a new owner, when the former has carried out a repair. The committee has discussed that issue. We want to put on record the fact that, on balance, we think that it is right that that provision is included in the bill. It will protect other existing owners who have agreed to have a repair carried out and have paid for it. If there was not joint and several liability, existing owners would have to seek recompense from the departing owner, rather than from both the departing owner and the incoming purchaser. We recognise that there is an element of rough justice in that but, as you raise the point, we would like to say that we agree with what is in the bill.

16:00

The Convener: Thank you for that clarification and, again, thank you for being with us this

afternoon.

On behalf of the committee, I welcome the representatives from the Convention of Scottish Local Authorities, who are—a holograph alteration is taking place as we speak—Councillor Sheila Gilmore from the City of Edinburgh Council and Ron Ashton, who is director of housing at Angus Council. We are pleased to have you with us. You will have gathered the pattern that is being pursued. We have COSLA's submission, which has been helpful; you are free to make any initial comments that you would like to make or, if you prefer, we can get on with the questions.

Councillor Sheila Gilmore (Convention of Scottish Local Authorities): The only thing that we would like to say, briefly, is that our focus is on certain parts of the bill rather than all of it. We gladly leave some of the detail on conveyancing and so on for other people to pursue. As local authorities, our main interest is in the organisation and management of common repairs and in how they can be improved. There is not a unanimous view across all authorities, but there are certain common themes that we want to put forward. If you want to ask us about esoteric things such as air space and mid points, we will—

The Convener: Are you going to disappoint us with your taciturnity?

Councillor Gilmore: We will.

The Convener: We shall try to live with that.

You suggest on page 1 of your written evidence that, rather than adopting a service test to determine ownership of pertinents, as the bill suggests, it would be simpler for all the owners in the tenement to have an equal share in them. I want to explore that further; why do you hold that view?

Ron Ashton (Convention of Scottish Local Authorities): We are trying to simplify the entire process as much as possible. We understand that there are difficulties and consequences for whichever scheme is arrived at, but the confusion that reigns in the minds of many owners and people who are involved in the maintenance of tenements is considerable. The end product of the scheme, if it is to be an improvement, should be a simplification of the process that everyone can easily and readily understand.

The Convener: On the relationship between pertinents, as defined in section 3 of the bill, and scheme property, as defined in the schedule, do you think there is a need for equal sharing of pertinents by flat owners? Under the scheme proposals, all flat owners would be liable for major structural repairs.

Ron Ashton: If owners are enjoying the use of the same, it is only fair for owners to pay for them.

Karen Whitefield: In your written submission, you indicate that there is a range of views among local authorities about the tenement management scheme, particularly on when it should apply. The committee has heard varying views on the matter. Earlier today, our witnesses from the Chartered Institute of Housing in Scotland made clear their view that the tenement management scheme should be a minimum scheme that should apply to everyone and which should override title deeds, whether or not the deeds are silent. What is the majority view of local authorities on that point? What are your general views on the tenement management scheme, in particular in relation to situations in which title deeds are silent?

Councillor Gilmore: There are general views on some aspects of the bill. For example, there is a general view that majority decision making should apply to agreements about maintenance and to the appointment of property managers. However, there is no majority view among the authorities that the tenement management scheme should always take precedence over titles. The City of Edinburgh Council and a minority of local authorities took the view that the scheme should take precedence over titles, but that people who want their titles to prevail should be given the opportunity to request that—I suppose that that approach would reverse the presumption in the bill. There is no general view that the whole scheme should take precedence over titles.

There are differences of experience and that, in part, is why we have different viewpoints. Different authorities seem to have encountered many different problems. In Edinburgh, our experience is that a lot of the older titles are not always helpful—they are certainly not well known—and that they add to the problem of getting people together to take action. That is why we took a fairly simple view.

Going beyond the question whether titles are silent, inconsistencies, complexities and contradictions are found in titles, probably because of the way in which flats are sold at different times over the years; the situation is different with flats in new blocks, which have a consistent set of titles that are all produced at the same time. There is general agreement that if such inconsistencies are found in the titles, the opportunity should be taken to use the tenement management scheme, rather than simply try to iron out or find a way round the inconsistencies. Over time, that approach, which COSLA supports, would enable a lot of difficulties to be overcome. If, as some of the submissions to the committee suggest, there are other situations in which people believe that the title deeds are okay and easy to follow, that is fine.

I hope that that is helpful and fair. I do not want to exaggerate the Edinburgh view; we certainly

hold a strong minority view in COSLA.

Karen Whitefield: Edinburgh has considerable experience in dealing with tenemental property, because tenements comprise much of the accommodation in the city. Did the local authorities that held that minority view within COSLA tend to have a slightly disproportionate representation of tenemental property in their areas? I assume that some of the rural authorities have fewer tenemental properties than, for example, Edinburgh or Glasgow has.

Councillor Gilmore: Ron Ashton is just checking his notes so that we can be sure before we commit ourselves on that.

Ron Ashton: My answer is yes and no, if that does not sound too political. Undoubtedly, the authorities in the larger cities in which there is a predominance of tenements tend to have a rather stronger view on compulsion than other authorities have. However, North Lanarkshire Council was clear in its view that the TMS should be a default. There is a mixture of views as a result of different local practice. Practices differ, even on titles, in different parts of the country, as do experiences of management of tenement properties, particularly those that are in mixed ownership. The strong view on compulsion is widespread throughout the country; it is not concentrated in certain places.

The views are mixed, but there is cohesion on the points that the tenement management scheme is a good thing; that all future titles should conform to it; and that it should certainly be used if there is a conflict between titles or a gap in titles. The only difference of opinion among local authorities is about whether we should go to the final stage of total compulsion. Up to that point, most authorities by far are in agreement.

Councillor Gilmore: In Edinburgh, we have got round the issue through the statutory notice system. However, the disadvantages of the system are that it is imposed on people and it often comes late in the process. We want to encourage owners to take action sooner rather than later because that is better for everybody and, apart from anything else, tends to be cheaper than waiting until there is a real problem. We have asked why so many people use the statutory notice route and we think that part of the reason is that people find it difficult to deal with the titles.

The difficulties with titles that we feel exist in Edinburgh can be overcome by the statutory notice system, which can come into play relatively easily. Because the system is not tied to grants, we have not failed to use it because of the expense; we have used it whenever we can. However, people rely on the system, which means that they do not come together collectively to resolve problems. We feel strongly that if we want to make progress, we need a culture in which owners plan for the future and get together to make agreements, rather than simply deal with crises when they arise.

We do not have a factoring tradition in the east of Scotland. Factoring is another way in which people overcome issues with titles. We are not convinced that people understand their titles or find them easy to use. People get round the situation either through good factoring or, in Edinburgh, through statutory notices. However, we would like people to tackle the issues themselves and to use fewer statutory notices.

Karen Whitefield: Is the Executive's definition of scheme property right or should something be added to it? Angus Council has suggested that chimneys should be included in the definition. Are you content with the definition? If not, what should be added to it and why?

Ron Ashton: The definition is a good starting point, but we must discuss the detail as the bill proceeds and as the regulations under the bill are produced. Angus Council has strong feelings on the issue because we have had many difficulties with chimneys and how they are covered in titles. Many of the definitions require close working in the longer term between local authorities, other parties and the Scottish Executive to ensure that the regulations are clear. We come back to the point that the scheme must be clear so that everybody knows what is going on, what the definitions are, what is covered and what can be done.

16:15

Karen Whitefield: Rule 1.5 of the TMS makes provision for maintenance and incidental improvements of tenement buildings. COSLA and Angus Council have suggested that that provision should be made for improvements that are not incidental. What kind of improvements do you envisage, and what would you like the TMS to cover?

Councillor Gilmore: It is often useful to give specific examples. The example that we have used in this context is installing a door-entry system where there has not been one before. What would normally be regarded as an improvement is now seen as the modern standard for a stair front door. It is not simply a case of replacing the old door to put in a door-entry system, or the repair or maintenance of what is already there. The work has to be done to a standard that would be widely recognised as desirable and—probably—necessary. If it is possible to do that by majority decision making, we think that that would be hugely beneficial to many stairs.

There are other examples. If the roof is being repaired, is insulation an improvement or simply a sensible addition? The distinction is too narrow. There are many issues that people think that the bill will be able to deal with. They think that the bill will resolve their problems, but that will not happen. People will still have the same problems in getting works done. Generally, a majority of people want such works to get done, but they get stuck when one or two people, for whatever reason, are not willing to get involved.

Karen Whitefield: Will there be an issue about getting the balance right? You are right that most people want their properties to be kept up to a good standard, but there might be a situation in which low-income families want to contribute to the improvements, but cannot afford to do so at the time. How would you ensure that any additions to the scheme would not be so draconian that they might disadvantage such people who have just managed to buy their property and no more?

Ron Ashton: One must think about people's quality of life. A prime example is that one might want to improve the fabric of a building, but not necessarily at huge expense. Local authorities sometimes get a bad name for having grandiose schemes that cost thousands and which people cannot afford. We are not talking about that; we are talking about implementing relatively simple and easy schemes, which will meet housing quality standards that we are all in favour of raising, immaterial of the sector.

We are looking at fuel poverty, insulation, external doors, door-entry systems—things that will add to people's quality of life, in which a recalcitrant or absent owner might not have any interest. We need to get into the fine detail and get the balance right, as you were correct to say, between grandiose modernisation schemes and things that can make a genuine difference to the people who occupy the block.

Councillor Gilmore: We are sensitive to the possible risk that so-called improvements, as currently defined in the bill, could be imposed on people who cannot afford, do not want and do not see the need for such improvements, particularly when a local authority or registered social landlord is the majority owner.

It ought to be possible, however, to find a form of words that would extend the current definition of an improvement to the point where people could agree that commonsense measures such as security arrangements or dealing with fuel poverty would be genuine improvements that should be included in the TMS, without taking it to the extent that any majority of owners—whether that majority is a council, RSL or just a majority of individual owners—could impose their will on other owners. We are very keen that people should make such decisions as a collective and that a group of owners should come to their own views on what should be done.

A majority of owners imposing their will on the other owners does not necessarily get the best results. Further, it does not encourage people to plan for the future; people who have had a bad experience of something being imposed on them will be reluctant to get together to do anything else, because they will feel that goodness knows what will happen the next time. Part of the process has to relate to shifting the balance back to the owners and away from authority, in whatever form, telling owners what to do. However, the legal position has not made that easy. The easier it is for people to organise repairs, the less they will need someone coming in as Big Brother to impose something on them.

Karen Whitefield: Liability for repairs under the tenement management scheme will normally be apportioned evenly among owners unless a flat has floor space of more than one and a half times the floor space of another property. Do you think that there will be problems with that definition? Is the choice of that differential correct?

Ron Ashton: To be perfectly honest, there will be a problem regardless of what formula is used. There is no panacea. Although the use of a clear-cut differential allows everyone to see what is happening, problems will be caused at the margins in situations involving the calculation of the nearest square foot and so on. There will be all sorts of complications involving questions of who has measured what and in what way the measurements have been taken. However, those problems will arise only where there is disagreement. As Councillor Gilmore said, we need to ensure that people sit down and agree on what is the best way forward and what is in the interests of the block.

Councillor Gilmore: If you try to make laws based on the most unusual situation that you can think of, you will end up with some pretty complex laws. The advantage of the arrangement that we are discussing is that it is relatively easy for most owners to understand. It is not based on some obscure provision from the past that people find baffling. For example, some people's obligations are expressed in terms of feu obligations and feu duty payments, which are long gone.

The end result of trying to account for every unusual situation will be worse than the end result of our simply trying to get the majority of situations right. If a minority of people still want to litigate, that will be possible, but we believe that the basic tenement management scheme should be as simple and straightforward as it can be. That is where the disagreement arises about whether the scheme should apply to all properties. Some of us

think that it would be simpler if the scheme applied all over.

Our experience has been that, on the whole, people do not find the equal shares to be onerous. We use an equal-share system when we issue statutory notices and we have found that, on the whole, people accept that. One or two people will dig through their title deeds to find a reason why the situation is unfair, but, as they are the people who have let the property get into that condition, it is perhaps not too unfair. The Edinburgh stair partnership that we have started to implement uses that arrangement as well and people seem quite happy with it. When the arrangement is suggested to them, people say that it is easier than the situation that they have had to deal with before, which they might not have fully understood. It has not been difficult to persuade people that the arrangement is the most straightforward one.

There will always be exceptions, but perhaps they do not provide the best point from which to start.

Karen Whitefield: Earlier this afternoon, the Scottish Consumer Council made strong representations to us about the need to enforce the TMS. I think that COSLA has similar concerns. Who should be responsible for enforcing decisions that are made under the TMS? How should such decisions be enforced if there is a need for sanctions against those who fail to comply with a decision that has been taken?

Councillor Gilmore: Is the question how payment by other owners should be enforced?

Karen Whitefield: Yes.

Councillor Gilmore: There must be better systems for that. We are concerned that requiring people to go to court to recover payment from other owners will mean that the process is quite complex. Our local authority has the power to impose a charging order so that those who refuse to pay up are eventually required to do so. It is important that we have a simple system whereby the money can be obtained relatively painlessly once a majority decision has been achieved.

Ron Ashton: I agree. People tend not to go to court because of the cost, complexity and timescales that are involved. Any system must be simple, easy for people to understand and, ultimately, enforceable. The hope is that people will reach agreement initially, as people should get into these situations only where there are real problems. There needs to be mediation and arbitration to move the system forward.

Mike Pringle: I welcome Sheila Gilmore to the committee. It is nice to see you again.

First, you mentioned the statutory notice system—I understand that it is unique to City of Edinburgh Council—and said that you would prefer fewer statutory notices to come to the local authority. Do not those notices often come to the city council because the proprietors in the stair are in dispute and cannot reach agreement, for example because one of them refuses to pay? Is not that why the local authority is asked to impose a charging order to force the person to pay eventually?

Secondly, you mentioned majority decisions. The bill will require that decisions be taken by a majority, but that will apply only to the decisions of tenement management schemes. Should the requirement that decisions be taken by a majority be extended to all schemes that involve people getting together rather than just to tenement management schemes? Clearly, if a majority decision was enforceable, the council would get fewer cases of people asking for a statutory notice to be enforced, as people could go through the process of getting the money via the courts. I understand that the council ends up receiving so many statutory notices because decisions are currently required to be taken unanimously.

Councillor Gilmore: The problem arises from the present state of many of the titles. People either do not know what the titles say, or they cannot fathom what the titles say, or, at best, the titles say that decisions on the property should be unanimous.

Unanimous decisions are often extremely difficult to arrive at. People may not be prepared to take part for all kinds of good reasons. Sometimes, the reason is sheer awkwardness; sometimes it is financial; sometimes, it is just that people take a different view about the phasing and timetabling of repairs. People may simply not come along to a meeting to agree. Letters might be sent round the stair, but if somebody does not reply, the whole thing may fall flat. People have found it difficult to reach agreement. That is why we take the view that the titles are not very clear; if they were, many of those problems would not arise because people would be much clearer about their obligations.

There is a tendency for people to say that they will just go for a statutory notice. One frustrated owner can apply to start the process—not always to their neighbours' delight and enthusiasm—but once the process has started, it tends to work its way through inexorably. The statutory notice process is quite slow, but because it is available and relatively efficient, people often use it even though it can mean that the gap between when the problem is identified and when it is seen to is longer than is desirable.

The statutory notice system is not a wonderful answer. If a person has a leaking roof that goes on leaking for two years while the statutory notice

wends its way through the system—it can take that sort of time, especially if there are objectors—they will end up with an even bigger and worse problem to deal with. We suggest that, for decisions on maintenance, and on appointing a property manager, the majority decision-making rules should take precedence over existing titles. That would allow a much smoother decision-making process to be put in place.

16:30

Mike Pringle: So, do you think that majority decision-making rules should be extended to all tenements?

Councillor Gilmore: Yes—on those two particular issues that you mention.

Mike Pringle: Do you mean not only for the TMS, but for all tenements?

Councillor Gilmore: Yes.

Maureen Macmillan: On dispute resolution, should the Executive have provided in the bill for referral to mediation services, or do mediation services not exist throughout Scotland? If provision were made in the bill for referral to mediation services, would that be an empty gesture because the mediation services do not exist? Could local authorities have a role in mediation?

Councillor Gilmore: Mediation is often put forward as being the panacea to all ills. We have in Edinburgh a mediation service that conducts the whole range of mediation. The service deals sometimes with disputes over the kind of issues that we have been discussing, but it probably deals much more with neighbour disputes and disputes about noise. In theory, mediation is available as a tool for disputes such as we have been discussing, but I do not know whether existing mediation services could take on a huge amount of such work.

We fund our service to do a certain amount of mediation in respect of neighbour disputes and antisocial behaviour, but we do not necessarily fund it at this stage to do mediation such as has been mentioned. I do not know whether people would be willing to pay for a mediation service to come in—I presume that that could be done. If such mediation is to be an extra burden on local authority funding, there will be matters of staffing and timescales. Not every local authority area has a mediation service, although I think that the intention is to increase provision. I suspect that our service would say that it is funded to do a certain amount of work, that it has a certain number of staff and that it cannot take on a huge case load. There is a financial implication.

Mediation is about people falling out; we are keen to get people to come together regularly. We have introduced the stair partnership; it is relatively new and 70 tenements in the city are currently taking part. That is not mediation, but it is about people getting together and having a proper discussion that is based on clear information. People sign up for it and pay an annual fee and what they have found comforting about it is that they get good advice. Part of their signing up involves their accepting equal shares and majority decision making, but they also get expert assistance to help their understanding of what a survey is telling them and they get help in getting contractors.

People find it difficult to deal with such matters themselves—they are wary of some of the so-called professional advice that they get because they do not think that it is independent enough and they therefore distrust it. Work often collapses because people do not agree—some say that they will not go with a contractor because they think that the contractor is unreliable or does not understand what needs to be done. Part of the problem is about provision of fundamental information; matters are much easier if people have information in front of them.

The Convener: Does that answer your question?

Maureen Macmillan: Yes—to a certain extent. Some people have said that such disputes are neighbour disputes and so should be covered by mediation. Instead of people in a stair applying for a statutory order for a repair, they could apply for mediation.

Ron Ashton: There are various levels of mediation: there is binding mediation as well as voluntary mediation, so there are various ways of dealing with such matters.

We are trying to say that there has to be a stage before a dispute goes to court because the court process can become very complex, lengthy and problematic. We are trying to encourage people to get together to talk through their differences so that a higher percentage of disputes do not go to court because they have been resolved locally. The principle of mediation is the important matter to pursue; how it is carried out can be decided later.

The Convener: Have we covered members' questions on insurance?

Jackie Baillie: We have covered two questions in particular, but there is one question that I want to ask, on a subject on which COSLA's written submission is silent. That is the issue of improvement and repair grants. The housing improvement task force made a series of recommendations that covered the financial position of low-income flat owners and called for a range of revised criteria, which is not necessarily a

matter for legislation. Does COSLA or the City of Edinburgh Council have a view on what would be required? Would you build on the improvement and repair grants, or should there be something different?

Councillor Gilmore: There is a need for further legislation and guidance both to empower and, to some extent, to finance that. We are especially interested in looking for alternatives to the traditional grant mechanism and in considering whether local authorities should have a role not only in assisting people in getting loans, but in providing loans or setting up some sort of organisation that can provide them.

When the task force considered the issue, there were some legal obstacles in the way of authorities doing all the things they wanted to do. Some of it is not about law, but about changing or expanding the way in which things are done. The achievement of co-operation is assisted by people being able to get financial assistance. Whether such assistance has always to be in the form of the traditional grant is another matter; that is an expensive method that does not always reflect the advantage that owners get. The problem for many owners is that they cannot afford to carry out repairs immediately. They may have bought their property recently and have a large mortgage, or they may have a low income but a reasonable equity, as is the case for some older owners.

We are interested in exploring authorities' ability to give people equity loans that could be repaid on resale so that people can have repairs done and properties can be improved. We do not want to revert to the 1980s situation in which very big grants were given, many people benefited directly as individuals but nothing came back. However, equally, if we had not given some such assistance, an awful lot of tenements in the city would have deteriorated to the point of collapse and demolition. We need to strike a balance—there is a need for a bit more legislation, and the private sector housing bill that we have been promised will perhaps allow us to make some progress without going back to past practices.

Mike Pringle: I have a question for COSLA, which represents 32 local authorities. Do you think that there are any omissions from the bill?

Ron Ashton: We represent 31 local authorities at present.

Mike Pringle: I am sorry.

Ron Ashton: The bill is a pretty good piece of legislation that has been a long time coming. I first started to examine the matter with a Scottish Law Commission report in the late 1970s, when I started work. I am glad that we have got to where we are and I want the bill to be delivered.

Mike Pringle: Is there anything missing from it?

Councillor Gilmore: We are disappointed that the encouragement of owners associations, which was discussed in some of the early consultation on the bill, has dropped out of the bill. I understand that that is because it was considered to be outwith the powers of Parliament because it was a reserved matter. However, I would hate to think that that would forever be an obstacle to dealing with the matter. It is a technicality—which has, perhaps, to be overcome—that owners associations are regarded as business organisations, which are a reserved matter.

If owners associations cannot be encouraged in the bill, we would like that to be done in the next piece of legislation so that we can empower and enable groups of owners to set up their own associations, which would allow owners to operate as a collective. That would help with some of the enforcement issues that have been raised.

Our authority—and, I think, a lot of other authorities—were disappointed that the advice was that such encouragement had to be dropped. We hope that an effort can be made to overcome that difficulty. When it comes to what are or are not reserved matters, nothing is insuperable. There may be a way around the difficulty in time for the next piece of legislation in this field.

Jackie Baillie: I have a tiny comment to make rather than a question. Today we have heard about a variety of means that are perfectly within our scope by which we could encourage owners associations. Therefore, I would not be willing to wait for more legislation; we can do something practical now.

The Convener: As there are no further questions, on behalf of the committee I thank Councillor Gilmore and Mr Ashton for being with us this afternoon. Your contribution has been most helpful.

Annual Report

16:41

The Convener: Item 2 on the agenda is our annual report, which we have to compile. Members have been issued with a draft and we are required to amend it or agree to it. I have one minor drafting suggestion.

Jackie Baillie: Oh, no.

The Convener: It is purely semantics. At the foot of the first page, the last sentence currently reads:

"The Committee also began a review of legislation passed in the first Parliament, the Adults with Incapacity (Scotland) Act."

I suggest that we insert the words "commencing with" after the comma after the word "Parliament". That would make a little more sense. Apart from that, do members agree to the draft?

Members *indicated agreement*.

Draft Arbitration Bill

16:42

The Convener: Item 3 on the agenda is the draft arbitration bill. The committee will remember that I undertook to meet Lord Dervaird and Lord Coulsfield. I duly did that, with Nicola Sturgeon—

Members: No.

The Convener: I beg you pardon—with Karen Whitefield, not Nicola Sturgeon. Pauline McNeill was also there, along with Margaret Mitchell from the Justice 1 Committee. Lord Dervaird and Lord Coulsfield simply explained to us what lay behind the bill. Also present at the meeting was a solicitor—a Mr Arnott—who has extensive experience in arbitration, and we were able to ask questions.

We gave no commitment whatever; we simply undertook to report back to the committee that the meeting had taken place. It occurs to me that the Executive should be informed of what has been happening. It may be that the Executive has an interest in the matter, although I have no idea. If the committee agrees, I think that we should write to the Executive to confirm that we held the meeting, and to ask the minister whether she has views or opinions on the current state of arbitration in Scotland and whether the Executive has any legislative intentions. If that is acceptable, we will have a letter drafted to that effect.

Members *indicated agreement*.

The Convener: I remind members that tomorrow we have a joint meeting with the Justice 1 Committee to discuss the budget process. That meeting is at a quarter past 10 in committee room 1.

Mike Pringle: Oh, good. I am glad that the meeting is not in the Hub.

The Convener: The next meeting of the Justice 2 Committee will be on 27 April. At that meeting, we will take evidence from the minister. We also propose to consider a report on our youth justice inquiry and to consider our response to the Procedures Committee's legislation inquiry.

Mike Pringle: We did not decide to try to ask the insurance industry for its views. There seem to be many differing views on how insurance will work in the Tenements (Scotland) Bill.

The Convener: I am sorry—what are we talking about?

Mike Pringle: I am going back to the Tenements (Scotland) Bill—

The Convener: The Tenements (Scotland) Bill?

Mike Pringle: Yes—you were saying that the minister is coming to give us evidence. Was any thought given to trying to get some opinions from insurance organisations about how the Tenements (Scotland) Bill will work?

The Convener: You mean the insurance companies or the insurance industry.

Mike Pringle: Yes. Does not it seem to be a contentious area?

16:45

The Convener: Have there been any submissions from any parts of the insurance industry?

Anne Peat (Clerk): I cannot remember. Some of those whom we approached to give evidence said that they were not in a position to add anything, but I cannot remember whether that included anyone from the insurance industry. I will need to check that and get back to you.

The Convener: I believe that mortgage lenders were invited to submit evidence, but they said that they had nothing to add. In terms of taking oral evidence, members will see that our timetable is squashed to the point of impossibility. I can certainly offer to write a letter to the appropriate body in the time that is available, if that would assist the committee. There is a body called the Association of British Insurers.

Mike Pringle: I wonder whether other members believe that it would be helpful to do that.

Jackie Baillie: It would be helpful. A number of points have been raised not only in this meeting, but at our previous meeting, some of which were contradictory. We need to get to the bottom of those.

Mike Pringle: That was my thought.

The Convener: I suggest that we leave it to the clerks to determine—[*Interruption.*] It has been pointed out to me that we received a written submission from the Association of British Insurers.

Mike Pringle: Oh, right. Perhaps I have not seen that.

Jackie Baillie: Can we check whether that submission addresses the specific points that have come up in evidence?

The Convener: If it does not and any points need clarification, you can let the clerks know and we will draft a letter. We can undertake to do that.

Maureen Macmillan: On owners associations or management schemes being partly reserved matters, that issue came up during the passage of the Title Conditions (Scotland) Bill and there was much discussion about it in committee. I wonder whether the clerks could look back at those debates to see what was said in the end.

The Convener: I understand the technicalities that are involved, in that the bodies to which you referred are constituted or defined as business enterprises. That is what it makes it incompetent for us to legislate on them.

Maureen Macmillan: A formula was used during consideration of the Title Conditions (Scotland) Bill that enabled us to address the issue. However, I cannot remember exactly what that formula was. Could we have a wee look for that?

The Convener: We can arrange for the clerks to do so. If there are no other matters arising, I bring the meeting to a close.

Meeting closed at 16:47.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Thursday 29 April 2004

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178