The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 11 January 2012

Session 4

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ECONOMY, ENERGY AND TOURISM COMMITTEE
1st Meeting 2012, Session 4

CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)
*Rhoda Grant (Highlands and Islands) (Lab)
*Patrick Harvie (Glasgow) (Green)
*Angus MacDonald (Falkirk East) (SNP)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Stuart McMillan (West Scotland) (SNP)
*John Park (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

*Claire Baker (Mid Scotland and Fife) (Lab)
*Jim Eadie (Edinburgh Southern) (SNP)
*Alison Johnstone (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ian Ferguson (Scottish Law Agents Society)
Fiona Letham (Dundas & Wilson)
Ross MacKay (Law Society of Scotland)
Graeme McCormick (Conveyancing Direct)
John Scott (Law Society of Scotland)
Ken Swinton (Scottish Law Agents Society)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 1

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 11 January 2012

[The Convener *opened the meeting at 11:00*]

Interests

The Convener (Murdo Fraser): Good morning. I welcome you all to the first meeting in 2012 of the Economy, Energy and Tourism Committee. I welcome all committee members—a happy new year to you all—as well as our officials, staff from the official report and the Scottish Parliament information centre, and our witnesses. We will shortly be considering the Land Registration etc (Scotland) Bill. I remind members and all others present to turn off mobile phones and other electronic devices.

I am pleased to welcome a new member to the committee: John Park. I pay a brief tribute to Anne McTaggart, who was with the committee from the start of the parliamentary session and contributed to its work. I am sure that we will all miss her and wish her well in her move to pastures new.

I invite John Park to declare any relevant interests.

John Park (Mid Scotland and Fife) (Lab): I have no relevant interests for the committee.

The Convener: Thank you—it is good to have you on board.

Decision on Taking Business in Private

11:01

The Convener: Under item 2, does the committee agree to take item 4 and all future reviews of evidence in private?

Members *indicated agreement.*

Land Registration etc (Scotland) Bill: Stage 1

11:01

The Convener: Item 3 is our first evidence session on the Land Registration etc (Scotland) Bill. I remind members of my entry in the register of interests: I am a member of the Law Society of Scotland, albeit not currently practising as a solicitor.

I welcome John Scott and Ross MacKay from the Law Society of Scotland; Fiona Letham from Dundas & Wilson; Graeme McCormick from Conveyancing Direct; and Ken Swinton and Ian Ferguson from the Scottish Law Agents Society. I thank you all for coming and for submitting written evidence in advance. If you want to say something by way of introduction in support of your written evidence, I am happy to give you that opportunity. Does anybody want to start? Mr Scott?

John Scott (Law Society of Scotland): No.

The Convener: You were nodding—that is why I picked on you.

John Scott: I was acknowledging you.

The Convener: If nobody wants to say anything, I am happy to go straight to questions. Mr Brodie will start us off.

Chic Brodie (South Scotland) (SNP): Good morning. Given the nature of the bill, how much priority would you give to completing the land register by having all land in Scotland transferred to it? What advantages do you believe will come from achieving that? Would it be acceptable to have a system of payment for an accelerated programme of completion of the register that increased the overall level of fees that are paid for all types of registration?

The Convener: Who would like to start off?

Ross MacKay (Law Society of Scotland): I will kick off. The Law Society of Scotland is neutral from a truly legal point of view on the benefits of accelerating completion of the land register. Speaking personally, I think that there are clear economic benefits from doing so. Scotland is already well advanced in having a computerised database of land ownership. It goes without saying that, in the digital age, having a complete record of land ownership in Scotland would have economic benefits in relation to data management, the identification of wasted assets such as land not being occupied and so forth.

Graeme McCormick (Conveyancing Direct): I am old enough to have been around when land registration was introduced in 1981 in Renfrewshire, where I practised in those days. At that time, Registers of Scotland expected land registration to be completed within 10 years—30 years afterwards, we are barely halfway through. Although land registration can assist and accelerate part of the conveyancing process, in my experience of dealing with transactions, it does not really affect how quickly a transaction can be completed. Most transactions are completed in a minimum of four, six or eight weeks. In general, that is plenty of time.

We must remember that, from a practical point of view, when dealing with a property that was originally a new-build property, a tenement property or a former local authority or public sector property, generally it is possible to get most of the information that is required regarding title conditions that might not be with the bundle of titles for the property if a land certificate is available for an adjoining property that has been registered. Solicitors use many mechanisms to get over the problems that can exist with urban properties, in particular, that have not been registered.

I do not see it as the be-all and end-all that the land register be completed. To be honest, I am quite happy with the way in which the system is working at the moment, with certain provisos. There are improvements that can be made, but I do not think that it is necessary to reinvent the wheel to make them.

Chic Brodie: On that point, you say in your submission:

> "In my opinion the purpose of legislation is to make life better."

However, you are saying that you are happy with the current situation.

Graeme McCormick: No. Although I say that the purpose of legislation is to make life better, I am not convinced that the bill has been designed to make life better. As I said in my submission, the important thing from a consumer's point of view is that, if they are a buyer, they get their keys on time and, if they are a seller, they get their money on time. The system and everyone who is involved in it must work towards that. The reason why people pay solicitors, surveyors and all the rest is that they expect to get a professional service. Most people are not concerned about the mechanics; they want the job to be done.

Chic Brodie: I understand that, but you went on to say that the bill

> "offers this Committee and this Parliament the opportunity to develop the land registration system to be more equitable, robust, clear, efficient and in the public interest while greatly improving the conveyancing process".

I am struggling with the position that you have outlined today.

Graeme McCormick: If you look at the issues that I raise further on in my submission, I make certain suggestions about how the system could be improved, given the experience that my firm has had of problems with the land register.

I go on to say that I check all the title deeds for all our clients who purchase properties and I draft the new titles—that is part of my job in my firm. I reckon that every week I see at least two land certificates that contain a material error. A system that is robust should not be like that at all. My guesstimate is that there are probably at least about 40,000 titles that have already been registered in which there are errors. As far as I am aware, the land register does not have a system of automatically reviewing titles to check them. It is only when errors are pointed out by solicitors and others that an attempt will be made to address them.

In my submission, I have identified issues and made suggestions for remedies so that they can be discussed, because I think that if we legislate to improve the life of our citizens—which I believe is what the primary purpose of legislation should be—we should make it easier for people to buy and sell property and should ensure that it is a robust system. Just accelerating the land register system per se will not improve things.

Chic Brodie: I understand that.

Currently, only 21 per cent of the landmass of Scotland is covered by the land register. That means that a vast amount of property—property on the remaining 79 per cent of the landmass—is not registered. We are talking about property that is not urban and which is not tenements or houses. In terms of equitability, do you agree that it would be helpful in several ways, not least economically, if we knew who owned 100 per cent of the land of Scotland?

Graeme McCormick: Property searchers can find that out for us anyway.

Chic Brodie: Under the existing register.

Graeme McCormick: I suggest that, if the committee has not already done so, it should consider inviting some of the professional searchers to speak to it. Most of them usually have experience of working with the land register as employees of Registers of Scotland, so they have vast experience of how that system works.

It is possible to find out who owns what in Scotland, and that is the way in which conveyancing has been done for years.

Chic Brodie: Things are not necessarily clear-cut. The system leads to disputes over who owns what land.

Graeme McCormick: But land certificates do not guarantee robustness now. Sometimes we have to look behind them, despite the suggestion that land registration was a means by which prior titles could be dispensed with.

I do not want to hog the limelight, as I seem to be doing, but I will give a brief example. We had a client who was selling a property. According to the land register, the title was in the joint names of her and her late husband. That was it. We said to the client that, if she did not have confirmation from the sheriff court, we would have to apply to it to get confirmation to allow her to sell her husband's share of the property. It was purely by chance that the original title deed that the local authority had granted in favour of her and her husband was with the land certificate when it eventually came from her lender. There was a survivorship destination in that title deed, whose effect was that there was no requirement to apply to the sheriff court for confirmation, thus saving the client hundreds of pounds.

The land register had an error, as the proper proprietorship or ownership of the property was not inserted in the land certificate. We would probably never have discovered that if the original deed, which was supposed to be superseded by the land certificate, had not been with the land certificate when we got the title deeds from the lender.

Chic Brodie: I do not know whether any other panel members wish to comment on the completion of the land register.

The Convener: I do not think that anybody has really responded to your second question, which was about the level of fees. There has been a suggestion that, in order to try to complete the register, the keeper of the registers of Scotland should look at increasing the level of fees payable. I am interested in thoughts on that.

Fiona Letham (Dundas & Wilson): I will go back to the first question. I am from Dundas & Wilson, which is one of the large commercial firms. We do not deal with residential conveyancing at all; all our work is corporate and commercial.

We support the moves to complete the land register. I agree with what Graeme McCormick said. We definitely see land certificates with errors, and my view is that, at the end of the day, the solicitor has a responsibility as part of a conveyancing transaction to check the land certificate and sort out errors then. I accept that that does not always happen, but it would in an ideal world.

As I said, we support the moves to complete the land register. We deal with many situations in which we have to look at very old titles that are recorded in the register of sasines, and it is very difficult to tell what a property's boundaries are. In commercial transactions, we quite often deal with piecing together sites where a number of different titles make up a property.

Trying to explain to clients why we are looking at deeds that do not have attached plans because they are too old can be very difficult. They predate the days of photocopying, and trying to explain why we cannot definitively say what the title comprises can be very difficult. Obviously, once everything is moved into the land register, based on the Ordnance Survey map, we will have nice, clean title plans. It will all be accessible online through the registers direct system, which we think is a massive advantage.

This has not been a massive issue until now, but the land register has been operational for the whole of Scotland for nearly 10 years, and we are finding that, as people come through the university system, they are less familiar with sasine conveyancing. Only those of us who are a bit longer in the tooth have a lot of experience of that.

The principle of removing two parallel systems is good, as some people are inevitably more familiar with one system than the other. Ultimately, the issues relating to overlaps and gaps that Graeme McCormick has talked about will be removed once the land register is completed and we have the cadastral map of the whole of Scotland, but unfortunately we are in a lengthy transitional phase before we get there.

On fees, however—

Chic Brodie: Pardon my naivety but, on your comment about solicitors finding problems and correcting the land register, how proactive should the keeper be in ensuring that the register is up to date?

11:15

Fiona Letham: I would like the keeper to do more. Inevitably, however, there is the possibility of human error.

There is a responsibility on both sides. I would like the keeper's staff to carry out more checks before land certificates are issued but, equally, the solicitor who handles the transaction has a responsibility to double-check that at the end of the day the certificate is correct.

Chic Brodie: Thank you.

The Convener: I believe that you were going to talk about expenses, Ms Letham.

Fiona Letham: We do not support any move to increase fees. A number of our clients who deal with property in England are surprised to find that the fees for registering high-value properties in Scotland are significantly—indeed, 10 times—higher than they are there. I appreciate that it makes sense to have a scale based on the value or price of a transaction but, if fees are going to be increased—and I have to say that, with regard to complex transactions, I am concerned about proposals to allow the keeper to charge on a time-and-line basis rather than according to a scale—it might well put off some of our clients who could be dealing with very complex titles.

Ultimately, there is a benefit not just to the individual client who has to pay for the transaction but to others who transact with that property in future; indeed, there are general economic benefits in having all property registered. I would like the English system to be introduced, in which the submission of a voluntary registration is perceived as a benefit and the person in question pays a fee lower than that if the application had been triggered by a transaction. Although that is not necessarily going to happen, I know that the proposals in the bill permit it and that it could be put in place.

The Convener: Your reference to universities reminded me that I had omitted to welcome our committee adviser, Professor Kenneth Reid, who is very helpfully assisting the committee in its scrutiny of the bill.

Does anyone else have any views on the question of fees?

Ross MacKay: I support Fiona Letham's view that, if the proposal is about enhancing voluntary registration and saying to the Scottish public, "Register your title now because it's to your benefit," there needs to be a carrot in the shape of reduced fees. If we ask the public to register voluntarily and then hit them with a big fee in the process, their response will be, "Thanks, but no thanks." The keeper has to consider the economics of all that, but there is a macroeconomic picture to be considered of the benefits of large-scale voluntary registration set against the cost to the keeper's office of facilitating that, and I suspect that that is not a question for the keeper.

The Convener: But the bill provides for the keeper to register titles proactively.

Ross MacKay: That is correct.

The Convener: I presume, then, that the keeper will charge the proprietor to cover the costs of that work. What is your view on that?

Ross MacKay: The bill provides that at some stage in the future—many years in the future, I

think—we will have what is effectively a compulsory transfer system. Eventually, there will be a tipping point at which, I hope, the land in Scotland that is still in sasines will be forced to convert to land registration. Of course, that has happened in other jurisdictions across the world, but I suspect that it will happen beyond my career.

As for voluntary registration, the keeper is quite rightly looking to expand the areas where submission of a deed triggers first registration. For example, conveyance by gift, which at the moment does not require registration, will now be a trigger. As a result of such moves, the land register system will expand incrementally, which is something that I fully support. In those cases, the standard transaction fee should apply. I do not think that there should be an increased fee for voluntary registration; indeed, as Fiona Letham pointed out, a carrot in the form of reduced fees would enhance the process.

Ken Swinton (Scottish Law Agents Society): Our concern about fees relates to a situation in which a title is at present in sasines and the owner wishes to remortgage. Under the bill, that might be a trigger event, depending on whether those particular provisions are activated, and we doubt whether it is proportionate to increase the costs of a remortgage transaction for those who remortgage and slow the transaction down by requiring a first registration.

As Ross MacKay said, there is a tipping point. However, in the financial memorandum, the keeper talks about it being 30 to 40 years before the sasine register is closed. We see no particular advantage in accelerating the process and we are not in favour of charging enhanced fees to accelerate it.

Graeme McCormick: On fees for remortgages, in the past few years, an awful lot of remortgages have been done almost en bloc. One firm of solicitors is appointed to act for a lender and, in most cases, the borrower does not bother to appoint a separate solicitor. The economics are that the lender or broker looks for an all-in package and does not differentiate between the fee that the solicitor charges and the land registration and search dues and so on. We must be conscious of that. If we are to have mandatory land registration of a title on a remortgage, we must consider whether there will be a charge according to the value of the property or just a single payment regardless of the value of the property. That obviously affects the economics and the all-in charges that are likely to be made. We must be aware of such issues.

My personal view is that there should be a one-off charge for voluntary registration of, say, £60 or something like that. In urban Scotland, most of the titles are very similar. Titles in urban Scotland are pretty bog standard. That is because of our history. We had a lot of social or public sector housing, tenement flats and then developments by companies such as Barratt, Wimpey and Miller. Basically, they used the same style of title, burdens and title conditions, regardless of whether the property was in Inverness, Glasgow, Edinburgh or wherever.

The Convener: Do other members want to come in on the completion of the register or fees?

Mike MacKenzie (Highlands and Islands) (SNP): I should begin by noting my interests as per my entry in the register of interests. I should also point out that Mr McCormick is a personal friend, although we have never dealt with each other professionally.

We have heard about the extent of the errors by the keeper, which I find a wee bit shocking. The aim of the bill is to encourage more property in Scotland to be registered more quickly. I am concerned that, if the bill encourages more registrations, the anticipated extra work that the keeper will have to do with the available resources might give rise to even more errors. From the point of view of a purchaser or seller of property who is unfortunate enough to be the victim of an error, should more consideration be given to a process for resolving errors that is short of a court remedy? I am interested in all the witnesses' opinions on that.

Ross MacKay: It is fair to say that the number of errors by the keeper has increased in the past 10 years, for a variety of reasons. The organisation is under pressure financially, in staffing and cost terms. It now has a target to turn round registrations, particularly first registrations, much more quickly to reduce its historical backlog. I am sure that all the witnesses will have cases of it taking five or six years to complete the registration process, if not longer. With the pressure to do that more quickly, human error creeps in. If there is a simple typographical or minor error, the keeper will rectify that quickly, but there can sometimes be errors, as in Graeme McCormick's example, that could cost the client money if they do not come to light at an early stage. The keeper should be more proactive in dealing with errors. She should be more responsive to agents, pointing things out and dealing with them as quickly as possible on an informal basis, short of full rectification of the certificate. To be fair to the keeper, I say that in my experience she is amenable to such an approach. It is inevitable that human error will creep in—it is as simple as that. That must be recognised.

John Scott: To be fair to the keeper, I understand that she has introduced a system of improving quality control for land certificates, which involves sampling certificates and double-

checking their accuracy. Measures are in place to address the issue.

Ken Swinton: We should get into perspective the scale of the problem that panel members mentioned. In our members' experience of errors in land certificates, the issue is not necessarily the title or the burdens but matters such as omission of special destinations or omission of the fact that a property is shared between two owners, although that is stated in the deed. In some cases, pertinents are omitted from the land certificate. The problem is not the actual base title but the ancillary bits, particularly in the proprietorship section.

The Convener: For the benefit of non-lawyers on the committee, will you tell us what a pertinent is?

Ken Swinton: It is something that goes with a title that does not have a separate title of its own. Someone might have shares of other parts of property—we might come on to that in relation to shared plots. There might be other rights attaching to the property, which pass automatically with the property without the need for separate title. For example, in a tenement flat, a share in the drying green at the rear might be a pertinent.

The Convener: Thank you.

Graeme McCormick: If we are to progress with land registration, I suggest that we concentrate on areas where land registration is fairly far advanced, such as urban areas. That will give land register staff the opportunity to check existing land certificates for flats that are registered in a tenement when they register other flats in the block for the first time. That is a practical thing that can be done.

I regret that I must take issue with what has been said. We find problems with the extent of the plans and the description of properties, in relation to shared properties, the existence of servitude rights and so on. Such problems arise because the keeper is not checking the titles of adjoining properties. We can go into the registers direct site and check such things for £3; she does not need to pay the £3 and can just go in and find them herself. We are finding basic problems, which are holding up transactions.

Fiona Letham: We see errors. Many tend to be minor, typographical errors, which we would want to be tidied up but which would not cause a significant problem in a transaction, but from time to time we find the more serious errors that Graeme McCormick talked about.

That is not a reason not to complete the land register. The benefits of completing the land register far outweigh the problem of resourcing the keeper's staff adequately to ensure that such errors reduce.

Mike MacKenzie: I am concerned that the OS plans are less accurate in some areas of the country than we would want them to be. In the experience of the panellists, does the issue cause material problems with titles? Given that the drafting standards are lower in rural areas, are there greater problems in rural areas with accuracy of plans and maps, which cause potential purchasers and sellers problems when they come to light for the first time in the registration process?

11:30

Ross MacKay: Regrettably, there is an issue with the scale of the plans that are used by the registration system. The smallest scale is 1:2,500. As is made clear, there is a tolerance level of plus or minus 0.3m or 0.4m. That is not a lot but, unfortunately, in an urban area, it is enough to trigger a neighbour dispute.

My firm acts for various legal expenses insurers. As often as not, when we are involved in connection with a boundary dispute that becomes a neighbour dispute, it is hard to tell which starts first. Part of the difficulty is that, because of the scale of the maps, people are arguing over inches.

The land certificates are perfectly fine in terms of the plans, but they are not definitive with regard to boundary measurements and features. That has always been a feature of land registration—the certificates do not say, "The boundary is the centre line of the wall," or whatever. That tolerance level—which is used by Ordnance Survey maps—can be enough to trigger disputes that I am sure you have all encountered in your constituencies. However, that is the system that we are stuck with. It would be wonderful to have a geospatial system whereby titles are mapped to the inch, but that is not going to happen. The system is the responsibility of the Ordnance Survey, and those are the tolerance levels that are used. The plans that the keeper extracts from the Ordnance Survey will never be inch perfect. Although the technology might exist, I suspect that the cost implications would be enormous. We have the system that we have, and it involves certain tolerance levels. Obviously, as you said, in rural areas, the scale becomes 1:5,000 or more and the tolerance levels increase, which will inevitably lead to disputes.

Mike MacKenzie: Will the fact that there is an implicit intention to migrate to a new and hopefully better map—this cadastral map that is based on an index map—lead to further and greater problems? Do you therefore feel that the legislation should try to encompass some mechanism, short of the courts, to try to resolve

the disputes, given that going to court to do so can be expensive and onerous?

Ross MacKay: You are talking of dispute resolution rather than conveyancing. As the keeper will say, she is not a court of law. It is not for her to resolve a boundary dispute in a situation in which she has issued two land certificates that are identical and show no problem but, because there is an inadequate level of detail, the neighbours have fallen out over where the line is, where the extension is going to go, where a tree is and so on.

If neighbours fall out, it would be great if there were some kind of arbitration or mediation service that could try to resolve the issues, but I do not think that that service would be provided by the keeper. I think that the office of the keeper will say firmly that it is its job to register titles as presented and that, if there is some latent issue there, that is for the neighbours to resolve. Unfortunately, under our current system, if they cannot resolve it personally, they end up going to court, which is hugely expensive—usually out of all proportion to the value of the land in question.

Mike MacKenzie: Given that the keeper indemnifies titles, do you anticipate that, particularly in rural areas, where the drafting tolerance of the maps seems to be much greater than it is in urban areas—I think that it is about 4m or so—there will be a bit of a rush to get the first registration on land around which there might be a bit of ambiguity at the moment? Do you think that, as we go further down the road towards completion, errors in the Ordnance Survey plan that are not evident at the moment will manifest themselves in ways that will be, in certain circumstances, fairly dramatic?

Ross MacKay: I would say that improved mapping will avoid that difficulty, on the whole. There will always be problems with maps, but the difficulty at the moment is that many titles are based on old sasines, which have no maps at all. As we all know, that is where the difficulties come in—someone has owned 8 Acacia Avenue for 40 years, based on a description from 1850 and, as there is no plan, one must be created. The land registration system will give certainty as to what 8 Acacia Avenue encompasses, which has to be beneficial. It will also give the larger and more complex estates the benefit of knowing their extent; that will become definitive once and for all. If there is a dispute on the back of that, it will be resolved, come what may. It will be beneficial to end the uncertainty of ownership of large swathes of land across Scotland by transferring to the land register. However, there will still be disputes, come what may.

Rhoda Grant (Highlands and Islands) (Lab): I want to go back to an issue that was briefly touched on earlier, which is the registration of burdens or indeed rights of access and the like. In his paper, Graeme McCormick says:

> "the Keeper refuses to mark the Title Sheet or Burdens section with any reference to these rights".

Is that for the person who has the right or for the property that the right is over? Is it both that are not marked?

Graeme McCormick: Generally speaking, it is both. We have the law of prescription whereby a right can be obtained or an obligation or burden can be imposed because of use, generally over 20 years. That has just been done. For example, in some villages in the north-east of Scotland there are no rights of access to the individual cottages, but the people obviously have had the right of access and practical access to the properties for 20, 50 or 100 years or more. Their title deeds, however, do not say that they have the right of access, so the keeper will not put on the land certificate that there is a right of access to those cottages even though the access to the cottages goes over land that is owned by someone else and is not publicly maintained.

A few years back, it used to be that you could get two individuals who lived next door, for example, and had no interest in the ownership of the property, to sign affidavits saying that they had lived in the adjoining property for 30 years and that the access had always been there. At that time, the keeper would mark the access on the land certificate. However, during the past few years, we have found that she has generally refused to do so.

That causes problems. If the solicitor who is acting for the purchaser does not know the area or what has happened in the past, one of the first issues that they will see is that the property does not have a right of access. In that case, if the keeper is not prepared to put something on the land certificate, invariably the purchaser's solicitor will insist on the seller's solicitor obtaining title indemnity insurance, which can cost £200 to £300, and the seller will have to pay. That is money for old rope because there will never be a claim against it, but that is what they will have to do. It is ridiculous.

Ian Ferguson (Scottish Law Agents Society): There is another method of sorting the problem. In such a situation, the solicitor could raise a court action declaring that there is a right of access over a specified piece of ground from use of more than 20 years, and they could lodge affidavits in accordance with that. Something can then be put on the land certificate. When the court declares on the case, it can be put to the keeper and she will give effect to it. However, it is a very expensive route to get to that point.

There were informal procedures whereby affidavits were accepted by the keeper but, because her fingers were burned by one or two people telling porkies, she decided that it was not a good idea to base her system on such a procedure. People can tell lies, so she has left it for the solicitor to raise the court action, or possibly to take the cheaper route of getting indemnity insurance.

Chic Brodie: How much would the court route cost?

Ian Ferguson: I am not a court practitioner, but I would have thought that a minimum of £600 to £700 plus VAT and outlays to begin with would be a good guess.

Ken Swinton: We are in danger of confusing a variety of different issues, one of which is the ability to create a servitude right of access by exercise for a prescriptive period where nothing appears on the register. That is one problem, and it will remain a problem whether the bill goes through or not.

The second problem is the mapping. The mapping in Highland areas is done on a scale of 1:10,000. I do not know whether you have access to the Scottish Law Commission's report but, at the back of volume 2 of that report—from page 639 onwards—there are examples of mapping at various scales, which illustrate the problem. I was asked to give an opinion on a title dispute over a garage in highland Perthshire where the mapping was on a scale of 1:10,000 and it was impossible to see where the garage lay in relation to the map. Both titles were in the register, but there was nothing to determine whose garage it was. It was the strangest garage. I went to visit it. It was a very long garage and had doors at either end, so both proprietors could gain access from the opposite ends of it. Even a site visit did not resolve that issue.

Simply changing the name to a cadastral map will not change the underlying mapping. The keeper must get the mapping from somewhere, and if the Ordnance Survey has mapped the area only at 1:10,000, the keeper will be no better off through the change in the legislation and terminology. The underlying mapping is the issue. In some cases, the answer would be for the keeper to use supplementary plans drawn from the title deeds. The issue in the case that I had to deal with was resolved by going back to the titles in the register of sasines, where there were plans on a scale of 1:250, which disclosed exactly what the situation was.

Mike MacKenzie: I am grateful for that answer. I have, unfortunately, been involved in several such situations. It seems strange that, when we have the technology to survey things far more accurately, we are still relying on title registration plans that are not drawn to a reasonable standard of accuracy and that will give rise to problems and disputes. It disappoints me that the keeper seems to be complacent about that and to think that people can go to court to resolve their differences. That can be very expensive and time consuming, and it can cause a lot of delay and grief. Given that this is a wholesale revision of the situation, it disappoints me that the opportunity has not been taken to introduce some helpful mechanism to resolve the disputes that will inevitably occur.

This all seems to stem from the idea that it would be good to get all of Scotland registered. Most people would agree with that principle, but I am concerned that that impetus will give rise to a lot more first registrations, which will put more stress on the keeper and may lead to more mistakes, some of which will be serious and some of which will not be so serious. There seems to be a missed opportunity, so far, to provide some mechanism for the resolution of errors and so on.

The Convener: We understand that a quasi-judicial system has been set up in England to resolve such disputes, which means that people do not have to incur the expense of raising a formal court action. In contrast, the default position that has been taken by the keeper seems to be that, if there is a problem, people should go to court, sort it out and then come back. Do you have a view on whether such a system would be appropriate? Would it be economically viable to establish such a system in Scotland?

Ross MacKay: The Lands Tribunal for Scotland already deals with title issues although, at the moment, it does not have a locus in dealing with a boundary dispute over who owns what. At the very least, there is scope for giving the tribunal a remit to look into that sort of thing. That would still be judicial, but the tribunal is quasi-judicial and the process is simpler and much speedier. There would still be a cost to it, but it would be a lot less than the cost of going to the Court of Session. My colleagues dealt with a bizarre boundary dispute over a matter of inches in the mining village of Bonnyrigg, outside Edinburgh. The case went to the Court of Session, where the default claim for damages was £2,000 but the court costs were in excess of £20,000. That is ludicrous. There should be a tribunal to resolve such disputes. I appreciate that the keeper is not there to act in a judicial capacity, but there should be something short of the courts for the resolution of disputes that are simply about boundaries but which mean a lot to individuals, so that they can be dealt with quickly and the problem can be knocked on the head.

11:45

Ken Swinton: Any system of dispute resolution in relation to property must be compliant with convention rights, and in particular article 1, protocol 1 of the European convention on human rights and article 6 in relation to a fair hearing. I would not wish it on the keeper to determine disputes; it is an administrative function and must be dealt with in a tribunal that is sufficiently judicial and independent to satisfy the convention rights.

Rhoda Grant: I have a short question about registration mistakes. Would a solicitor acting for someone registering for the first time not have the ability or perhaps the responsibility to ensure that the first registration was correct and to look again at what the keeper had drafted and at the title deeds, which would put the required checks and balances into the system? Would it be possible for that to be built into the process?

Graeme McCormick: That is what we are supposed to do as solicitors. When a land certificate comes back from the registers, we are supposed to look at it and check it. However, there are two or three qualifications to that. The first one is that the idea of the family solicitor being used by generations of the same family to do conveyancing has disappeared to a large extent. People are inclined to use a different solicitor when they come to sell the property from the one they used to purchase the property—that happens quite a lot. Quite often, the solicitor who acted in the purchase is either dead or no longer practising, or something similar to that. As a result, the solicitor acting for the client when they are selling has basically got to deal with what they are shown on the land certificate and accept that as the gospel truth. That is one problem.

Further, if the solicitor who acted for the client on the purchase did not check matters, we still have a practical problem if a mistake has not been picked up and there is no recourse to the solicitor who previously acted for the client. The seller's solicitor must deal with that.

The other point is that we now have a system of land registration that is flawed and has been flawed from day one. However, there are things such as a P16, which is basically a certificate that you obtain before you complete a transaction in order to check whether the boundaries on the ground correspond with the boundaries in the title deed. You get that certificate and, if the keeper says that the boundaries appear to correspond, a solicitor acting for a purchaser on a first registration has more confidence in proceeding to pay the price.

However, the land registration process does not get into gear until the price is paid. A problem can arise during the land registration process that can take years before being raised by the keeper. The purchaser may have paid the money and the solicitor may have looked at everything that they are supposed to look at, but then, lo and behold, something crops up that the keeper raises. That can put people in a dreadful position because the application can be cancelled or withdrawn in some cases. Most people have a mortgage on the property, so the lender will be screaming that they do not have a security over the property, and so on. We are dependent on the land register to give us a far better steer than it does in such cases. That is an area that should be looked at. The keeper could look at more complex applications even for urban properties and not just for rural properties. I know that there is a title investigation service, but there is a separate charge for that. If you are buying or selling a property for £100,000, you do not expect to have to pay the keeper hundreds of pounds for that service. There must be some proportion in that regard.

The Convener: I am conscious that time is getting on and that we have a lot of ground still to cover, so we will move on to electronic conveyancing and registration.

Stuart McMillan (West Scotland) (SNP): The Scottish Law Agents Society highlighted in its submission that it welcomes the provisions to extend the ARTL system, but Mr McCormick's comments on that were somewhat different, to say the least. I have a few questions on the ARTL system for the whole panel. I am one of the non-lawyers on the committee, so I have never seen or used the system. Before I ask any questions, can we have a brief description of what the system is supposed to do?

Ross MacKay: ARTL is short for automated registration of title to land. It is a computerised system that has been created by Registers of Scotland whereby the transfer deeds—the disposition and the security—are created online between the buyer's solicitor and the seller's solicitor and are, on completion, submitted to Registers of Scotland. It allows the registration process to be completed instantaneously. In the "traditional" paper system, a paper deed is signed by the seller and handed over in exchange for the price on the day of completion, and then posted to the keeper to be registered. That paper process takes about four to six weeks for an existing register title.

The ARTL system is great in principle: it allows for very speedy automatic registration as the title sheet can be updated within 24 hours. It is not e-conveyancing, which is a phrase that is used, because that would cover the whole process from start to finish. The ARTL system focuses only on the last part of the process, which is the creation

of a transfer document and its registration electronically.

Ian Ferguson: There are various problems with the system, of which the committee should be made aware. As a practical conveyancer, I fully intended to use ARTL to a great extent, and I said in my firm that everyone should use it where they could. However, we cannot impose it on the other side, and they will frequently say that they do not want to use it. That is because the system can cause delays: people are unfamiliar with it so they get thrown out and their password is revoked, and they have to go back in. You have no idea how frustrating it can be.

The practicality is that most people use ARTL for discharges—where that can be done; some lenders will not do it—or for mortgages. Things such as remortgage transactions are being covered.

It is almost not being used for any other purpose: buying and selling is a dead duck at present because the system is not, in my view, fit for purpose. It needs to be changed because it is a mess and it is not working properly. It is too clunky and difficult to work with.

I am stating the practical position so that members know that ARTL is no magic wand that has solved problems. I have to say that I am disappointed by it, given that I was enthusiastic to try to make it work. I have been thwarted—it never really seems to happen.

Various transactions are not covered by ARTL. I have suggested to the keeper that we have a "Tell me, don't show me" principle, whereby we could tick a box to say that we have seen all the links in title. At present, if we have not done that, such transactions cannot be operated through the system. Many of the transactions that I carry out, including confirmations, trust appointments, deed appointments or court appointments require links in title. We need those to go through, and we could just tick a box somewhere so that could happen, but at present the system just does not work for swathes of transactions. It is a great disappointment to us, and the problem will be solved only if a new system of some sort is introduced when there is money.

Fiona Letham: Dundas & Wilson has not yet signed up to ARTL. We have not prioritised it for exactly the reasons that Ian Ferguson has mentioned. There are so many types of transactions for which it cannot be used that we feel we would be able to use it only on very rare occasions. I have seen a demonstration of it, and I agree with Ian about all the problems, which I have also heard about from colleagues in other firms.

Because it can be used only on rare occasions, it does not speed up the process, due to unfamiliarity and issues that I have heard about that result from information technology capability not being robust enough. The system can, apparently, be very slow to operate because it can hang, crash and so on. I have heard that it slows the process down, rather than speeding it up.

We do not yet have much detail about the proposals for electronic conveyancing and registration. A lot of work would have to be done on that, but there is an opportunity to replace the ARTL system with something much broader that would work for the majority of transactions. We would support such a change. In this day and age, we should go down the e-conveyancing route, including electronic contracts, which there is currently no possibility of doing. Our having electronic deeds of every type, rather than just being limited to transfer deeds as we are now, is an aim that should definitely be pursued through the bill and which we should work towards achieving as soon as possible.

Ross MacKay: The Law Society of Scotland is looking very closely at the idea of e-missives or e-contracts. ARTL deals with the keeper's role of registering deeds, but the creation of the contract is done between lawyers. The Law Society fully supports the idea of e-missives. We are looking to create a digital signature framework for our members—I hope very shortly—so that they will all be able to create e-missives once the bill is passed and we will have the public key infrastructure framework available to facilitate that, but that is way beyond registration. Registration may not be part of the process, but the development of e-contracts is certainly welcome.

Graeme McCormick: An original purpose of land registration was that at some point in the future a solicitor would not be required to do the conveyancing, but since then almost any reform or change has made it increasingly difficult for the punter to think that they could ever do it themselves. In the ARTL system, solicitors get personal identification numbers. Will PINs be given to punters? No.

I am also happy to try e-conveyancing, but we must bear it in mind that if, somewhere down the line—in 30, 40, 50 or 100 years—we try to have a system whereby solicitors, conveyancers or whatever are not required to do bog-standard transactions, we will have been constantly moving away from the intent of the original land registration system: we will have moved further away from the economic interests of the consumer.

Stuart McMillan: We are led to believe that an IT upgrade of the ARTL system is coming in. Are you aware of what is planned? Will it benefit the

system and you, as practitioners? Will it have any effect on the bill?

John Scott: Our understanding is that there is no prospect of a major upgrade of the ARTL system for at least three or four years. I am not aware of an imminent upgrade.

Stuart McMillan: Mr McCormick's submission states that, of the 1,200 legal businesses in Scotland, 95 per cent are small businesses and various case management systems are in operation. Can you provide a rough figure for how many there are? You mentioned that they do not all work with the ARTL system.

Graeme McCormick: I have no idea. Some solicitors buy case management systems off the shelf, some have bespoke ones and some have a mixture of the two, or goodness knows what else.

A few years ago, Registers of Scotland decided, in its wisdom, that the application form should be in PDF format. As a result, I had to spend £10,000 upgrading our case management system so that things could be integrated in our system and not done separately. Things are integrated now—the fields are defaulted, and all the rest of it—so we cut down on repetition. That may say as much about the case management system that we had before as it does about what Registers of Scotland was up to.

12:00

You cannot introduce systems that will cost small businesses an absolute fortune. Any system will have to be compatible and properly stress tested. The problem with ARTL is that—despite what Registers of Scotland will say—it was not properly stress tested. The 10 most active domestic conveyancing firms in the country should be asked to test systems properly in order to ensure that they work in different kinds of transactions.

Stuart McMillan: If the ARTL system were to become compulsory, with a long lead time, would it be feasible to introduce, as you suggest, an element that would involve firms working with the keeper on stress testing? Could the number of firms involved be increased so that any system that was to be introduced, or that may be compulsory in the future, would be better future proofed and easier for small businesses in particular to install and implement?

Graeme McCormick: If such a process could be developed, that would be fine. However, ARTL really is a dead duck. As far as I know, Registers of Scotland is in an agreement with BT and will not be able to extricate itself until 2014, or something like that. I am not technical; I simply look for something that works, and ARTL does not work. That is the problem.

Chic Brodie: I take Mr McCormick's point about small businesses, but I want to ask a question from a taxpayer's point of view. Can we find out how much has been invested in the ARTL system? I appreciate your openness, but the system appears not only to be "a dead duck", but to be money down the drain.

The Convener: The keeper will be here to give evidence, so we can pursue that point then.

Chic Brodie: Can we ask the question before the keeper comes?

The Convener: Yes—we can ask in advance to ensure that we have information before the keeper comes.

Stuart McMillan: My final question follows on from comments on ARTL and its limited scope. The early part of Mr McCormick's submission talks about difficulties—not involving ARTL—in registering tenemental properties and shared plots. If issues relating to such properties are difficult when ARTL is not used, would it be possible to use the current ARTL? Would that be difficult or cumbersome, or would it be easy? Would any particular issues arise?

Graeme McCormick: The problem with descriptions of tenements is not a problem with ARTL.

Stuart McMillan: No.

Graeme McCormick: When land registration was introduced, it was done on the cheap. Basically, the keeper said, "We've got to work with what we have." If a property was described as "the leftmost flat on the third floor" or as "the second door from the left on the first floor", the keeper just had to deal with that, so that is what went in the property section. However, because of bad drafting by solicitors in the past, complications arise. People get mixed up with compass points, and goodness knows what else. From where do you take your right or left? Is it from where you look up the stairs from the front close, or not?

We need, for tenement properties, a system of floor plans that shows the footprint of properties. Many builders now use such a system for flatted developments, and that gives certainty.

John Scott: Just for clarification, I point out that at the moment a land certificate for a tenement property shows on the plan the footprint of the tenement block rather than the floor plan of the individual flat.

The Convener: John Park will ask about e-missives.

John Park: From the perspective of not only consumer engagement but efficiencies within your organisations, is a move to electronic documents achievable? What practical and—which is perhaps more important—legal issues have to be considered?

Ross MacKay: The legal issues are relatively straightforward. When the electronic communications legislation came in several years ago, it permitted the use of e-contracts in everything apart from contracts relating to land. In a way, the proposal in the bill rectifies that omission; in the simplest terms, all it will do is allow solicitors to create by e-mail a contract for buying and selling property. However, allowing the use of such modern means of communication will avoid the difficulties that arise from paper having to cross the country.

Basically, the system will be solicitor owned—communications with regard to creating the contract will be between, for example, me and Fiona Letham—and the Law Society will create protocols for that. As I have said, the Law Society will also create the supporting public key infrastructure in order to ensure that any offer I might send off to Fiona will contain my digital signature, and any response that I receive from Fiona will contain hers. I hope that the process will be relatively simple and straightforward.

Of course, that leads us on to the question of how we build such an approach into case management systems. However, that is a separate issue that relates to the practice of, and commercial arrangements between, firms. The problem is that there is no national supplier of such systems—although I have no doubt that, once the contracts are created, suppliers will get into the marketplace to try to sell their products to firms. In the end, that will all boil down to an industry standard.

Graeme McCormick: When I started in the 1970s—in the days before faxes, e-mails or anything like that—missives for the purchase or sale of domestic property were generally concluded within 24 or 48 hours. Now even a simple missive for the purchase or sale of a domestic property is rarely concluded within 10 days. E-commerce, e-missives or whatever they are called are not necessarily going to change that; after all, many things need to be checked connected with the purchase of a property besides the title.

The main impediment to the conclusion of missives is finance. Solicitors will not conclude a binding contract to purchase a domestic property until the mortgage papers have been issued. We do not trust lenders' statements that they are going to lend money because sometimes they pull the plug. I am all for e-commerce, but we should not for a minute think that it will actually speed things up. What would speed things up and give more certainty to the system would be improved processing of mortgages.

John Park: That is an interesting point, but it would take not just this committee but a parliamentary session to sort it out.

I am worried by previous comments about how the existing system has not been used. Would any system supporting e-leases, e-missives and that sort of stuff have to be established, which would require a marketplace to exist, or could individual practices or organisations carry that out themselves?

Ross MacKay: Are you talking about the ARTL system?

John Park: I am talking about moving in the direction of e-missives and e-leases.

Ross MacKay: With all such things, the facility needs to be created and practice for its use then develops. It strikes me as bizarre that one can buy a photocopier or holiday electronically but not a house, so in that respect a move towards ARTL must be a big step in the right direction.

Graeme McCormick is right in the sense that technology is not a magic wand; it will still take time to formalise contracts. The facility to send them instantaneously by e-mail and to save 24 hours by not sending them through the post will not make a huge amount of difference. However, such a facility will be used more and more regularly and it can tie in to the process of moving beyond just creating the contract, going into the conveyancing and then on to registration.

Such a system will require robust IT systems. Individual solicitors will have their own systems, and that is fine, but Registers of Scotland's IT system is not adequate at the moment. That seems to be recognised, whatever the rights and wrongs of the situation. I, like other witnesses, have tried ARTL. I can do on paper in five minutes what takes me half an hour electronically. That is wrong, so a new system has to be created. When it is ready and it is as simple to use as paper, practitioners will use it. That is the bottom line.

John Park: Do you have any sense of what it would mean for individual consumers who are trying to engage with practices and the system? Would such a system mean an improvement in that respect? You are seeing it from the viewpoint of trying to provide a service. I recently spoke to someone who had taken out a loan electronically. They told me how wonderful it was just to have to tick a box, type their name into the system and so on. They said that it was a lot easier than waiting for correspondence to come. Do you have any

sense that an electronic system would improve your engagement with the consumer?

Ken Swinton: I do not think that an electronic system would have any impact on consumers because consumers do not have a digital signature; we have not invested in the infrastructure to give every citizen in Scotland a digital signature. To come back to the point that Graeme McCormick raised earlier, only those who possess a digital signature will be able to engage in the process.

Anything that is done will have to comply with European e-commerce and e-signatures directives. The e-signatures directive requires a public key infrastructure system, which is what Ross MacKay has been speaking about. Someone needs to be the authority that registers people to issue digital signatures. At the moment in relation to ARTL, in the absence of a certification authority, the keeper has become the default certification authority. One of the questions about the extension of ARTL and its use for e-missives was around the fact that the keeper has no authority to do anything other than in relation to registration of deeds. The keeper is therefore not able to authorise anyone to issue a digital signature for missives.

The European directives do not require that land transactions fall within the e-system, but we clearly want to move towards that. Most of the cost of transactions comes about because solicitors add value—we hope—to the process of transferring property. Whether we use an e-system or paper will not really affect the cost of a transaction, and other factors affect the speed of a transaction. I am sure that it is sometimes very important to conclude missives quickly for commercial reasons, and an e-system will enable that, which is where I think it will have an impact. However, for the general citizen buying and selling a property or remortgaging, it will have little or no impact.

The e-system is optional, so people will be able to use paper deeds as long as they want to. I do not think that there is any proposal to force people down the route of an e-system at this stage.

Also, if every citizen was given a digital signature, there would be a danger that it would all become too easy. It is all very well that it is easy to book an easyJet flight, but being able to dispose of property with the ease with which people can book an easyJet flight might have disadvantages.

The Convener: On cost, I was interested to see that the Scottish Law Commission's report that preceded the bill has an economic impact assessment that says that

"Based on the innovations that have already taken place in the conveyancing market, it is not difficult to see how e-enablement could reduce typical legal costs by 50%".

Is that a proposition that you accept?

12:15

Graeme McCormick: I accept it perhaps in relation to some solicitors, but not to myself. I am not looking for business when I say this, but my firm is fee driven. A couple of years ago, I conducted an exercise in which I e-mailed every firm of conveyancing solicitors in Scotland and asked them for a quote. Half of them replied. There was a factor of six between the lowest quote and the highest quote for the same sort of transaction, but many firms of solicitors offer conveyancing at fixed fees or at what I would call modest fees. The cost of domestic conveyancing has plummeted in real terms over the past 20 years, so the legal fee is not the problem.

As I said, it is often ancillary items that are the issue. Are there local authority consents? Is a National House-Building Council certificate missing? Is there an architect's certificate? Does the central heating work? We have all become engineers and all those matters come into play now. I suppose that those things give added value, but people generally look for them for a fixed fee. I do not make a lot of money out of each transaction and I would find it quite difficult to shave 50 per cent off the fees that I charge, but maybe others are more successful than I am.

The Convener: Maybe Dundas & Wilson could afford to cut its fees. Sorry, that was a rather unkind comment. Does anybody else want to say anything about cutting costs through e-commerce?

Fiona Letham: We hope for commercial transactions that there would be some efficiencies and some effect on fees, but I do not think that the impact would be as significant as it might be hoped to be in the residential sphere, because so much else is involved in the transaction that e-enablement is a much smaller part of it.

Ross MacKay: All that we would save by doing the transaction electronically would be the cost of a stamp, because all the advice and the service behind it will remain the same. We still have to tell the client what the letter means and send the client a copy of the letter. The estimate of a 50 per cent saving is somewhat optimistic.

John Scott: It is fair to say that, for most transactions, by far the biggest outlay that the buyer will make is payment of the stamp duty land tax.

The Convener: Thank you. Unless members have other questions on e-missives and so on, we will move on to security of title.

John Wilson (Central Scotland) (SNP): Good afternoon. The Government's proposals in the bill include the provisions in section 82 on security of

title. The provisions lay down some markers to identify the rights of people who sell property and, I hope, thereby protect property purchasers.

What is the panel's view on the proposals? Do they go some way to addressing the issues that come to us? An example is that one of my constituents said that two members of her family tried to sell her house when she was out of the country visiting other family members. Will the proposals help to protect individuals when family members try to sell their property when they are not in the country or, as in the example that is given in the committee's briefing, fraudsters identify an empty property and try to sell it on, knowing that the real owner is not in the country?

Ken Swinton: Under the current legislation, title flows from the land register, so the fraudster who disposes of the property confers on the new proprietor a title—or at least it flows from the land register. The shorthand that is used to comment on the current system is that it is said to give too much, too soon, so a system that slows down the process and allows the true owner to assert their right to the property on their return to the country is clearly welcome and aligns the land registration system more closely with property law.

The other part of the equation that must be balanced against that is the need for the security of transactions and for people to be able to transact on the faith of what is in the register. The existing legislation has one solution to that, which is that the new proprietor keeps the property and the real owner is compensated for their loss. However, that system is seen to have defects, and it promotes physical possession of the property over anything else. Our view is that the move towards deferring the indefeasible nature of the title is an improvement on the current system.

Ross MacKay: I have a problem with the current system as well. The Scottish Law Commission looked at it closely and at great length in its report. It referred to the question of

"the mud or the money",

which is a bit odd. In the current system, as soon as you get the title in the register—bang, that is it. As long as you have the keys as well, that is it. You are the owner and are secure and no one can kick you out. If there has been fraud in the background, it is a case of saying, "Very sorry," and the former owner getting whatever indemnity that they can get from the keeper or another source, but they cannot get the house back. The commission has recognised that that situation is wrong.

The commission's proposal is to bring in a one-year cooling-off period whereby, if you buy a property and occupy it for a year, your title will be secure and free from challenge. That will introduce difficulties in practice, though, and we have not really thought it through. A practising solicitor buying a property who was offered a title when the owner had owned the property only for, say, nine months would have to have a discussion along the lines of "Well, can you prove that there is nothing else behind you and that you have occupied the property for that period of time?" We will have to think through the practical issues.

As a matter of principle, I think that the commission has come up with a fair balance in trying to protect an owner who has lost out because of fraud or something similar and to ensure that they can get their house back, provided that they do it within a year.

John Wilson: The difficulty is the level of compensation to be given to the true owner of a property for its loss. How far can we equate the true value of all that they have lost by a fraudulent or other act by an individual or individuals with the value of the loss of the property?

We might think that the period of a year to which Ross MacKay referred is long enough, but there are people who do voluntary work overseas, for example, and who sometimes sign up to volunteer for two years or longer. How would we protect their property rights if someone identified their house as an empty property, found out locally that the owner was working with Voluntary Service Overseas in Cambodia, say, and decided that there was an opportunity for them to sell the property because the owner would not be back for at least 18 months? With a one-year rule, the new owner would get title to the property.

What level of compensation would the true owner get? Would it be only for the value of the property at the point of sale or would it be a meaningful value that also took account of goods that they might have lost through the sale?

Ross MacKay: The level of compensation is almost a separate issue—in effect, there would have to be a claim. I imagine that the keeper's indemnity insurers would look at what loss had been suffered, and one would hope that that would include not just the bricks-and-mortar value of the house but the inconvenience and other ancillary losses that had been suffered. However, that would almost be like an insurance question when a claim is made. When you make a claim, you put everything into the equation and see what you can get out.

I suspect that whether the one-year period is adequate would have to be a policy decision. Your point about the one-year period is quite right, though. Another such example is that someone in the armed forces could be away on a tour of duty for two years, so they could lose out if someone fraudulently took their house away from them. The

commission considered the issue and felt that, on balance, one year should be sufficient time in the vast majority of cases for an owner to be aware that someone had wrongly moved into their house.

Such an approach is not scientific; the commission simply feels that it strikes a fair balance between protecting the true owner and protecting the buyer in good faith, who will at least know that they own their property. If there is no time limit, the concern is that, even though the buyer has a registered title, there is always the risk of someone whom they do not know coming along and kicking them out. We need to strike a balance between protecting the innocent owner and having certainty with regard to the land register and the purchaser.

Ken Swinton: Solicitors are also gatekeepers as far as money laundering is concerned. We cannot guarantee that identity fraud will not happen but, under our professional rules, the general money laundering regulations and the Proceeds of Crime Act 2002, we have a duty to identify individuals who come to us as clients. In other words, we are required to identify the person and ensure that they tie up with the address. No system is perfect, but this one has a number of safeguards that, over the years, have become increasingly onerous.

John Wilson: I am tempted to ask how many solicitors have been charged and found guilty under money laundering legislation. I would like to think that no practising lawyers or solicitors in Scotland have been in that situation, but I am sure that that information will emerge in evidence.

I have just been passed a note saying that presently the true owner of a property has up to 10 years to reclaim it. Disputes over compensation, who owns the property and who has the title to it tend to arise when the property is resold quickly and the new owner takes ownership. Will the one-year time limit diminish current rights, under which a person can reclaim a property up to 10 years after it has been sold?

Ken Swinton: The current legislation does not set out such a period for a title registered in the land register. In other words, as soon as the title is registered, the purchaser becomes the proprietor. If they are in possession, are in good faith and have not been fraudulent or careless, they will keep the property; irrespective of how it happens, the keeper cannot amend the registration. The situation is different with titles in the register of sasines, which are conditional on 10 years' possession. No new purchase can end up with a sasine title, and an existing sasine title would transfer into the land register.

Any decision on the period is a policy decision and any such period will to some extent be arbitrary. It has been thought appropriate to set out a one-year period in the bill, but one could make a case for a longer or shorter period. Ultimately—I do not think that any of the panel will say anything else—it is up to the Parliament to decide what is an appropriate period.

People who go abroad can take precautions against the possibility of identity fraud or losing property by, for example, getting a neighbour or friend to keep an eye on the property—or, for those with real concerns, setting up a webcam to see who is in it. We do not design systems on the basis of absolute worst-case scenarios; instead, we have to design a system that suits most situations. The counterbalance to that is the transactional security of subsequent transactions but, as I have said, where the balance lies is ultimately a matter for the Parliament.

John Wilson: Given the earlier discussion on electronic conveyancing, I am interested in the prospect of solicitors advising people to set up a webcam to keep a regular eye on their properties.

Ross MacKay: There has been a big discussion about the reliance on Google earth and Google maps and how they might be brought into the system. I am not being facetious; the issue is being discussed seriously. After all, many people rely on those facilities to identify where a house is and what it looks like. There is a question whether the keeper can pay copyright fees to bring all that into titles, but I think that that is for another day.

12:30

Graeme McCormick: I have just a couple of points. First, we use Google maps to look at properties and examine them against land certificate plans and things like that.

Secondly, my view is that if somebody buys a property in good faith and gets a land certificate, their ownership of the property should not be disturbed, but compensation should be given to the person who has been defrauded of the property. However, there are things that the land register could do—I mentioned a couple in my submission.

The bill does not appear to address the problem of money laundering and identity fraud, but Registers of Scotland and the law enforcement agencies are arms of government, so they should talk to each other and provide information. They should also take solicitors into their confidence by providing information about whether individuals whom solicitors might be acting for have form and about who they are connected with. Because we run a risk-based business, if we were given such information, we could decide whether we wanted to act for people on that basis. Generally, we do not have such information about people. For

example, we probably have relations who we think are upstanding but are not—you just cannot tell. Currently, there is not that kind of to and fro of advice.

There might be a suspicion that solicitors should be able to get such information about people, but I remind everyone that solicitors are actually officers of the court, so we have a greater responsibility than most citizens have. If we fall foul of the court, we should probably suffer more than other citizens would.

There is an opportunity through the bill to squeeze an awful lot of individuals out of the system and prevent them from being able to own or deal with property in Scotland. We probably spend almost half the time that a transaction takes in dealing with the question of identity fraud, mortgage fraud and so on and deciding whether we are happy. We review files constantly in the course of a transaction, but we do it with our arms tied behind our backs. We do not get any help from officialdom at all.

John Wilson: I have a follow-up question for the Law Society. Is it possible to find out how many purchasers of properties have made complaints to the society about lawyers and solicitors whom they feel have advised or instructed them wrongly?

Ross MacKay: The Law Society does not have such information, because if it is a question of a claim—I will go back a step. There are two possible routes. One could be a claim about inadequate professional service whereby someone could say that they were not properly advised that, for example, a garage did not come with a house. That claim would actually go to the Scottish Legal Complaints Commission and not the Law Society. The SLCC has been in place for the past couple of years.

On the other hand, if someone claimed that they paid for a house and garage but lost out because the garage did not in fact come with the house, that would be a claim for compensation that would be referred to the Law Society master policy insurers, who would deal with it as a negligence claim. There are two distinct points to bear in mind about how things would operate.

The Law Society does not have statistics on either of the types of complaint that I described. A complaint about an issue relating to property would be within the SLCC's remit. If the complaint was about negligence arising from a property transaction, it would go to the insurers, so they would have that information.

The Convener: Stuart McMillan has a question, but I am conscious of the time so I ask him to be brief.

Stuart McMillan: Mr McCormick talked about the working relationship with lawyers and solicitors. Solicitors operate private businesses—they are not part of the public sector—and in Scots law and the law in general someone is innocent until they are proven guilty. It would sit uneasily with me and I am sure with most individuals if, through an information-sharing protocol or whatever, a solicitor was passed information about someone who had not been convicted, and was told, "This individual is a bit crooked, so don't deal with him." I accept that we should try to drum out criminals, but there would be difficulties with such information sharing in practice.

Graeme McCormick: I take your point, Mr McMillan, but we currently have to make such assessments. If another solicitor or other third party says to us, "You might be asked to act for Joe Soap; beware," and we think that there is the potential that something nefarious is going on, we are supposed to refer the matter. That is the problem that we have. It is belt-and-braces stuff, and at the end of the day we are the ones who will be in the frame. It does not matter where the information comes from; we must assess the risk.

There is a knock-on effect on the public, because legal fees go up considerably if, for example, the Scottish solicitors guarantee fund, to which every solicitor has to contribute, takes a huge hit. It is in the interests of the public that we deal with the problem. The relationship between a solicitor and a client is confidential, so we will not pass information to everybody under the sun. We make a risk-based assessment as to whether we want to act for an individual. Just now we do not have all the information that will enable us to make a judgment, in many cases.

Ross MacKay: I appreciate Graeme McCormick's concern. I accept that it is not really for the police to tell the keeper that there is suspicion about an individual that should be fed back to the solicitor. It would be dangerous if vague suspicions were bandied about throughout the conveyancing process.

The Law Society entered into a protocol with the Scottish Crime and Drug Enforcement Agency a few months ago on exchange of information, so that if we become aware of members who, regrettably, are involved in crime in some way we can discuss the matter confidentially with the police. Likewise, if the police become aware of concerns about one of our members they can feed information back to us. Therefore, information exchange between the society and the police, under an agreed protocol, is in place.

I reinforce the point that all solicitors are governed by money-laundering regulations. We are all obliged to have regimes in place for verifying clients' identity and we are all obliged to

report suspicious transactions to the Serious Organised Crime Agency in London. In addition, the society has various anti-fraud initiatives in place. As you probably know, firms' books are inspected regularly and those that are deemed high risk are inspected more regularly than others are. The inspection is thorough and will flush out a lot of concerns at an early stage.

Ian Ferguson: I will join in the debate. I have a joint role: I am here to represent the Scottish Law Agents Society but I am also a director of the Legal Defence Union, so I deal with a number of cases of solicitors who are facing inspections and having to answer queries about what they have done.

Section 1(5) of the bill says:

"The Keeper must take such steps as appear reasonable to the Keeper to protect the register from—

(a) interference,

(b) unauthorised access, and

(c) damage."

It does not mention fraud, which is an omission; fraud should be in there. The keeper, along with solicitors, should have a responsibility in that regard that should be expressed in the bill.

Some members of the Legal Defence Union have raised with the Law Society concerns about the effect of the information-sharing protocol on confidentiality for clients. Discussions have not concluded, because the LDU is reacting to the announcement on the ISP, not having been part of the process whereby it was arranged with the Scottish Crime and Drug Enforcement Agency.

One of my major concerns, which is in our written submission, is about section 108 of the bill. That section deals with the creation of an additional offence relating to applications for registration, and is rather naive. The policy memorandum acknowledges that a common law crime of fraud is already being used for the matter. Bringing in a new offence that restates what existed before represents rather muddled thinking. Introducing such a provision will not deter fraudsters—as I said, it is rather naive to think that. Fraudsters will commit fraud anyway, no matter whether there is an additional fraud category.

To be honest, I think that the section is aimed more at solicitors. Solicitors get information from their clients and pass it on. I see them as being in the front line. When such an offence is committed, the person who is responsible for the fraud will immediately blame the lawyer, and the lawyer will get the hassle. I do not think that the section will deter anybody. We should leave the matter to the common law, which is nice and simple. I do not see the need for an extra law, and I do not think that it has been properly shown that there is a need, as is stated in the policy memorandum.

The key to why the provision is included is in paragraph 79 of the policy memorandum, which states:

"The common law of fraud already applies in relation to applications to the Keeper and is currently relied upon to secure the conviction of any person making such a fraudulent application. A key element of that offence is that knowledge of the fraud has to be proven, which is extremely difficult."

That is the nub of the problem. The offence is difficult to prove. There is an attempt to change the basis so that lawyers have to prove that, "It wisnae me," by showing that they have done everything. They are being second-guessed as to what ought to be done in the situation. There are no guidelines for us in that situation.

The provision is not helpful, and it should be struck out. It is not needed, the case has not been made, and it will make lawyers' lives much more difficult. The idea of people doing their own conveyancing is certainly hit on the head. The proposal will simply not work.

I have had my say.

The Convener: Thank you. That is very helpful. We were going to ask about section 108 specifically so, as you have raised the subject, I ask the other panel members to say whether they share your views.

Ross MacKay: The short answer is yes. The Law Society has submitted its own response on section 108. The concern is that it will possibly affect the innocent solicitor. There is no reference in the section to fraud—it is not mentioned at all—and it boils down to making an arguably misleading statement on a "reckless" basis. The word "reckless" is not known in Scots law; it is not known exactly what that might be, and certainly not in the context of filling in a form. We are not aware of any cases or prosecutions that have been dropped because of a defect that the section would cure. Mr Wilson asked whether any lawyer has been convicted of money-laundering offences. The answer to that is no—the Law Society is not aware of any solicitor who has been convicted for money laundering. However, the section covers potentially innocent solicitors being caught by a fraudster. They will have been duped. They will have put in a form in good faith, but were they reckless? We do not know what that means. The section mentions the defence of due diligence, but what is that due diligence? We do not know what steps we can put in place to protect that. At the very least, there would have to be reference to intentional crime—to the intent to commit a crime.

To repeat Ian Ferguson's comment, the matter is already covered elsewhere. Our memo refers to

the Proceeds of Crime Act 2002, which deals with offences if people enter into any arrangement involving the acquisition or retention of criminal property. As far as I am aware, the police in Scotland have not sought to rely on that provision at any stage. We also referred to the existing Criminal Law (Consolidation) (Scotland) Act 1995, which puts an onus on anyone who is involved in submitting a form to a Government body to ensure that the statement is true and correct, but that is about knowingly and wilfully making a false statement. Those tests are not in section 108, which refers to the concept of recklessness and the defence of due diligence. We do not know what they mean.

I suspect that, in practice, it will increase the complications in conveyancing practice. Solicitors will try to get their clients involved in signing the forms themselves, which will knock ARTL on the head, because ARTL can only be used internally by the solicitor. The solicitors will say that they are not filling in the forms and that the clients will have to do it. Extra work will be involved and it might also involve extra cost.

In our view, therefore, section 108 is not required. It is badly drafted and unnecessary.

12:45

John Scott: The Scottish Law Commission report on which the bill is based was in gestation for the best part of a decade and there is no mention in that report of a requirement for criminal provision to be slotted into civil statute. It was not in the draft bill on which the keeper consulted in 2010; it was slotted in last autumn at the last minute, or so it seems to us. We were somewhat surprised at that and we feel that there has not been sufficient consultation about the provision.

Fiona Letham: I agree with everything that the panel has said about this so far. I first heard about section 108 when I attended a stakeholder event that was being run by Registers of Scotland at the end of November, just before the bill was introduced. When I reported back to colleagues in my firm and in other firms, the reaction to the new offence was one of absolute horror. There were lots of questions about the types of issue that the panel has been raising. What will we have to do to make sure that, as innocent solicitors, we are not caught by the provisions? As drafted, section 108 does not make that clear. If we ask a client whether a third party uses their property, do we then have to go on a site visit to look for evidence of third-party occupation?

Sending the land registration forms to the client also came up. As drafted, section 108 does not seem to allow us to rely on information that comes from the client as a defence. As Ross MacKay said, we have to exercise all due diligence, and we have to take all such steps as could reasonably be taken to ensure that no offence will be committed, but we do not have any guidance on what those steps should be. We are very concerned that such a draconian provision that could have extremely serious consequences for innocent solicitors has been brought in, particularly because it was brought in at the last minute and was not part of the lengthy consultation process that took place in 2010. We have been put on to the back foot because it was brought in at the last minute and, as the Law Society says in its submission, it is not necessary.

If the provision is to be in the bill in any form, we feel strongly that it should be tightened up, as other panel members have suggested.

The Convener: Thank you; that is pretty clear. I have one more issue to ask about and I know that Mike MacKenzie wants to come in on it too. Section 107 would put on solicitors and their clients a civil duty of care to the keeper. Does anyone on the panel have a view on that or are you quite comfortable with that?

Ross MacKay: We are quite comfortable with that. It reflects what we understand to be the law anyway, so we have no difficulty with it. We have always assumed that, if we make an honest mistake as part of the process, the keeper may revert to us to seek compensation. As a matter of principle, we could not object to that.

Having given that acceptance of liability for negligence, if you like, it seems to go too far to try to criminalise what might be exactly the same behaviour. It just seems to be unnecessary.

Fiona Letham: There was a question on the duty of care in the Registers of Scotland consultation. We responded by saying that we did not think that the provision was necessary on the basis that common law duties of care already exist.

The length of time that those duties should last has been changed since the draft bill that the Scottish Law Commission produced. I understand that the proposal now is that the duty of care should last until completion of the registration process. Given the length of time that some applications can take to be processed, that could be many years after the solicitor has dealt with the transaction, which would put quite an onerous duty on a solicitor. Someone who did not deal with the original transaction might receive a letter out of the blue five years later while the registration application was on-going and it might not be clear that it would have an impact on the registration application. We would prefer that provision either not to be there at all or to be brought back to the commission's proposal for the duty of care to end

either at the time of settlement of the transaction on the part of the grantor of the deed and their solicitor, or when the registration application is submitted, if it is the purchaser and their solicitor who are making the application.

The Convener: Does the Scottish Law Agents Society have a view on section 107?

Ken Swinton: We are content to adopt the Law Society's position. On Fiona Letham's point, if it is a common law liability, it persists until it prescribes anyway, so it is not just ended at application stage.

Fiona Letham: We would prefer it to be clarified.

The Convener: Let us not have a dispute between lawyers on the panel of witnesses.

Ken Swinton: That would not do.

Mike MacKenzie: It was interesting to hear the comments on sections 107 and 108. If there was a mistake on the part of the keeper and you were involved on behalf of your client in resolving the problems that arose from that mistake, who would pay for that? Should the keeper pay for her mistakes?

Ian Ferguson: I can give you the low-down on that. The keeper has no policy of making payments to people but I know that it happens. I have heard that from two solicitors, one of whom had made a claim previously. I had a solicitor who was incredibly annoyed about what had happened to him. He told me all about it and I asked whether he had sent the keeper his bill. He said that he had not, so I said that he should, and should wait and see what happens. The bill was paid almost by return. I cannot go into the details, but it was a big mess—a real mistake—that cost several hundred pounds to sort out. The Registers of Scotland will pay up informally. If it does not, and what it has done has caused someone loss, that person could probably raise an action against it.

Ross MacKay: The difficulty in practice is that although most of the errors are fairly minor, if there are additional costs we are probably talking low hundreds. The solicitor will swallow those costs as part of the service to their clients. We try to get errors resolved to get the transaction over the line, depending on when it is. It is part of the value-added service on the part of the solicitors—if I dare make a plug for the profession. We do a lot behind the scenes to resolve issues, which clients are probably blissfully ignorant about. We are there to sort problems out, not create them.

Graeme McCormick: Until recently the keeper did not charge us if we made a mistake in an application but now we are charged a penalty in certain instances—

Ian Ferguson: Which is why the keeper—

Graeme McCormick: What is sauce for the goose is sauce for the gander.

The Convener: Please do not speak at once—it is confusing for the official reporter who is trying to note down what is being said.

Mike MacKenzie: My second point is that these days I seem to have to produce three different forms of identification just to buy a postage stamp.

The Convener: That is just you. [*Laughter*.]

Mike MacKenzie: Possibly. We all know that that is designed to prevent money laundering and so on—we would go along with that—but it can be an impediment and sometimes a burden when one is trying to do business efficiently. The unfortunate effect of that—at least in my case—is that some solicitors and banks and so on demand original documents, although others are quite happy to take a scanned PDF or whatever. There are now lots of identity theft kits floating about insecurely in cyberspace, the inadvertent effect of which may be more identity fraud and other crimes, not less.

We have heard your concerns about the effect of section 108 on solicitors, but what burdens might you have to impose on your clients in order to ensure that you protect yourselves? What would the effect be of that?

Ross MacKay: The regulations require passports and so on to be provided at the start of the transaction, on day one. Someone goes to see their lawyer because they want to buy a house, and we say, "That's great. Now, can I see your passport, driving licence, utility bill?" The regulations are somewhat vague—there is not a specific list of what we have to see. Each firm has leeway about whether it is a passport or whatever.

On day one we verify the identity of our new client. We start the process and put the offer in and so on. If at any stage during the course of that transaction we become suspicious about criminal activity, we have a duty to report our suspicions to the Serious Organised Crime Agency in London. If there are no such suspicions, we get down to business. At the end of the transaction, when the property has been bought, current practice is to submit forms 1, 2 or 3 to the keeper, as appropriate, with the deeds, for the application. There are questions about the names of parties, whether a company is insolvent and various other, technical issues. We put all the paperwork in to the keeper.

Current practice is that the form is adjusted with the selling solicitor and does not, on the whole, go to the client—the questions are asked between solicitors. If the provision is enacted, clients will almost certainly become involved in the process and be given copies of the form to fill in, or at least

be asked to certify to us that the contents are true and correct. That will be yet another level of paperwork in the process, to protect the lawyers' backs—to be frank—so that we have done what we can do under the heading of due diligence.

Mike MacKenzie: Will the approach be effective in preventing fraud?

Ross MacKay: No. The fraudster is a criminal—I am stating the obvious—who I suspect knows the regulations better than anyone around this table does. Even with all the checks in place, fraudsters will get through the net, because they know the systems.

A big case was reported last year in which a finance company raised a compensation claim against a firm of solicitors. In effect, it was confirmed that although the solicitors were a blue-chip firm, which had carried out blue-chip verification of identity and had seen a passport and done everything else, they had been conned. It was as simple as that. In that case, the lenders, who were also conned, were seeking to recover money from the fraudsters' solicitors—they accepted that the solicitors were innocent but were trying the argument that there was some duty involved.

The regrettable bottom line is that even with all the checks in the world, fraudsters will still get through the net. All that solicitors and society can do is to put up as many hurdles as we can to try to prevent that. We are the gatekeepers in the process, but it is inevitable that someone will get a ball in the back of the net.

The Convener: I am conscious of time, as there are other areas that we want to cover. We will move on to prescriptive acquisition.

Patrick Harvie (Glasgow) (Green): I understand that the bill's approach is fundamentally to retain the existing mechanism for prescriptive acquisition, while attempting to secure a clearer statutory basis for the keeper's current practice and to tighten somewhat the conditions under which an a non domino disposition can be accepted, including owner notification, where possible. Is that an accurate understanding of what the bill is doing? If so, do the witnesses support the approach?

Ross MacKay: It is beneficial to set out clearly, on a statutory basis, what the keeper does. Currently, there is ad hoc practice, which has grown up over the years. However, I think that the profession is quite comfortable with the keeper's policy, which in effect is that, if someone is seeking to take title to a piece of land that no one owns, the keeper will ask searching questions and look for evidence as to why no one owns the land and why the situation has arisen. A flexible, pragmatic approach is taken to applications for an a non domino disposition.

Our concern is the provision on giving notice to third parties, which was not in the draft bill that the commission produced. The bill proposes that the applicant must satisfy the keeper that notice has been served on the proprietor, if he, she or it is known—that is unlikely, because if you know who the proprietor is, you will not be seeking to take title—or, secondly, on a person who is likely to be the proprietor, or, third, if such individuals are not known, on the Crown, through the Queen's and Lord Treasurer's Remembrancer.

We have difficulty with the provision. First, it is clear that, if the applicant knows who the owner is, they should not be taking the property; they should be negotiating with the owner to try to do a deal to acquire it, as it might have a value. Secondly, there are many cases in which it is clear that who has title to a strip of land on someone's development site is unknown and has been lost in the mists of time. It is a useful pragmatic tool for people to be able to go to the keeper and say, "Can we get title to that bit?" so that they can round off the development site—or round off something that has been de facto for many years without causing concern. Our concern is that, if a notice went to the Crown, the Crown would see that as an opportunity to treat the land as, in effect, something of a ransom strip and seek compensation for it.

13:00

Patrick Harvie: Why should it not?

Ross MacKay: It would be detrimental for commercial entities. For example, take a situation in which someone is trying to put together a large development site with various titles and has 99 per cent of the site but cannot buy the missing 1 per cent from anyone because no one knows who owns it. That 1 per cent may be the key to the whole site so, if the developer cannot meaningfully get it, the development might not go ahead, which would have a knock-on effect for business.

In many other cases, title is sought purely to sort out a long-standing historical arrangement for individuals. Someone may have occupied a house and garden for many years but, only when they come to sell, discover that they do not have title to a particular bit of ground even though it is within their garden and fences. Because they do not know who the owner is, they cannot sell it on, so they must either move the fence or go to the keeper, tell her what the story is and ask whether she would consider giving them an a non domino title to sort things out.

At the moment, the keeper is being quite pragmatic in that regard. She will listen to the story

and take a view as appropriate, but one certainly has to satisfy her that one has done all due searches to ensure that the owner has disappeared and can no longer be traced. It is a useful tool in such situations.

Patrick Harvie: Are there any other views?

Fiona Letham: We are concerned about the time periods that are set out in the bill, which are new; they do not exist at present. The bill says that, if someone wants to submit an a non domino disposition, they must be able to prove

"that for … 7 years immediately preceding the date of application the land … has not been possessed by"

the owner. In addition, the person who wants to submit the a non domino disposition must prove that they have possessed it for the immediately preceding period of one year.

The one-year period seems perfectly fine. We do not have any problem with that, although we have questions about the level of evidence that the keeper would look for to prove the level of possession for the year. Would the applicant need to have a photograph of themselves at the property every month in that year with a locked gate to prevent other people getting into it?

The Convener: Or a webcam.

Fiona Letham: Although we have questions about that, we think that a year is sensible in principle, but we have concerns about the seven-year period.

I am not thinking about the situation that Ross MacKay mentioned of somebody who has lived in a house and occupied the garden for a long number of years but does not have title to it, because it would be quite straightforward to prove that no one else has occupied it. An a non domino disposition can be extremely useful to unlock a development site, but how would a developer be able to prove that an owner had not been there for seven years, unless the person who wants to apply for the disposition must wait until they have had possession for seven years? How else would they prove that the owner had not been there? The seven-year requirement could lead to long delays for developments that would otherwise happen and be of great economic benefit.

We should also bear in mind that the requirement is simply a test—a filter—for getting an application on to the land register in the first instance. Getting it on to the register does not give the person who has applied a good title to the property; it starts a 10-year period to get good title to it. In practice, the bill is saying that there must be a period of 17 years before an applicant gets good title, because they must prove that the owner was not there for seven years before they apply and there will be another 10 years once they have applied.

The seven-year period is excessively long and would be difficult to prove. I know of other commercial law firms that have the same view.

Patrick Harvie: Given the answers that we have heard so far, I think that there may be limited support for the argument that I will now put to the witnesses. However, we are likely to hear it put to us later in our evidence-taking sessions, so I would like to hear the witnesses' response to it.

I will read a short extract from an article by Andy Wightman, who will give evidence later:

"Prescription and a non domino deeds have provided for widespread theft of land over the centuries by the greedy and powerful being able to get their claims in the door first and the innocent bystanders being both ignorant of the attempt and losing their land. Under the current rules, the Keeper is even prohibited from notifying the true owner that a hostile claim has been lodged.

It is time to end this abuse of the law."

He goes on to offer an alternative approach.

"Instead of the (admittedly stricter) rules set out in the Bill, a far more public process should be adopted. Any claims to 'unowned' land should be lodged with the Keeper and then advertised publicly on the Registers of Scotland website for a minimum period of one year. The publicity should include the name of the claimant and their grounds for the claim, the extent of the land being claimed, a report on investigations into its legal history and the conclusions of the research conducted to identify the true owner, and an invitation to lodge rival claims. The view of the Crown should be sought and publicised as it is the ultimate owner of land and could legitimately lay claim."

Would the witnesses like to respond to that?

Ross MacKay: The commission considered the possibility of advertising and expressed the view in its report that it would be impractical and difficult to regulate what advertising would be appropriate. The commission considered the issue for its report and felt that advertising is not necessary. In its view, it is a question of issuing notice to the proprietor, to the person who is thought to be the proprietor or, eventually, to the Crown. The commission felt that that was an adequate answer to the question of advertising.

I will not go into claims of 100 years ago. Yes, there were issues with what was done, but that was the old system. We are now talking about land registration and, having been burned over the past 20 or 30 years, the keeper has a strict policy of not accepting applications without proper investigation. She must be satisfied that searches have been done to the best of the applicant's ability to show that the owner cannot be traced. We are talking only about several hundred applications of this type each year, which is not a large number.

That is the practical approach that the keeper has adopted. You could make the policy argument that, if no one knows who owns a bit of land, it belongs to the Crown in theory, and the Crown/Crown Estate should get the benefit of that land if it has any value. That would be fine. However, the difficulty is that that might impact on a commercial development, particularly if the land is going to the Queen's and Lord Treasurer's Remembrancer, which is the body that deals with such things, as the QLTR may take a ransom value for it. It is for Parliament to make the policy decision whether that is appropriate.

Patrick Harvie: But, surely, if an unreasonable value is being claimed, the matter could be determined fairly by some process or other. Is there not a point of principle at stake that, although it might be convenient for a commercial developer simply to acquire a piece of land that does not appear to have an owner, others may have a legitimate claim to it and it is reasonable to give others the opportunity to make that claim?

Ross MacKay: Absolutely. However, at the moment, if someone has a potentially valid claim, that should come out in a search of the title to identify that party.

Patrick Harvie: The Crown might be unaware of the situation.

Ross MacKay: Yes. The Crown would have no knowledge of that, but the "true" owner should be aware of it even if he is not occupying the land. You must bear in mind that we are talking about unoccupied ground that no one has possessed. We are not talking about someone's house; we are talking about bits of land.

Patrick Harvie: What if, for example, a community body were to say that it had as much right to claim a piece of unoccupied land as the developer against whose unwelcome development it had been arguing for years?

Ross MacKay: That would require a policy decision. At the moment, in practice, little bits of land are identified in the residential sector that are occupied by a party quite openly. In the commercial sector, it is bits of land on brownfield sites whose owner no one can identify. To rectify the situation, title has to be granted in favour of a party, be it the owner or the developer. At the moment, as Fiona Letham says, the deeds do not give someone good title—they just give them a bit of paper according to which 10 years of possession can start running. It should be borne in mind that, if the true owner comes along at any time within 10 years, they can challenge that. The deeds are only the start of a process lasting 10 years before someone can possibly have good title. To have good title within 10 years, it is not just a question of having the bit of paper; the person must also occupy the land.

There is a twofold aspect to getting good title to such a piece of land: first, an existing title; and secondly, occupation for 10 years

"openly, peaceably and without judicial interruption".

If someone has done that for 10 years, the law prescribes that they have good title. In the scenario that you have outlined, if the land has some value, the question whether the Crown or the local community should have a say in its ownership is a policy decision for Parliament to make.

Patrick Harvie: Are there any other views?

Graeme McCormick: I see no reason why this could not be advertised. We should be as transparent as possible with these things. We must also remember that the keeper has a general duty of care. I see no reason why, when the keeper gets such an application, she cannot then refer it to the QLTR for his or her comments.

Patrick Harvie: Again, would that be a departure from current practice that required a statutory basis?

Graeme McCormick: I assume that it would. I do not know whether the keeper does anything internally; I suspect that she does not. I see no reason why she should not.

Ian Ferguson: The land register is a public register, so the information is there. When someone puts an a non domino deed on to the register, the company needs 10 years to pass before it can get good title. That amounts to disclosing that it has had bad title for 10 years, and there is public knowledge of that because it is on the register. Then it is a question of whether one goes further and advertises, which I suspect would lead to all sorts of nutcases coming forward with no possible basis for owning the land but saying, "It's mine."

Patrick Harvie: I am reminded of Arthur Dent lying in front of his house and being told by the man with the bulldozer, "The plans have been on display for some months in your local planning office—it's not our fault if you don't take account of local affairs."

Ross MacKay: Then there was the Vogon destructor fleet.

Patrick Harvie: It made the same argument on a grander scale, yes.

Ross MacKay: I agree that an advertisement is an alternative. As I said, the commission took the view that, on balance, notice was appropriate rather than an advertisement, but I do not think that that is something that anyone here would go

to the barricades about—it is a practical aspect. Personally, I wonder who will pick up on a small advert in the local paper, or indeed a national paper. I do not know whether that addresses people's concerns in this respect.

John Wilson: Let me give some background on notification of claim of title. In the area where I live, for a number of years we have been aware of a character known as the raider of the lost titles, who goes around snarfing up titles all over the place. I recently came across an inquiry from a constituent who had purchased their house three years ago and thought that they were also purchasing a garden that had been managed for over 50 years by the previous owner of the house, only to find, two weeks after the purchase, that somebody else claimed title to that garden. The difficulty is about the notification period. It may not be appropriate to advertise in a national or local newspaper, and some 40 per cent of the population in Scotland do not have access to the internet or a computer. It might therefore be advisable that the neighbour notification process be applied as it is in the planning process, so that, if someone claims title to a piece of land, at least the neighbours of that land are given notice that they have done that instead of facing the current situation whereby, for example, the purchasers of a property suddenly find out that someone else owns the garden that had been tended by the previous owner of the property. How do we get the information out to people that somebody has decided to claim title to a piece of land that they have identified by searching through the records and other information and then saying, "There's no identified owner here—I'll lay claim to this piece of land"?

Ross MacKay: These are all tests that the keeper would have to adopt in satisfying herself as to whether there is a valid reason for title being taken. At the moment, it is perfectly possible for the keeper to say to the person who has made the application that she wants to know about everything involved in the occupation and history of the property—the whole story.

The keeper is perfectly free to increase the level of evidence that is required. That can go beyond title searches to provide evidence that no one owns the bit of land that is being talked about and can bring in advertisement, whether that is neighbour notification, a press ad or something else. It is for the keeper to decide whether to adopt that evidence and to satisfy herself that the application is not a land raid or somebody trying to steal somebody else's property, but is for proper commercial use in the general sense or is for the true owner of the land to sort out their title. The keeper must be satisfied that that is the situation. To repeat, just getting the title by itself is not enough, because there is the question of occupation.

13:15

John Wilson: I throw this question open to the panel. Has the keeper been diligent in her duty of ensuring that any land transfers that take place are properly assessed and accordingly allocate the ownership of the land to people who make title claims?

Ross MacKay: I suspect that that question is more for the keeper than for the panel, but I can give anecdotal evidence. A few years ago—I am not sure exactly when—the keeper's policy changed from being fairly relaxed about such applications to being much more diligent and seeking a lot more information. That was about five or six years ago.

Fiona Letham: I, too, am not sure when the policy changed but, from my experience, a few years ago, when I submitted some a non domino dispositions to the keeper, we were put through the hoops in the number of searches that we had to do to verify whether there was an owner of the land. From personal experience, on that occasion, the keeper's staff were stringent in ensuring that we did all the possible searches. The approach was more lax in the years before that. I do not know when the approach changed, but it is now very tight.

John Scott: The issue is a fine example of the deficiencies of the existing legislation on land registration. There is no provision in the Land Registration (Scotland) Act 1979 to cover it. Over the years, keepers have had to evolve their policy to take account of the circumstances, particularly when claims were made on the keeper's indemnity because sufficient checks had not been carried out. Many more checks are now in place than there used to be.

The Convener: The final topic that we want to cover—briefly—is advance notices. Angus MacDonald has a question.

Angus MacDonald (Falkirk East) (SNP): I will be brief. The proposed system of advance notices must be simple to operate and must fit with existing practices. It is envisaged that advance notices will primarily be in electronic form. Are the witnesses content with the idea of a system of advance notices? Do you have any reservations with regard to points of detail?

Ken Swinton: We support the introduction of advance notices because of the dangers of granting letters of obligation, which have become more apparent as a result of fraud cases in the past 12 months, to which Ross MacKay referred. It seems inevitable that we will have to change the

system of granting letters of obligation because of the prospective insurance costs.

We have concerns about the drafting of the bill. It says different things when the advance notice relates to the register of sasines and when it affects a title that is in the land register. With the register of sasines, the keeper will have to register the notice but, with the land register, it appears that the keeper will grant the notice. There is a mismatch in the drafting of the provisions.

We are concerned that the advance notice might sit silently in the application record. It is not clear from the bill that the application record will be searchable. The application record is not referred to in the current statute, but it exists and is potentially searchable by searchers. We want an assurance that that will continue. An example of the need for that is the case of a creditor who seeks to obtain an inhibition against an owner of a property to prevent them from selling or otherwise dealing with their assets to the detriment of the creditor. In some cases, the creditor might do that after title has been investigated and it is known that there is a title to attach, but they will not want to incur that expense if an advance notice is already on the record that will prevent the inhibition from being effective. Without the transparency of being able to search the application record, we do not think that that is fair to a potential inhibiting creditor.

Ross MacKay: We agree with that. On a technical point, if advance notices are to be worth anything, they will have to appear on the record in an easily searchable format so that when someone is about to buy a property, the advance notice will be flagged up. That is a technical change that we would agree with.

We would like advance notices, and we would like them as quickly as possible please. For information, the current system is that every selling solicitor grants what is called a letter of obligation on completion of a sale. That is a personal undertaking by the solicitor, not the seller, that when the buyer, subject to certain checks, registers their title, nothing will show up that they do not know about. If, for example, the seller has been underhand and has been putting through a remortgage at the same time as the sale, and they time it so that they complete a remortgage on the same day they complete the sale, they will get the sale price and the remortgage funds, and they will get on the next flight to Brazil. When that comes out at a later stage of the registration process, there is no discharge of that security. The liable person will not be the seller but the solicitor, who is entirely innocent in that regard but has been caught out by some sort of fraud.

Again, one of the hidden benefits of using solicitors is that we underwrite the process by effectively guaranteeing to buyers that, if something comes up at the last moment at completion, we are the ones who have to sort it out. That goes back to our indemnity insurance arrangements, and our insurers might have to fork out for that.

The Law Society operates the master policy that provides indemnity insurance to all solicitors covering all sorts of claims against them. As well as being convener of the property committee, I am also convener of the insurance committee, which has regular discussions with the insurers. They are concerned about letters of obligation and do not quite understand them, but they do know that England and Wales do not have letters of obligation and instead have priority period notices, which are the same as the advance notices that are being proposed in Scotland. Huge claims have been made in the Republic of Ireland due to breach of undertakings and the insurers are equating the two, although technically they are different. We are now under some pressure from our indemnity insurers to endorse advance notices in principle and to seek their introduction as quickly as possible. That will, hopefully, allow the solicitors' personal liability to wither on the vine and they can then make a saving on the insurance policy.

The Convener: Does anyone have any further points?

Fiona Letham: On advance notices, we would prefer the legislation to be clear about whether one advance notice or two would be required in a situation in which someone is purchasing property and granting a mortgage over it. Does the lender who is providing the funds need a separate advance notice or would the one in favour of the purchaser protect the lender as well? I know that some people who have been working on the bill are of the opinion that one advance notice will protect both, but I do not think that that is clear in the bill and we require clarity, or else lenders will insist on there being a second advance notice.

The Convener: Thank you.

Ross MacKay: On a technical point, no style of advance notice is given in the bill. It just says there should be an advance notice but it does not say who will prepare it. There is no reference to the Scottish Government producing a style in the fullness of time. If the style of the advance notice suits the profession, I am sure that it will suit the keeper as well.

The Convener: As there are no other questions, I thank all the witnesses for coming. It has been extremely helpful. I am aware that we have had quite a long session this morning, but we

have covered a lot of ground and it will be useful to the committee in preparing our stage 1 report.

13:24

Meeting continued in private until 13:42.

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