SOCIAL INCLUSION, HOUSING AND VOLUNTARY SECTOR COMMITTEE

Wednesday 20 September 2000
(*Morning*)

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SOCIAL INCLUSION, HOUSING AND VOLUNTARY SECTOR COMMITTEE
29th Meeting 2000, Session 1

CONVENER

*Ms Margaret Curran (Glasgow Baillieston) (Lab)

DEPUTY CONVENER

Fiona Hyslop (Lothians) (SNP)

COMMITTEE MEMBERS

*Bill Aitken (Glasgow) (Con)
*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Mr John McAllion (Dundee East) (Lab)
Alex Neil (Central Scotland) (SNP)
*Mr Lloyd Quinan (West of Scotland) (SNP)
*Mr Keith Raffan (Mid Scotland and Fife) (LD)
*Mike Watson (Glasgow Cathcart) (Lab)
*Karen Whitefield (Airdrie and Shotts) (Lab)

*attended

WITNESSES

Liz Cameron (Edinburgh In Court Advice Project)
Linsey Lewin (Law Society of Scotland)
John McNeil (Law Society of Scotland)

CLERK TEAM LEADER

Lee Bridges

SENIOR ASSISTANT CLERK

Mary Dinsdale

ASSISTANT CLERK

Rodger Evans

LOCATION

The Chamber

Scottish Parliament

Social Inclusion, Housing and Voluntary Sector Committee

Wednesday 20 September 2000

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:38*]

09:44

Meeting continued in public.

The Convener (Ms Margaret Curran): I ask members to agree that the items at the committee's next meeting on questions for witnesses and the draft report on drug misuse and deprived communities be taken in private. Are we agreed?

Members *indicated agreement.*

Mortgage Rights (Scotland) Bill

The Convener: I invite Cathie Craigie to give evidence on her member's bill, the Mortgage Rights (Scotland) Bill.

Robert Brown (Glasgow) (LD): Before Cathie gives evidence, I would like to declare an interest in relation to both members' bills. I am a consultant for Ross Harper and Murphy solicitors and a member of the Law Society of Scotland. I just want to ensure that that is transparent.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I thank the committee for giving me this opportunity to give evidence on my member's bill. I have circulated a briefing paper that highlights the main aspects of the bill. The explanatory notes to the bill are also a good guide to the aims of the bill.

When I was a councillor on Cumbernauld and Kilsyth District Council and housing convener for North Lanarkshire Council, many people came to my surgeries with mortgage problems. I have long held the view that many of those people and their families could have been spared the indignity of repossession had the courts been able to take all their circumstances into account. Last August, the Scottish Association of Law Centres proposed Scottish legislation that would allow the courts to consider all the debtor's circumstances. That provided me with the impetus to introduce the Mortgage Rights (Scotland) Bill. I am committed to the changes that the bill would make and I am committed to the principle of helping people to remain in their own homes. We could help hundreds of people every year.

As some members will know, the current legislation does not allow sheriffs to use their discretion to grant a decree against a borrower who, for whatever reason, has fallen into mortgage arrears. English courts have had the power to exercise discretion for many years and can help people whose circumstances have changed. In England, people can pay back their arrears over a sensible period. That allows people to stay in their homes.

Figures from England show that, in about 60 per cent of mortgage cases, the debtors persuade the courts to suspend the order in favour of the creditor; of that 60 per cent, about 75 per cent manage to clear their arrears. In real terms, about 45 per cent of mortgage defaulters in England manage to stay in their own homes, having been given the time to get back on their feet. In Scotland, about 2,000 homes are repossessed every year. If we translate the English figures to Scotland, we are suggesting that 900 families could stay in their homes.

Those figures are based on the 1998 survey. There have been some changes in the latest figures issued by the Scottish Executive, which are contained in the briefing paper. In 1998, 900 families that had been made homeless through mortgage default sought local authority housing. They were considered to be in priority need for housing by the local authority.

Although the English approach is interesting, we cannot simply adopt their legislation. There are clear differences between Scots and English property law. There is no point simply tying a tartan ribbon around the English legislation. We need legislation that addresses the specific circumstances in Scotland.

Although no explicit power to suspend repossession orders currently exists in Scotland, courts have the discretion to use their general common law powers to stop proceedings—that is known as a sist of process. The courts can also postpone the implementation of a decree—that is known as a suspension of extract. However, in practice, repossession orders are rarely, if ever, suspended for the purposes of protecting debtors. The key need is to provide an explicit statutory power linked to criteria on which the court can exercise its discretion. As I said, if the courts could exercise discretion, many families caught up in mortgage default could pay off their arrears and stay in their homes.

I will give the legislative background to the existing powers. Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 created the standard security known to most of us as a

mortgage. That was the only means of securing debt over land and buildings. The 1970 act sets out 12 standard conditions that the parties to a mortgage are required to adhere to, either as set out in the act or as varied by agreement between the parties involved.

The first seven of those conditions concern the maintenance of the value of the property and place obligations on the borrower, which the lender can carry out if the debtor fails to do so. The remaining conditions deal with the lender's right to enforce security—for example, to pursue payment of arrears from the borrower and to allow the lender to recover, from the borrower, any expenses incurred in exercising those rights. When the borrower defaults on mortgage repayments, or otherwise fails to carry out obligations under the standard security, the lender can take action to—among other things—sell or enter into possession of the property.

The 1970 act provides three distinct processes that lenders can use when they seek to enforce their rights. The explanatory notes to the bill contain clear guidance and illustrations of how that is effected. I will not go into great detail, because I am aware of the lack of time, but I will outline the three processes.

First, a calling-up notice is issued by the creditor, requiring the debtor to repay the whole sum borrowed and any interest within two months. Secondly, a notice of default is issued by the creditor, requiring the debtor to remedy the default within one month. The notice of default expires five years from the date of notice. Thirdly, under section 24 of the 1970 act, the creditor can apply to the court for a warrant to obtain the right to exercise any of the remedies available to the creditor when the debtor is in default.

In addition to those three processes, section 5 of the Heritable Securities (Scotland) Act 1894 provides that, when a debtor is in arrears, the creditor can apply to the court to eject the debtor from the property. I will not go into further detail, as those processes are outlined in the explanatory notes.

I hope that the Mortgage Rights (Scotland) Bill will become:

"An act of the Scottish Parliament to provide for the suspension in certain circumstances of enforcement rights of a creditor in a standard security over property used for residential purposes and the continuation of proceedings relating to those rights; to make provision for notifying tenants and other occupiers of enforcement action by a creditor in a standard security; and for connected purposes."

That is what is stated in the bill. I will put it into plain English—Robert Brown is familiar with the legal speak, but most of us are not. I want my bill to allow the courts to consider the personal and financial circumstances of the borrower when deciding whether to grant the order asked for by the lender and to provide greater protection and information for the tenants of those in default.

As I said, I believe that, by allowing the courts to take all the debtor's circumstances into account, we can reduce homelessness and ensure that lenders receive payment in full on the money that they have loaned on the property.

The figures that I have quoted were given to the Executive by the local authorities and the courts. However, many people hand in their keys when they find themselves faced with court action, so the process does not get that far and those people are not included in the statistics, as the committee heard from Shelter Scotland last week.

People find themselves in court and do not get the opportunity to explain why they have defaulted on the mortgage. Under current Scots law, the issue is black and white. When the borrower goes to court, the sheriff is faced with a yes or no decision. He is not allowed to take everything into account.

Where a lender has taken action for repossession to sell or enter into possession of the property, the bill makes provision for the sheriff to take everything into account and to suspend the enforcement of the process if such action is appropriate in his view. To enable the tenant to keep their home, the court will be required to consider whether the applicant might be able to repay the debt or arrears or fulfil the obligations under the standard security within a reasonable time. It will allow for the enforcement process to be delayed to give the applicant and others staying in the property time to find alternative accommodation.

The bill contains a section that deals with the application to suspend enforcement of standard security. That is outlined in the brief and, to allow time for discussion, I will not go into it in great detail. It deals with what usually happens when a creditor has issued a calling-up notice or a notice of default or has made an application under section 24 of the 1970 act. The proposed section allows the debtor or the proprietor, where the proprietor is not the debtor, to apply to the court for suspension of the creditor's rights of enforcement. That is the important point. A debtor or proprietor can apply only where the property subject to the security is that person's sole or main residence. The section also allows for the debtor or proprietor's non-entitled spouse—for example, where the couple have separated—to apply to the court. Applications to the court must be made within the time limit specified—not later than one month after the expiry of the notice, which is specified in the default.

Section 2 deals with the disposal of the application. Where the court considers it reasonable in all the circumstances, it may suspend the creditor's rights to such extent, for such period and subject to such conditions as it thinks fit. That will give the applicant reasonable time to remedy the default, where, in the view of the court, the applicant is likely to be able to achieve that, or give the applicant and others staying at the property sufficient time to arrange alternative accommodation and avoid risking homelessness. Where the applicant clears the default while an order is in force, the standard security has effect as if the default had not occurred.

A calling-up notice requires the debtor to repay the whole loan rather than simply make good any arrears or rectify any other forms of default. In this case the default is the failure to comply with the notice. As such, if the court decided to give the applicant time to remedy the default, the applicant would be required to repay the whole sum borrowed and any interest, which for most debtors would be extremely difficult. By opting to serve a calling-up notice rather than a notice of default, a creditor would effectively deprive the debtor of the opportunity of obtaining an order allowing time to clear the arrears or otherwise rectify any default. The effect of section 2(4) of my bill is that the court may suspend enforcement of the calling-up notice until the notice expires under the 1970 act. By attaching conditions to the order, the court can thus allow the applicant to repay the arrears only, rather than the whole debt as required under the calling-up notice.

Section 2 also allows the creditor or the applicant to apply to the court to change the terms of the order or revoke it, or further to continue proceedings to a future date.

Section 3 of the bill, which gives effect to the schedule, deals with the notices to debtors, proprietors and occupiers. It amends the forms used in connection with a calling-up notice or notice of default and provides for notices to be given to the debtor and proprietor where a creditor applies to the court for a warrant under section 24 of the 1970 act or commences proceedings under section 5 of the 1894 act. The section also provides for a notice to be sent in each case to the occupier of the property. The notices, which will be sent by recorded delivery, inform each party of their rights.

10:00

The bill would allow the courts to consider the personal financial circumstances of the borrower. Over the past year, I have thought carefully about the provisions that would enable those aims to fit into the legislation. I consulted interested organisations before drafting the bill and asked them for comments on the draft bill. I believe the bill will help in the fight against homelessness. It will not solve all the problems, but it will certainly avoid many of the cases of homelessness that result from mortgage default.

At present, a debtor who gets into difficulties should contact the creditor as soon as possible and try to come to some arrangement. That works in the majority of cases and many lenders work with borrowers to reschedule their loans. Most of the main high street lenders are signed up to a code of guidance, but we know that other lenders are not so understanding and have not signed up to the code.

Some borrowers, for whatever reason, do not face up to their difficulties or seek help. If they do not get help, by the time the case gets to court it is too late. Creditors sometimes feel that they will get a response from debtors only by taking them to court and, by that time, the house is lost. Some people do not take on board the implications of borrowing money, and some people who take out second mortgages against their house run the risk of losing their home. We understand the difficult financial choices that people—especially people with children—sometimes have to make when they fall on hard times. Debtors need a chance to draw a line under their problems and come to an arrangement with their creditors. I believe that my bill would give debtors that chance.

Tenants can also be unwitting victims of repossessions. Usually, the tenant and the creditor do not know of each other's existence. The first the tenant knows about a repossession order can be when the sheriff officers arrive at the door. My bill allows for the tenants to be given notice of default notices so that they can take legal advice. That will give them time to find alternative accommodation.

I hope that committee members will agree that my bill helps to address the difficulties faced by many families and that they will support its attempts to tackle homelessness.

The Convener: Thank you, Cathie. I am glad that you talked about your bill in plain English, although from time to time you sounded like a lawyer. There has been some opposition to the bill. Where has that opposition come from?

Cathie Craigie: Opposition to the bill is relatively weak. I have consulted Shelter, the Scottish Association of Law Centres, the Chartered Institute of Housing and the Council of Mortgage Lenders. Although the Council of Mortgage Lenders has some concerns—and you may want its representatives to give evidence—it has seen a similar system work in England without too many difficulties for its members.

Members of the Council of Mortgage Lenders have been very helpful in drafting the bill. They will have comments to make, but their objections are not insurmountable. I am sure that, given the opportunity, we can work through any difficulties. The Council of Mortgage Lenders has a code of guidance, which its members follow. However, I know that there are always people who, when they find themselves in difficulties, hope that the problem will just go away. They expect to get back on their feet—they may be getting a new job or experiencing changes in family circumstances—and think that they will be able to deal with their debts before the case gets to court.

Those are the people who can fall through. As members will see from the figures, if people who have had their house repossessed due to mortgage default apply to a local authority for housing under the homeless legislation, they will not be deemed to be in priority need if they have been using their cash for leisure pursuits and enjoyment rather than to pay for the roof over their heads. However, 900 families were deemed to be in priority need as a result of mortgage default, so the local authorities must have felt that there were grounds for treating them in that way. Given the opportunity, I am sure that the courts would do the same and people would be able to remain in their homes and avoid the indignity and stress of repossession.

Mike Watson (Glasgow Cathcart) (Lab): I congratulate Cathie Craigie on her bill and on her presentation. I also congratulate her on making a rather more judicious choice of subject matter for a member's bill than has been the case with some others. If she would care to discuss a swap, I will see her later.

Paragraph 3 of the member's briefing on repossessions in Scotland, which is not a subject that I know a lot about, says that the total number of repossession orders has increased from around 2,000 in 1994 to almost 6,000 in 1999. The next paragraph states:

"The Council of Mortgage Lenders estimates that their members repossessed around 3,000 houses in 1999."

Who repossessed the other 3,000 houses in1999?

Cathie Craigie: There are other lending establishments that are perhaps not members of the Council of Mortgage Lenders.

Mike Watson: I am not clear who that would be.

The Convener: Would that be the banks?

Cathie Craigie: No. Most of the high street banks are members. The establishments that are not could be the people whom I have previously described as being the folk who advertise in the pages near the back of the newspapers. The figures quoted are from statistical information produced by the Scottish Executive. If Mike Watson wants, I could try to research the figures a wee bit more. Sometimes the figures are unclear and information about who has requested repossessions is not available through the courts. Work may be done on that in the future, but I can try to get further details now if that would help.

Mike Watson: I do not know whether we have time to do this, but perhaps we could ask the clerk to find out who accounts for the other half. The Council of Mortgage Lenders has given us evidence, but I would have thought that it dealt with about 90 per cent of repossessions—if it accounts for only half, we need to ask questions about the other half.

A couple of points arise from the Law Society of Scotland's briefing note. Section 2(2) may already have been mentioned this morning, so I apologise if I missed it. The Law Society of Scotland believes that applications to the court should be competent only if the property is the applicant's sole residence. If someone owns more than one property, we would not expect them to be able to apply. Presumably there will be some way of avoiding people utilising the legislation in respect of either property.

Cathie Craigie: The intention is to protect a person's main residence—that is made quite clear in the bill. In deciding a case, a court will take all the circumstances into account. If the property being repossessed is a holiday home, the sheriff will be aware of that when he hears the case.

Mike Watson: Section 2(4) allows the court to give the debtor five years. The Law Society of Scotland suggests that that is too long and that the maximum period of suspension of a calling-up notice should be two years. I would be interested to hear your view on that.

Cathie Craigie: There may be a misunderstanding here. One of the purposes of the bill is to provide the debtor with time within which to pay back their debts. If a time limit of two years were imposed, the calling-up notice would come back into effect. Even if money had been repaid, the debtor would still face repossession. I believe that a period of five years is needed.

Mike Watson: So do I. I wanted to have that clarified.

Mr John McAllion (Dundee East) (Lab): I am pleased to be dealing with a member's bill that we can all support happily and that will not cause any anxiety to anyone.

Cathie Craigie: Except to me.

Mr McAllion: Except to you.

I want to follow up on Mike Watson's point about section 2(4) and the suspension of the calling-up

notice. Do you know what the position is in England? It would be helpful if there were a period of five years in England. We would then be bringing the position here into line with that.

Cathie Craigie: I would have to go through my notes, as I do not want to give the committee wrong information. I do not think that there is a time limit in England. However, I will examine my notes and come back to you on that.

Robert Brown: I take it that the five-year period would be a maximum. The court would not have to make that time available, would it?

Cathie Craigie: The court would have to take into account the person's ability to pay. If someone had eight or 10 years of their mortgage to run, it would be unreasonable to ask them to put things right within two years. A five-year period would be acceptable.

Robert Brown: In section 2(5)—

Cathie Craigie: Are you referring to the Law Society's submission?

Robert Brown: I am still on the same point. Section 2(5) would give the court the power to change the order on request. That suggests that the Law Society's point about the five-year period is a bit of a red herring, although I may have misunderstood what it is getting at.

Cathie Craigie: But the Law Society is suggesting that the period should be two years.

Robert Brown: As a maximum.

Cathie Craigie: Five years would definitely be needed.

Robert Brown: My next question relates to the point that Shelter made the other day about the need to have specific criteria attached to the instructions to the court—you will remember the things that Shelter listed. Your bill does not provide for that in any detail. You have listed three criteria in section 2(2), but they seem fairly narrow. Is it intended that, within the reasonable period referred to in section 2(2)(b), the debtor would have to clear the whole arrears? I am thinking of the situation of a separated spouse who is on benefits, can pay the interest element of the mortgage but cannot clear the arrears. Nobody is really suffering because of that, because there is equity in the house and so on. The bill does not appear to allow that situation to continue.

Cathie Craigie: I disagree. I think that the bill allows the courts to take every circumstance into account. If we were to be more prescriptive, some people might fall through the net. The debtor and the lender would have the opportunity to appear in court to put their case, and the debtor's ability to pay for and maintain their home would be taken into account. That is better than detailing the circumstances that the court should take into account; the court should be left to consider all the circumstances. Both parties to the proceedings would be able to come before the court with all the information. If it was felt that a person could maintain their mortgage by making a small contribution to the arrears over the years, that would be in everybody's interest. The borrower would not lose their house and the lender would not be forced to sell the property, which sometimes adds to the cost on the debtor. In many cases, people do not get the full value of their asset.

Robert Brown: The committee will entirely agree with what you say, but that is not what the bill says. Section 2(2)(b) talks about

"the applicant's ability to fulfil within a reasonable period the obligations under the standard security".

That is payment of the mortgage—let us not beat about the bush—and the arrears. The direction to the court does not seem to allow account to be taken of the longer-term situations that we have just been talking about. I wonder whether the section is phrased too tightly. That is not to go against the objective of the bill, but to take into account the ability to do what you just said you want to achieve.

10:15

Cathie Craigie: My opinion is that it covers the circumstances, but I would be happy to have a discussion if it were felt that something could be added to improve the bill. The intention is that all circumstances would be taken into account. I hope that, when the bill becomes an act of Parliament, there will be guidance to the courts on how to operate it.

The Convener: We could return to this, Robert.

Robert Brown: I have one other wee point relating to occupiers. This may be my ignorance, but I think that there is reference to the situation of tenants of the debtor. There can be other sorts of occupier. For example, somebody may go abroad and leave their family in possession of their house. One could think of other situations in which the people in occupation are not tenants. The notice goes to the occupier. Would people who are not tenants have any rights under the bill? I accept that the matter is enormously tortuous. I have the same problem myself.

Cathie Craigie: I had not thought about people who have gone abroad. I think that the occupier is covered. The occupier would be served with the notice, which would advise them to seek legal advice at an earlier stage than would normally be the case, such as when the sheriff officer is chapping at the door. I think that the occupier would be covered, but if it means that we have to

word that section differently, we can look at that.

The Convener: Thrashing out the issues is helpful for our stage 1 report. Thank you Cathie.

Housing Bills

The Convener: I welcome the witnesses from the Law Society of Scotland. I am terribly sorry for keeping you waiting. I welcome you warmly to the meeting. Thank you for the paperwork that you submitted. You probably know our procedure. I will ask you to introduce yourselves and give a brief introduction to your submission, then the committee will ask you questions. If there are issues that you wish to flag up for us, you will get the opportunity to do so.

Linsey Lewin (Law Society of Scotland): Thank you. My name is Linsey Lewin and I am secretary to the Law Society of Scotland's conveyancing committee. The conveyancing committee has considered a number of the new bills from the Scottish Parliament. For today we have looked at the Mortgage Rights (Scotland) Bill.

Our spokesman for the bill is John McNeil, who has been a member of the conveyancing committee for more than 30 years, on and off. He is a former convener of the committee and a past president of the Law Society of Scotland. John is the senior partner at Morton Fraser, a well-established law firm in the city, which deals with conveyancing. The conveyancing committee has considered the bill and our briefing note is based on its comments. John also has comments to make on the Family Homes and Homelessness (Scotland) Bill, but in the main it is the Mortgage Rights (Scotland) Bill that we wish to comment on.

John McNeil (Law Society of Scotland): Before we came in, we were watching the television monitor and heard the questions that were asked of Cathie Craigie about the briefing note that we submitted a fortnight ago.

I wish to speak to two points on the briefing note. The first has already been raised: a sheriff's ability to grant a court order in relation to the suspension of a heritable creditor's rights. If the property in question is the debtor's sole or main residence, we feel that it is illogical—with great respect—to apply the proposed legislation when alternative accommodation is readily available to the defaulting debtor. For that reason, we think it right and proper that the applicability of the legislation should be to a debtor's sole residence.

As regards the notices that require to be served under the Conveyancing and Feudal Reform (Scotland) Act 1970, it is clearly provided that notices to the occupier of the property presuppose that he or she is a tenant and that the purpose of the notice is to put the tenant on notice. In some circumstances, the creditor—the lender—cannot recover the possession of the property without a

court order.

We take the view that because one of the applicants for a stay of proceedings is the non-entitled spouse under the Matrimonial Homes (Family Protection) (Scotland) Act 1981—the spouse of the debtor, who is probably estranged but who carries on living in the matrimonial home and therefore has occupancy rights in the matrimonial home—he or she should be entitled to notice under the 1981 act. That does not appear to be provided for in the bill as drafted.

Those are the main points of principle we mentioned in the briefing note. The remainder of our points are mainly of a drafting nature and I hope that they can therefore be accommodated. If members of the committee wish to have any points clarified, I will do my best to do that.

I heard a few remarks about our suggestion that a stay of the effect of a calling-up notice should not be for the full five-year period. Cathie Craigie suggested that there may have been a misunderstanding on our part of the effect of a calling-up notice. With respect, that is not the case. We were fully aware of the fact that the purpose of having a five-year limit on a calling-up notice is that a calling-up notice expires after five years. If the court were to make an order limiting the period of suspension to less than five years, when the calling-up notice revived, that would mean that the defaulting debtor would require to pay the full balance of the mortgage.

We understand that that is the case, but felt none the less that the full five-year period was perhaps excessive from the point of view of the enforcing creditor and that it should be possible for the sheriff to impose a two-year period of suspension, followed by the right of the debtor to reapply for a further period of suspension of two years, making the total of four years a possibility.

The Convener: Thank you. That was very helpful. I am sure that committee members will wish to engage with you on a number of those issues. I ask you to help the committee as we try to understand these bills. Can you give us a broad outline of the procedures that are currently used by creditors against the debtors who are in default? Can you explain to us the calling-up notice, the notice of default and the application to the court under section 24?

John McNeil: Yes, I think I can.

The Convener: We are not all lawyers.

John McNeil: I am speaking from memory. Basically, there are three remedies under the Conveyancing and Feudal Reform (Scotland) Act 1970. I shall deal with them in order.

A calling-up notice requires to be served by the creditor on the borrower—the last named proprietor of the property as far as the Sasine register or the land register of Scotland is concerned—in terms of which it is stated that the borrower is in default to the extent of £X over X years and that the creditor requires those arrears to be cleared within two months, failing which the property may be sold.

Once the calling-up notice expires—and the debtor may dispense with the period of notice or agree for it to be shortened from two months to one month, or whatever—the heritable creditor, the lender, may proceed to sell the property under the statutory powers in the 1970 act, after due advertisement and after ensuring that the price that is achieved is the best that can reasonably be achieved, given the market conditions at the time.

To achieve a sale, if the borrower, the house owner, is still in residence and there is no kind of rapprochement between the debtor and creditor whereby some accommodation is made for paying off the arrears—a de facto, if not de jure, suspension of the calling-up notice—and if the parties have come to the end of their respective tethers, the creditor must go to the sheriff court for an application to recover possession of the property under section 24 of the 1970 act. That simple, short form of initial writ is presented to the sheriff court and is rarely defended, as there is no stateable defence in 99.999 cases out of 100. That is the logical progression from calling-up to recovery of possession.

A notice of default specifies the default and expires within one month. After the expiry of the default notice, the creditor cannot proceed to sell the property without acquiring an order to do so from the court. That is the basic difference. Although the default notice lasts only one month, it does not automatically, on expiry, allow the creditor to sell the property—although all the other remedies that are available to the creditor under the act can be instantly enforced.

Essentially, those are the procedures that are available under the 1970 act. As I am sure you have heard from the Council for Mortgage Lenders—whether verbally or in writing—most responsible banks, building societies and institutional lenders will bend over backwards before they invoke any of those proceedings. They may well instruct their solicitors to serve notices of default and/or calling-up, but on expiry of those notices they do not straight away proceed to exercise the ultimate sanction of selling the roof over somebody's head.

Although I am involved only as a practising solicitor, my firm acts for a number of very large lenders in a great deal of mortgage and recovery of possession work, and I understand that the creditor is forced to take the ultimate sanction only in a small minority of cases.

10:30

The Convener: That was very interesting. You probably heard Cathie Craigie say that that happens because people often take action themselves. For example, they might receive notice that legal action is being pursued against them and leave the accommodation. Do you have any figures for how many people pursue those actions?

John McNeil: No, although I understand that the statistic stands at roughly 6,000 for any given year.

The Convener: Can you give us a breakdown on how many creditors use different methods such as calling-up notices or notices of default?

John McNeil: I am sorry—I have no idea about the numbers of notices served. However, I can say that different major institutional lenders adopt slightly different practices. Although it is not appropriate for me to name names, I get the impression that there is an increasing tendency for the more thoughtful institutions to take all three steps at once when they come to the end of the road with negotiations with the borrower.

The Convener: Last week, we heard evidence from Shelter and the Scottish Council for Single Homeless, both of which are very supportive of the bill. Do you have any sympathy with the bill's overall rationale?

John McNeil: Oh, indeed. In the preamble to our briefing note we say that we welcome bringing the two jurisdictions in England and Wales and Scotland into line in this regard. As I said in my introduction, our main concern is the fact that anyone who owns a holiday home might be able to get off the hook in that respect. The bill's provisions should not operate if those people have another place to go to.

Bill Aitken (Glasgow) (Con): Not all repossessions have to go through the courts. In percentage terms, how many cases go through the courts and how many are dealt with by the other means that you mentioned?

John McNeil: I am afraid that I cannot give you any statistical analysis on that. My hunch is that the figure is roughly 50:50 where there is serious default and the creditor is contemplating or taking action. In roughly half the cases, the borrower simply abandons the property.

Bill Aitken: You have dealt with the fact that an application to the court for repossession more or less goes through on the nod because in the majority of cases there is no arguable defence. If the bill is passed and the court is required to apply the test of reasonableness, each case will probably need to be heard on an evidential basis. How is that likely to impact on the courts' time and resources?

John McNeil: I do not think that I can comment on that—I am not a litigation specialist. That said, I cannot see that there would be a flood of applications for orders under the bill. We all know that the courts are overworked and under-resourced, for reasons that can only be attributed to Europe. I do not see this as adding significantly to their work load.

Mike Watson: Mr McNeil, I think you heard my question about sole residence when you were waiting in the coffee lounge. I wondered about the difference in terminology. You talk about sole residence and the bill talks about main residence. I can see that they amount to the same thing. Is there any legal difference?

John McNeil: There is a difference. If one has a sole residence, one has only one place to stay. If one has a main residence, it presupposes that there is more than one.

Mike Watson: Maybe I have not made myself clear. The bill talks about main residence—

John McNeil: Sole or main residence.

Mike Watson: You have restricted it, then, to sole residence. You want to take "main" out.

John McNeil: We think that the provision should apply only to sole residences.

Mike Watson: That clarifies the point.

The second point is to do with whether the suspension period should be five years or two years. I understood your intention that the borrower should be able to apply for a second two-year period. Part of the thrust of the 1970 act, as I understand it, is to encourage people who have got into debt to work out a system for repaying that debt and getting back on their feet. It strikes me that—for obvious reasons—that would be easier over a five-year regime than over a two-year one.

Even if it were a two-year-plus-two-year regime, the initial aim is still to get that person or that family to pay back their debts over a period of two years, which might be too much. There is a danger that some people in that situation might say, "You are asking me to do it over two years. I cannot do that, but if I had the option of five, I believe I could." You might be excluding some people whom I understand it is the intention that the bill should cover.

John McNeil: I understand the point entirely—it is debatable. As I said earlier, we fully appreciate the reasons underlying the proposal. It could be much better dealt with by a substantive amendment to the 1970 act, to the effect that the sheriff would have the flexibility to suspend the operation of a calling-up notice for a particular period. It would therefore not be automatically

suspended for the full five-year period, after which the calling-up notice flies off—or prescribes, or whatever you like to call it—anyway under the act. If you amend the 1970 act to give the sheriff the right to restrict the operation of a calling-up notice for whatever period—

Mike Watson: Five would be the maximum.

John McNeil: Yes, with a five-year moratorium/maximum.

I meant to mention a small but important point. A number of the provisions of the act impose duties on creditors in standard securities generally. We are talking about residential property here, are we not? We must make it clear that none of this applies to commercial or other forms of property.

Mike Watson: That was the intention.

I have a couple of points on debtors. In your experience, what percentage of people who receive calling-up notices would be entitled to receive legal aid in dealing with their problems?

John McNeil: No legal aid is available for being the recipient, if you like, of a calling-up or default notice. It would be available for defending proceedings for the recovery of possession under section 24 of the 1970 act. The answer to your question, Lord Watson, is that I do not know how many people are, or are likely to be, eligible. Applications for recovery of possession are rarely defended, because there is not usually a statable defence.

Mike Watson: In the light of other answers you have given, this may not be an appropriate question, but the Law Society of Scotland may be able to provide the information. You say that you do not have figures of analysis on certain matters. Where would information on the typical backgrounds of those who get into debt and the geographical spread—whether debtors are more prevalent in Dundee than in Aberdeen, for example—of debt across Scotland be held?

John McNeil: That information is most readily obtainable from the Council of Mortgage Lenders, which keeps statistics on socio-economic groupings and so on. Obviously, there are hot spots—that is not the right term—of arrears, which tend to be in the Glasgow conurbation, although they exist, too, in Edinburgh, Dundee and Aberdeen.

Robert Brown: I wish to ask about the breadth of experience of the members of the conveyancing committee. You said that you are a conveyancer rather than a court lawyer.

John McNeil: Yes.

Robert Brown: Is that true of the other members of the committee? Are there any members who have experience of litigation—the sharp end?

John McNeil: We all like to think that we are expert property lawyers. We are not litigators.

Robert Brown: Are you aware that section 2(5) of the Mortgage Rights (Scotland) Bill, would allow the court to

"vary or revoke an order"

on application from either side? Would that not in practice deal with your objection to the five-year period of suspension? If people were not happy with the situation, they could ask for the suspension order to be lifted or for whatever else was appropriate.

John McNeil: That might well deal with my objection. That is an interesting point. Either party may apply for a variation.

Robert Brown: I have one or two more questions on what happens in practice. As you have said, it is difficult to gather statistics, but we are aware that many people give up their houses before the final stages of a court action. Do you have any feel for how many people move out after a court action is raised, as opposed to at an earlier stage?

John McNeil: No, I do not have any feel for that.

Robert Brown: Is it your experience that legal firms and mortgage companies deal sympathetically with people who come to them with problems? In my limited experience on the other side, when people have had problems, it has been difficult to get legal firms handling repossession arrangements to take much interest once court action has been raised and the case is progressing to its later stages. Does that reflect your experience?

John McNeil: It may mirror my experience of 10 or 15 years ago, but it is no longer the case. The degree of sensitivity with which these matters are handled nowadays by mortgage lenders and, in particular, by the major institutions is quite remarkable. There has been a sea change during my professional life.

Robert Brown: I wish to ask a question relating to sheriff court appeals—it arises from the Family Homes and Homelessness (Scotland) Bill rather than from the Mortgage Rights (Scotland) Bill. As you are aware, one of the provisions of the Family Homes and Homelessness (Scotland) Bill gives a right of appeal to the sheriff, rather than to the Court of Session by judicial review, in homelessness decisions. Does the conveyancing committee have any views on that? I will not press the question if it is not your area of expertise.

John McNeil: Are we talking about section 6 of the Family Homes and Homelessness (Scotland) Bill?

Robert Brown: Yes.

John McNeil: Please bear with me for a second. [*Interruption.*] What was the question?

Robert Brown: I asked whether you have any views on the provisions in section 6. As you are aware, appeals of that sort are currently limited by judicial review to applications to the Court of Session. The bill proposes a more immediate application to a sheriff in such situations. Does the conveyancing committee have a view on that?

10:45

John McNeil: We do not, because we have not had the opportunity to study the Family Homes and Homelessness (Scotland) Bill. I have concentrated on section 1 of the bill, because I cannot quite understand how it ties in with the Mortgage Rights (Scotland) Bill.

The Convener: I was going to ask Robert Brown about that.

John McNeil: With respect, the provisions in section 1 of the Family Homes and Homelessness (Scotland) Bill seem to be superfluous.

The Convener: I will come back to that at the end.

Cathie Craigie: I will have to read that exchange in the *Official Report*—I was reading something else and did not hear Robert Brown's previous question.

I want to go back to the point that Robert Brown made about the attitude of high street lenders. I acknowledge that the vast majority of high street lenders follow a code of good practice and are sensitive to people's needs. How do you feel about those who are not members of the Council of Mortgage Lenders or nationwide companies that are sensitive to people's needs? Do you think that there are problems that need to be addressed in that area? Do you think that the Mortgage Rights (Scotland) Bill would assist people who borrow from organisations that do not take into account borrowers' circumstances and needs before rushing to court?

John McNeil: I am sure that it would. I was absolutely astonished to hear that only about 50 per cent of repossessions are initiated by members of the CML. That means that an awful lot of repossessions must be initiated by other lenders who are—one can only assume—fringe banks and moneylenders in the worst sense of the term. I suspect that a considerable number of repossessions are in respect of second mortgages that have ferociously high interest rates.

People get themselves into serious bother because they have borrowed to buy a car or to do home improvements and have been unable to get an additional mortgage from their main lender for that purpose. I refer to loans made under the Consumer Credit Act 1974, which are usurious, to be frank. The Mortgage Rights (Scotland) Bill would help people who are in trouble because of such borrowing.

Cathie Craigie: Thank you for the briefing that you have given the committee and for the support that your organisation has indicated for the Mortgage Rights (Scotland) Bill. I do not want to abuse my position as a member of the committee to enter into discussions with you today, but I would be happy to meet your organisation to talk through in more detail some of the issues that you have raised.

John McNeil: Thank you. We would greatly appreciate that.

The Convener: The committee will find your evidence very helpful in its stage 1 consideration of the general principles of the two bills. Without wishing to be impolite, what you do after that is your own business.

Mr McAllion: I was going to ask for John McNeil's views on the Family Homes and Homelessness (Scotland) Bill and the appeals system for the homeless, but there is no point my doing that because he has no views on the bill yet.

I want to go back to the answers that were given to Mike Watson, when you spoke about the need for the Mortgage Rights (Scotland) Bill to apply only to sole residences, rather than to main residences. In your view, is a second or third home always a holiday home?

John McNeil: No, not at all.

Mr McAllion: Can you envisage circumstances in which it would be unfair or unreasonable to grant repossession of a second home because, for example, that might interfere with a person's employment?

John McNeil: That is a fair point. To be frank, we are not going to change our minds. We have presented our considered view. The main criterion on which a sheriff should grant a stay of execution is whether people will be rendered homeless.

Mr McAllion: I understand that that is the main criterion. However, I know from my experience as an MP that most MPs have second homes in London. I rent mine, but I know that many MPs buy their second homes in London. I realise that that would come under a separate jurisdiction.

John McNeil: That would be a nice investment.

Mr McAllion: Yes, for some MPs.

Many Scots never leave Scotland, but they live in one part of the country and work in another, which might require them to own a small flat in a

second city. To repossess such a flat might deny that person the opportunity to continue their employment. Could not there be exceptions in the legislation? The phrase "main residence" might be better than "sole residence". That would allow sheriffs the discretion to make judgments in such circumstances.

John McNeil: That is a matter for Parliament—advised by the committee—to decide. As I said, the Law Society of Scotland believes that a stay of execution should apply only in respect of a sole private residence.

Mr McAllion: If the residence belonged to an MP who earns £49,000 per year I would agree, but not everyone is in such circumstances. Some people own small properties in which they work and live during the week, but return to their main home at weekends. It would be unjust to allow such properties to be repossessed.

John McNeil: You might be right.

Mr McAllion: That is on the record. You are the first person to say that about me in a long time.

The Convener: Do you see any overlap between the two members' bills?

John McNeil: I do not understand what additional protection section 1 of the Family Homes and Homelessness (Scotland) Bill is supposed to give. It simply highlights family homes, rather than the private residences to which the Mortgage Rights (Scotland) Bill refers.

The Convener: That is something that we will consider. I assume that you do not have any other comments on Robert Brown's bill because you have not had a chance to examine it.

John McNeil: We have no more comments to make at this stage, although we probably will in future. The bill covers several different areas, some of which—appeals and so on—are not matters for the conveyancing committee. The Law Society of Scotland will have to examine the bill bit by bit and put together a composite briefing note.

The Convener: That would be helpful. We have to report on stage 1 by the end of October. It would be useful to receive the Law Society's submission by then. We will be grateful for any information that you can give us.

John McNeil: We do not see that section 1 of the Family Homes and Homelessness (Scotland) Bill adds anything to the Mortgage Rights (Scotland) Bill. The same point about sole residence or main residence applies.

The Convener: I am sure that that is something to which we will return. Thank you for your help.

John McNeil: Thank you.

Robert Brown: I should clarify that the Family Homes and Homelessness (Scotland) Bill was notified and lodged before the Mortgage Rights (Scotland) Bill. There seems to have been some misunderstanding on that point.

The Convener: We will move on. I welcome Liz Cameron from the Edinburgh in-court advice project. I am sorry to have kept you waiting. Please introduce your organisation and make a brief statement, after which the committee will ask questions.

Liz Cameron (Edinburgh In Court Advice Project): Good morning. I work for Edinburgh central citizens advice bureau. I have worked there for 15 years and have been the deputy manager for the past 11 years. My remit used to be lay representation at employment and social security tribunals. When the sheriff court was picked out to be the centre of a project helping party litigants, I became involved in running that project. I have been running it since it was set up three and a half years ago.

The briefing paper does not address any specific points in the bills. I wanted instead to give the committee a flavour of what is available in court to people who do not have legal representation. The committee will gather that I have considerable experience of people going to court. The project is particularly involved in evictions of people who have secure tenancies, such as council tenants. They must undergo the test of reasonableness as to whether they should be evicted. It is in the light of that background that I might be able to assist the committee.

People who have mortgage arrears problems generally come to the CAB. They can be either the owners or hapless tenants who are suddenly faced with being asked to leave without notice. We do not have a great deal of experience of helping such people in court. There is little point in their going to court because they have no defence. I will be happy to comment on some points that were raised this morning: the impact of time on cases if the new bill became law; the question of legal aid; the restriction on criteria of reasonableness; and the repossession of a second home.

The Convener: Thank you. We will explore those issues during questioning.

I hope that I have got my head around your service correctly. I might not have, so please bear with me. Can you give me a flavour of the kind of work that you do and the kind of advice that you offer? I am particularly interested in the in-court service. What range of people do you deal with and what issues are involved?

Liz Cameron: The in-court adviser is a full-time post. The majority of the work—around 54 per cent—is in the heritable properties court. When

those people are sent a notice to tell them that their case has been called to court to decide whether to grant a decree of eviction, an insert with that notice tells them that they can get in touch with the in-court adviser. If the person gets in touch with the adviser at that point, we can do a great deal to help them. It might be that they do not have to go to court if we can come to an arrangement with the housing department of the local authority.

We provide a service on a Friday morning, which is the day of the eviction court in Edinburgh. We see a large number of those who turn up and we give them on-the-spot advice. We have three or four advisers available to do that, because the court is busy.

In-court advisers also help people with small-claims cases and summary cause cases. Of particular interest to the committee will be the fact that, under the Debtors (Scotland) Act 1838, we are allowed into courts that deal with defaults of payments of larger sums. We are allowed to help in any court in which a lay representative is allowed. Although the incumbent in-court advisers are all legally qualified, we are seen as a lay representation.

We also have a citizens advice bureau in the court. It has one full-time adviser, one part-time adviser and some administrative support. That bureau has been running since January. We had problems with clients who came for initial advice and were referred to other organisations—including our own main office—for further help, but who did not go to those other organisations. They treated their eviction as the emergency, but if that problem was solved they did not address the fundamental problems. We therefore felt that if we had a unit in the court, people would be more likely to go for that further help. The CAB unit deals with some of the cases that are referred to the in-court adviser, because there is far too much work for the provision that we have. That unit also deals with the long-term aspects of people's problems and considers all the issues.

11:00

The Convener: We know the CAB's work well and are very supportive of it. I want to focus on mortgage repossessions. I know that the pilot project does pre-court work; do you do in-court work as well?

Liz Cameron: We do not do in-court work. I cannot think of a case of someone coming to us because they were in court for mortgage arrears. We are much more likely to meet them at a CAB.

The Convener: Do you mean before the case goes to court?

Liz Cameron: Yes. The reason is simply that people who have mortgage arrears do not go to court, because they know that there is nothing that they can do. If they went to court, the sheriff would listen, more or less, to what they had to say and then ask, "Do you accept that you owe the money?" That is about the only question that would be asked. If the person owed the money, the sheriff would have no discretion. The person's only possible defence would be that they did not owe the money. Such cases come down to a question of fact—is the money owed or not?

The Convener: Would the Mortgage Rights (Scotland) Bill help?

Liz Cameron: Yes, absolutely.

The Convener: Does your pre-court work help people so that they do not reach crisis point?

Liz Cameron: Our work helps people to manage the crisis. In the short term, it helps people to present their case to the sheriff in a way that will make it more likely that they can stay in their houses and make regular payments over a period. Notices usually go out about six weeks in advance of the court calling. If we work with people during those six weeks, we can get them established in a payment pattern. Most sheriffs will not, in such circumstances, give a decree for eviction, but will give those who have mortgage arrears a chance to put their case.

The Convener: Do you pick people up after they have received a notice, or after some kind of action has been taken against them?

Liz Cameron: That is when we hope to get most of them. However, if they come to us on the morning of their court appearance, we can—by discussing their circumstances with them—still help them to make a reasonable offer. Most sheriffs will listen to that offer.

The Convener: Do you think that the kind of service that you offer should be expanded, especially if the Mortgage Rights (Scotland) Bill is passed?

Liz Cameron: Yes. Over the years, we have tried to establish the service in other courts. A researcher from the University of Edinburgh has produced two reports on our project—the second is not yet published—which have been very supportive of the project and have said how useful it has been. However, funding is the issue.

Bill Aitken: Thank you for the very extensive paper that you have submitted, which indicates that your organisation has a fairly wide experience. I note, however, that the bulk of your interventions involve the city council housing department, which is understandable. What percentage of the cases that you deal with relate to mortgage repossessions? Do you consider that

it is a growing percentage? If so, what is the reason for that?

Liz Cameron: We do not deal with mortgage repossessions at all. All the cases that are listed in the report concern the local authority. Our main office deals with mortgage repossession that may be part of a much wider debt difficulty, but our service does not.

Almost all our cases start in court, whereas mortgage repossessions do not go to court. We get the people who want to defend the action, or who want to argue with the sheriff that what is happening is not just: that is how we pick up our clients. Because there is no argument against a mortgage repossession, apart from the one that I outlined—that someone does not accept that they owe the money, which is not true in most cases—people in that position do not come to us.

Bill Aitken: Do the people whom you deal with who fall into that category—and I accept that they will be few in number—come from certain geographical areas or certain occupations?

Liz Cameron: We work only in Edinburgh.

Bill Aitken: But even in Edinburgh, what are their backgrounds?

Liz Cameron: We break down our client base according to postcodes, but I do not have that information with me today.

Bill Aitken: Have you identified any change in the general trends?

Liz Cameron: That is not an aspect of our work that I deal with in our main office. However, I would say that such cases are on the increase, that their number has increased over the past few years. There are probably not so many as there were when the problem was at its peak, when, for example, people in England were experiencing negative equity. The situation is not quite so bad, but it is still a real problem.

Bill Aitken: I appreciate that much of what you say might be apocryphal, as you do not deal with those cases personally. However, the indication is that the problem is increasing.

Liz Cameron: I do not know whether it has got worse in the past couple of years than it was two or three years ago. However, there have been many more such cases over the past 10 years.

Bill Aitken: In your opinion, why is that?

Liz Cameron: I can state only my personal opinion that there has been a greater push for people to buy their own houses. They have taken on a commitment that, in many cases, does not fit in with a lifestyle in which employment is less secure. People take on commitments and find that they cannot keep them up because their jobs are changing—for example, they may lose them or go to a lower salary.

Karen Whitefield (Airdrie and Shotts) (Lab): How many mortgage repossession cases do you deal with annually, and how many—

Liz Cameron: I am sorry, I do not know. I brought figures relating to what we deal with in the courts, but I do not know the figures for our head office.

Karen Whitefield: Could you provide us with those figures at a later date? If you keep a record of them, it might be useful for the committee to see them.

Do the majority of the cases that you deal with involve repossession orders, or are the majority of them resolved before they reach that stage?

Liz Cameron: We are quite successful in negotiating with the creditors over a wide range of debts, and that applies to mortgage arrears as well. We negotiate a great number of settlements if people come to us early enough. Only the minority of cases would continue as far as repossession.

Karen Whitefield: Are there cases in which the mortgage repossession is unavoidable? What makes it impossible for you to help in those circumstances?

Liz Cameron: The usual pattern is that someone who has entered into one or two agreements and reneged on them will approach us on the day before the sheriff officers are due to arrive. The chances of our doing anything in those circumstances are pretty slim. If someone has defaulted for the first time, for a temporary reason such as sickness, and there is plenty of time to enter into an agreement that would put some money towards the arrears, that is the other end of the spectrum. I would expect us to be 100 per cent successful in that situation.

Karen Whitefield: What is the banks' response to rescue packages as opposed to repossession orders? In your experience of helping people who have got into financial difficulties, are there examples of good practice in how some banks or mortgage lenders deal with rescue packages?

Liz Cameron: I cannot comment on individual rescue packages, because I do not deal with them. In general, if the offer seems reasonable, I think that most of the institutions with which we negotiate are open at least to allowing people some time to start making payments. I cannot give any specific examples.

Karen Whitefield: What contribution do you think both bills will make to the families that you deal with? What are the positive aspects of the bills? What will make a real difference?

Liz Cameron: I can speak only on the Mortgage Rights (Scotland) Bill. It is an excellent start and I support it. Having seen what can be done with people in secure tenancies who wish to argue reasonableness, I think that it is right that people with mortgages should be given that opportunity. I am sorry, but I am not sufficiently prepared to be able to comment on the Family Homes and Homelessness (Scotland) Bill.

Karen Whitefield: I have one final question, relating to the evidence that we received from the Law Society of Scotland about calling-up notices and whether a two-year or five-year period is appropriate. Do you think that the two-year period might be too short for individuals or families whose financial problems you are helping to sort out? Such people might still have difficulties as they approach the end of the two-year period and might not have managed to get themselves back on their feet. Because of insecurity of employment, for example, they might have been out of employment and have only recently returned to the workplace. The five-year period could give them a little bit longer to try to put themselves back on the right track and tackle their debt problems effectively.

Liz Cameron: I agree that the five-year period is, realistically, a better length of time from the point of view of those people. They need to make their payments and pay an amount towards arrears during the repayment period, so it is much more realistic to spread that over five years, as that puts people in a better position to make the payments.

Robert Brown: I know that you operate in Edinburgh. What do you know about arrangements in other courts in Scotland, not least those in Glasgow? Is there any provision equivalent to yours?

Liz Cameron: The only other court that has provision to help party litigants in eviction cases is in Glasgow sheriff court, where the Legal Services Agency provides a service. It is not the same as our service, it works on a different system, partly because the people providing the service are solicitors and they are looking for legal aid. The two courts are run on very different systems. I do not want to go into too many details, because it would not be relevant for the committee, but you could not run the LSA service in Edinburgh without the sheriffs changing their way of deciding questions of reasonableness. The provision in Glasgow covers only heritable cases, and not the range of services that we cover.

11:15

Robert Brown: For the avoidance of doubt, in Edinburgh sheriff court, where you are dealing with eviction cases, do mortgage repossession cases come before the Friday court, or do they go somewhere else?

Liz Cameron: No, they do not go to the Friday court. The Friday court is concerned with local authority evictions and housing association evictions, but the people concerned are all tenants. The evictions for mortgage repossession cases come before a court that is held on a Wednesday.

Robert Brown: From what you have said, can we take it that the arrangements in Edinburgh help to prevent people from becoming homeless?

Liz Cameron: Yes.

Robert Brown: I appreciate that it can be only a gut feeling, but what percentage of people who might have become homeless do not in fact become homeless, because of your help?

Liz Cameron: You are right—this is a gut feeling: I would say that it is about 90 per cent. Some people come to us for what I would call long-term help and work with us for a while. We have figures from the CAB, which tends to work with people long term, and there has not been a single eviction among the 700 cases that it has dealt with.

Robert Brown: That is very impressive.

Liz Cameron: To put that in context, I would add that the in-court adviser deals with more short-term cases and gives advice to people who may go into court that day and who may have the decree of eviction passed on them. Some sheriffs are very hardline and, no matter what advice you give them, if arrears are at a certain level and payments have not been made on a regular basis, they will pass the decree. However, if people are prepared to work with us, we can help them to negotiate with the council even if a decree has been passed.

Robert Brown: What percentage of people who are threatened with eviction turn up at court, and how many of them are legally represented?

Liz Cameron: Court lists come out each week, and I would say that probably less than 50 per cent of people turn up. A lot of cases, although listed, do not call, for a variety of reasons. Out of those who turn up, a tiny minority are legally represented—if, by that, you mean that they have a lawyer.

Robert Brown: Yes.

Liz Cameron: Most of the lawyers are there to pursue on the part of either housing associations or councils; very few people have lawyers. There are other agencies that appear in court with their clients, for example, people from the Wester Hailes advice centre, the Granton advice centre, the advice shop and the Citizens Rights Office. Those are the main people who come, and the

Wester Hailes centre has by far the highest number of clients.

Robert Brown: Is it fair to say that there is a considerable difference between the number of people who have the right to be represented by a lawyer or by someone else and the number of people who take up that right?

Liz Cameron: Yes, there is. We hoped that we would address that to a certain extent by sending out an insert with the summons to say that advice is available, and that has helped. Many people call us or turn up at court with the slip, asking who they are supposed to see about it. However, there are always people who do not come for help.

Robert Brown: Finally, on homelessness, as some of those whose cases go to court eventually have eviction decrees granted against them, alternative accommodation is an issue. Do you give advice on housing matters as well as on debt?

Liz Cameron: Yes.

Robert Brown: Do you know how many people, if any, seek court decisions on the reasonableness of the homelessness provision that is offered to them in due course by the council?

Liz Cameron: We refer people to lawyers to seek judicial review. We often speak to people in temporary housing who have inadvisedly turned down the options for alternative housing that they have been offered. In Edinburgh people are offered two options, but the choice that they are given is not great. Often people turn down the first option in the hope that the second one will be better, but usually it is worse and they feel that they cannot take it. We try to negotiate with the council. We argue that the choices were not reasonable and that people should be given a third option, and we are sometimes successful.

Robert Brown: It is obviously desirable to sort out such matters by agreement. Would it be advantageous for people in such situations to have the right to an appeal to the sheriff rather than the right to seek judicial review by the Court of Session?

Liz Cameron: It could be advantageous, if there were provision for advice to be given to people on how they could appeal to a sheriff. The main problem with the Court of Session—I am sure that you are well aware of this—is that people really need a lawyer and cannot make their own case there. There would be a good chance that somebody who was homeless would be entitled to legal aid. If people need a lawyer and receive legal aid, it does not make much difference to them whether they are in the Court of Session or in front of the sheriff. If they were trying to make their own case, they would stand a better chance in front of the sheriff.

Mr McAllion: You mentioned that very few people who attend the Friday eviction court have legal representation. I want to be absolutely clear about the circumstances in which people would be entitled to legal aid to pay for legal representation. When a council or a housing association seeks to evict a secured tenant, is the tenant entitled to legal aid?

Liz Cameron: They are entitled to legal advice and assistance in the preparation of their case. They are then entitled to legal aid if the Legal Aid Board concludes that it is in the public interest that they should receive it. The difficulty is that they will not be eligible for legal aid if they have any income. It is possible for people who are earning to be evicted because they are not paying their rent—they may have other debts. Not everybody who faces eviction is automatically eligible for legal aid, even if they get over the income hurdle.

Mr McAllion: Does the fact that so few people turn up with a lawyer indicate that the Legal Aid Board is refusing any application for legal aid?

Liz Cameron: I could not say that. The reason that people are turning up without legal representation is that many of them do not think of going to a lawyer. Some people ask whether they can speak to the duty solicitor, but we do not have one in civil cases.

It is well known that the advice agencies that I have mentioned provide help and assistance. In the first instance, many people go to an advice agency rather than to a solicitor.

Mr McAllion: Would the advice agency advise them to apply for legal aid if they had a chance of getting it?

Liz Cameron: Not for a lawyer to appear in the first instance. The only situation in which we would advise people to apply for legal aid for legal representation would be if they were going to defend the action, in which case a separate hearing would be fixed.

What usually happens on a Friday is that the sheriff listens to the circumstances and makes a decision based on reasonableness. However, in Edinburgh an explanation of the circumstances is not regarded as a defence. If someone says that they wish to defend the action, the sheriff will not listen to any arguments but will fix a date, maybe six or eight weeks ahead, for a more formal hearing on defence of the action.

Mr McAllion: What proportion of cases proceed to such a hearing?

Liz Cameron: Very few cases go to such a hearing. We refer people defending actions to an organisation such as Shelter Scotland, which

provides services for such people.

Mr McAllion: In a case before the Wednesday court, in which a creditor is applying under section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 for eviction because of mortgage arrears, is the debtor not entitled to seek legal aid, or is it the case that they do not do so because there is no argument?

Liz Cameron: The same test for legal aid is applied: what is the person's income and would the Legal Aid Board grant it? In most cases, the Legal Aid Board would turn down an application because money is not being paid to put up a defence. If there were a defence, it is possible that legal aid would be granted.

Mr McAllion: The conveyancing committee of the Law Society suggested that at the stage when the creditor serves a calling-up notice or a notice of default there is no entitlement to legal aid. Is that right?

Liz Cameron: It would be better to ask the Legal Aid Board. I am concerned with the practicalities of whether people receive legal aid or not. I know roughly what the rules are but I could not answer your question exactly.

Mr McAllion: That is fine. I have no idea even though I am supposed to be a legislator.

Do you have any views on the housing bill that the Government is introducing? Do you think that the grounds for eviction that are being introduced as part of the single social tenancy will have an impact on your work?

Liz Cameron: I do not know enough about the rules to answer your question.

Mr McAllion: You have not yet looked at the Government's proposals. Maybe we will ask you back at some time in the future.

The Convener: Thank you very much. Your evidence has been extremely helpful and interesting. We may well seek your views on the housing bill if we launch ourselves into that matter.

11:28

Meeting continued in private until 12:33.

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