OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 4 October 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 4 October 2022

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DELEGATED POWERS AND LAW REFORM COMMITTEE

25th Meeting 2022, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Mike Dailly (Govan Law Centre)
Myles Fitt (Citizens Advice Scotland)
Dr Jonathan Hardman (Law Society of Scotland)
Alan McIntosh (Advice Talks Ltd)
Dr Hamish Patrick (Shepherd and Wedderburn LLP)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 4 October 2022

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning, and welcome to the 25th meeting in 2022 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent.

The first item of business is a decision on whether to take items 6 to 10 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Moveable Transactions (Scotland) Bill: Stage 1

09:33

The Convener: Under item 2, we will continue to take evidence on the Moveable Transactions (Scotland) Bill. We will hear from two panels. I welcome the witnesses on the first panel: Mike Dailly, solicitor advocate and principal solicitor at the Govan Law Centre; Dr Jonathan Hardman, convener of the Law Society of Scotland's banking, company and insolvency law sub-committee; and Dr Hamish Patrick, partner and head of financial sector at Shepherd and Wedderburn.

I remind all attendees that they should not worry about turning on their microphones, because those are controlled by broadcasting colleagues. If you would like to come in on any question, please indicate to me by raising your hand—that would be helpful.

I will ask a couple of general questions before I bring in colleagues. Notwithstanding the issues that you have raised in your submissions, which we will come on to in some detail, are you content with the general thrust of the bill?

Mike Dailly (Govan Law Centre): I do not think so. The Govan Law Centre is very grateful to be invited to give evidence to the committee. There is an unprecedented cost of living crisis, so our concern is whether the bill is needed. If so, who will it help? The difficulty is that, in our experience as a law centre, the bill would lead to a bonanza for predatory lenders looking to exploit vulnerable consumers. We know that from the experience in England. For small and medium-sized enterprises I can see some streamlining benefits. I heard the evidence last week from the Scottish Law Commission, which was very helpful, so I can see some of the benefits from a business-to-business perspective. However, that said, I am not aware of any empirical evidence that establishes a real business case for the bill for businesses; I have yet to see such evidence.

I should say that, although I am giving my evidence on behalf of the law centre, I spent six years representing consumers on the Financial Conduct Authority's consumer panel and five years as a member of the European Banking Authority's expert panel, so I come at the matter as a consumer representative with a knowledge of the financial markets in the United Kingdom.

Dr Hamish Patrick (Shepherd and Wedderburn LLP): Contrary to what Mike Dailly said, I think that the answer is yes. As I indicate in my submission, basically, we have post and we

need broadband. The bill is a technical reform. The legal infrastructure that we have at the moment is from the 19th century and is completely useless for practical commerce.

I understand the point that Mike Dailly made in relation to consumers—I am sure that we will come on to that in more detail—but there is absolutely no doubt that the bill will be of immense benefit to businesses. I spend most of my working life apologising to people in England and the United States about how rubbish our law is here. I have to say, "No, we can't do this," or, "We might be able to do this, but it will be very complicated, increase your risk and cost more money, or you might not be able to do it at all."

The bill is needed, but there might be a question relating to consumers. The major benefit of the bill will undoubtedly be for business, although there might be benefits for consumers, too. There are obviously risks to consumers, as there are with anything new that appears. I am sure that we will come on to that. When you are able to do something on the internet that you otherwise would have had to do manually, you have to look out for the issues that arise from that. However, the bill will undoubtedly make business life better, as we will be able to do things that we cannot do now.

Dr Jonathan Hardman (Law Society of Scotland): The Law Society of Scotland's position is that reform in this area is needed drastically and as soon as possible, so we support the reforms. Specific comments on aspects of the bill are included in our submission, but we are very supportive of the reforms in general.

The Convener: I have a question about the threshold of £1,000, and I know that one of my colleagues will ask about that in a bit more detail. The initial report by the SLC was published a number of years ago, and I imagine that the £1,000 threshold was probably fit for that time. Do you want that threshold to be increased?

Mike Dailly: Again, I am trying to recollect the evidence from the Scottish Law Commission, which was sympathetic to uprating the figure. However, with the greatest of respect, I do not think that consumers should be in the bill at all. I think that the bill will be a disaster for consumers in Scotland. The Govan Law Centre would like consumers to be removed in totality from the bill. We can no doubt explore that further.

Dr Hardman: We are concerned about consumers being included in the bill. There are a few different mechanisms to reduce those concerns. One option would be to remove consumers from the bill altogether. A second option would be to remove assets that are traditionally associated with consumers, such as washing machines and televisions. A third option would be to increase the amounts so that it effectively takes out most consumer assets. That would cause less damage to the operation of the bill in its current form but, as Mike Dailly says, is a rougher metric.

Dr Patrick: I have nothing to add to that. There is no reason not to increase the threshold. The focus and benefit of the bill are elsewhere.

The Convener: Dr Patrick, can you explain how the current law in Scotland affects businesses' ability to access finance?

Dr Patrick: To step back a bit, the bill is not about finance; it is about how we do certain things legally, many of which will be nothing to do with finance. The pledges section of the bill is about finance, because that is a security interest. The assignation section is not about finance. It will be useful when someone tries to restructure a business within a group, for example. The bill is not just about finance but is about many other things, too.

A whole series of different types of finance are affected. Consumer finance is a very small element. We may come on to that later. The immediate impact relates to invoice discounting, which is basically buying debts. Invoice discounting is a method of financing using working capital. Many invoice discounters regard their product as a better version of an overdraft because it is safer—for them—and so has better capital treatment, which potentially makes it cheaper and so forth.

At the moment, invoice discounting cannot be done as it would be done under the bill because the 19th century structure requires any business wishing to transfer a debt to give notice—"Oyez, oyez!"—to all its customers. That means that there are lots of inefficient workarounds and there are questions about how those operate.

That affects all sectors of the market, including large multinationals, for which Scotland may be an ineligible jurisdiction—when financing on the basis of book debts or commercial debts throughout Europe or globally, Scotland does not count so there is no benefit from something like renewable energy receivables due from companies. There is a whole series of things for which the multinational company would not get benefit. It would help at that level.

At the bottom end of the size scale—this is an issue to be discussed in the context of consumers because there is a small gap between the two—at the moment in Scotland, many of the invoice discounters will not fund sole traders. They do it in England but not in Scotland, because Scots law is inadequate and individuals cannot grant floating

charges, which is the back-up mechanism. In England the law is ugly, but it works.

This change would enable sole traders to have access to discounting, which is currently not available in Scotland—some will do it, but it is a risky business and the price may be high.

Dr Hardman: I agree with what Hamish Patrick said. It is important to add the benefits for raising finance on corporeal moveable items—things that you can touch. At the moment, if a manufacturer has a valuable piece of plant or a shoemaker has a shoemaking machine, which is the most valuable thing in the business, they cannot use it to generate finance or secure it against finance without physically delivering it to the creditor and therefore entirely removing it from the operation of the business.

Dr Patrick: Sheep are my favourite example.

Dr Hardman: Yes. The pledge aspect increases access to finance, too. There are three areas in which it will help businesses that have been raised in the Law Society of Scotland banking, company and insolvency law policy sub-committee. First, those who currently cannot obtain finance will be able to obtain finance. There are empirical studies linking the ability to grant fixed security to access to finance—in the same way that you can imagine that RBS would not lend me money to buy my flat without having the ability to have a standard security against it. The same logic applies. Some businesses that cannot currently obtain finance will be able to do so, against both their corporeal items and their non-corporeal items, which are things that you cannot touch, such as claims and intellectual property.

09:45

Secondly, for those who currently have finance, it will make it cheaper, because how lenders set their rates, in theory, is about the profit that they want to make and the risk to them of lending the money. In theory, it reduces the risk element because, if the borrower does not pay, it gives them further assets that they can go against. Therefore, it should make existing finance cheaper.

Thirdly, there is a concern that the current law is driving people away from using Scots law. People are encouraging the writing of contracts under English law in order to make them easier to assign; they are encouraging the use of bank accounts that are based in England in order to make them easier to take fixed security over; and they are encouraging the incorporation of English subsidiary companies instead of Scottish subsidiary companies in order to be able to take security over their shares more easily. Those are three areas in which Scots law and Scotland more widely are needlessly losing out.

The Convener: Before I bring in Mike Dailly, just on that point about the use of Scots law and English law, do you know what type of financial sum Scotland is losing out on, annually, as a consequence of the current law?

Dr Hardman: No; it arises anecdotally, I am afraid.

Dr Patrick: It is difficult to gauge. As I have said, I have spent a lot of my practising life saying, “Put that bank account in England.” It is anecdotal, but it is absolutely an everyday occurrence, certainly at the mid and larger end of the market, where that is possible or practical. As for the extent to which it is structured at the smaller end of the market, you will find that retail contracts are often written under English law, because that is easier.

The Convener: So would the bill stop you from having to say that to clients?

Dr Patrick: Yes. In fact, I will be saying, “Write your stuff under Scots law instead of English law, because we’re better than you now.” Whether they will do it is another matter, obviously.

Mike Dailly: I fully accept the points that Hamish Patrick and Jonathan Hardman have made about the business benefits. I conceded at the start that it is clear that there is a streamlining benefit to businesses. However, I do not see the arguments when it comes to the consumer position.

The Convener: We will come on to a range of questions that will involve that.

My final question concerns the business-to-business opportunities of the bill. Will any particular sector of the business community benefit primarily if the bill were to pass?

Dr Patrick: All sectors will benefit because, as I have said, it is a broad, technical structural reform. The obvious one is invoice discounting—trading businesses that have book debts.

In addition, for example, the real estate sector—sorry, I am getting a bit English; I mean, property people—will now be able to fund student accommodation development more easily, because they will be able to assign the rents. If anyone has ever had to advise a client who said, “If I give notice to all these students of this assignation of rents, they will not know where to pay them—and when another student comes in, I will have to do another set of documents,” they will know what I mean. It will also affect the property market for other types of development, such as shopping centres.

It will affect the operation of energy businesses—both renewables and oil and gas. Potentially, it will affect fishing, depending on whether someone's fishing boat is a "ship"; if it is not a ship but a boat, it will be able to be pledged, which will make life a lot easier.

It will affect technology. Once the intellectual property provisions are through, we will be able to do proper security over intellectual property. At the moment, we say, "Oh, sorry, you can't do very good security over that," or, "Maybe you should move to England or the US to do that."

There is a whole series of sectors. Every sector will benefit in due course—some earlier than others. There will be a gradual realisation of the opportunities that the reforms present to the sectors, in order for that to be developed.

Dr Hardman: I agree with everything that Hamish Patrick said. Intellectual property for technology start-up companies will be especially important. Another big area relates to those that rely on having large valuable assets, such as whisky. Being able to pledge whisky barrels to a funder means that whisky distilleries will be able to obtain finance on their whisky while keeping it in their warehouse, which is not currently possible. That strikes me as potentially a big opportunity.

Oliver Mundell (Dumfriesshire) (Con): I will ask a couple of questions about assignation. Principally, will there be any challenges if assignation is able to occur by both intimation and registration? Do you have a view on whether both types of claim might continue?

Dr Patrick: I have no problem with that at all. There are several reasons for that, one of which goes back to the breadth of the bill and its potential applications. There are some situations in which elements of the current system, such as notice, work absolutely fine. In a lot of circumstances, the requirement to give notice stops things happening. With large-scale invoice discounting, there might be hundreds of customers with debts that are due for 30 days; giving them notice every 30 days simply will not work.

In, for example, large project financing for building a harbour, a hospital or something like that, in which you assign lots of high-value limited contracts, everyone is there: everyone is in the room and everyone can sign the contract, and notice is very easy. In fact, it is probably easier than registration.

There will also sometimes be commercial sensitivities. There will, therefore, be needs throughout the variety of uses of the infrastructure that mean that one method is more advantageous than the other. The disadvantages of having both methods are outweighed.

On the argument about the register not being complete, the register was never going to be complete and was never going to be the answer to absolutely everything. The land register works because the land is registered. Assets that are assigned are not registered—it is not known who owns them to start off with. The register is a completely different thing; it tells you simply that something has happened and puts you in a position to find out what that might be. The risk exists that someone has given notice, but that risk is reduced.

I think that the practice of everyone registering will develop in certain fields. There might come a point when we say that registration will be the only way for particular types of claim; indeed, the bill provides for that. That would obviously improve the usefulness of the register in particular ways, but that is not what the register is for. It is not a land register.

Oliver Mundell: I hear you saying both things, there. Do you think that the register will become the default over time?

Dr Patrick: For a lot of things, yes it will. In fact, for some things, people will do both. For example, if I am buying a business and I am buying the debts of the business, when I close the deal, I will immediately register in order to protect myself from the insolvency of the seller. Customers might carry on paying the wrong person for a period, so I would probably give notice to them, because it would work better that way.

Equally, there are situations in which you would not give notice because it confuses things. For example, in transferring retail debt, a person usually carries on paying to the same bank account, because giving people notice simply confuses them.

Oliver Mundell: On a wider point, is it important for people, and even for smaller businesses, to know to whom they owe money?

Dr Patrick: If people pay the wrong person, they are protected. That is what the notice provisions are about.

Oliver Mundell: Is it important, however, for people to know to whom, ultimately, they owe money, or is that just how business is done and it does not matter?

Dr Patrick: There are certain contract types in which transfer would not be possible anyway, because the identity of the person with whom the contract is performed is important, which will be preserved by the bill. There are other situations where it is not.

Oliver Mundell: Right, so you think that there are situations in which it is not important or not relevant?

Dr Patrick: I think that in many circumstances it is not important. It is not what happens at the moment; at the moment a person would be given notice and would find out that they have to pay someone else, but they cannot do anything about that, and if they have not had notice they would carry on paying the person whom they had paid previously. Once that person has the money, it will probably go to a secured account and will then be passed on to someone else.

Dr Hardman: I will add two things to that. First, I do not think that there is an alternative to the dual approach, because the alternative would be to say that the only way to transfer a claim would be to register it in the register of assignations. That would mean that if, for example, Hamish Patrick owed me £5 and I wanted to transfer that to Mike Dailly, it would not be a valid transfer unless it was done through the register of assignations, which would mean forcing everyone through a very narrow legal technical approach, which is not going to be the way in which claims at the lower end of the scale will be transferred. I do not think that there is an alternative.

Secondly, in answer to the question whether it is important that a person knows whom they owe money to, I think that, traditionally, the law regards it as being more important to know who owes a person obligations than to know to whom a person owes obligations. If I owe £50, that is what I owe. However, if the terms of the debt can change, that is a different matter.

To follow up on what Hamish said, I note that there are probably two approaches. The first is one in which people still pay debt to the same place: if RBS creates loads of loans and assigns them, a person will still be paying RBS regardless of whether the loan ultimately sits with RBS. In that situation, it is probably less important than if you physically want the money to transfer, because there is no way round it other than to tell somebody not to pay into one bank account and instead to pay into another.

Oliver Mundell: I have another question to ask before Mike Dailly comes in. It is slightly out of my area of questioning. If consumers or individuals know whom they owe money to, they have an idea of how that debt might be treated and how they will act. It is the same for smaller businesses: if a person thinks that they owe money to a friendly supplier with which they have done business for a number of years and the business that they owe money to changes without the person knowing, they could suddenly find that the debt is handled differently. Does that consumer protection issue arise, or should we not worry about it?

Dr Hardman: It is important to note that, at the moment, debts can be transferred by notice, so a person might find out about it—

Oliver Mundell: If that happened, a person would know and would instantly be able to change their behaviour or their approach to how they manage that debt within their business.

Dr Patrick: They would know if the behaviour was changed. There are already practices in relation to consumer debt that are promoted by the regulators and trade bodies that deal with it. Mike Dailly will, no doubt, have a view on whether those are good and effective, but there is a bigger question about whether debts ought to be transferable at all. However, as they are transferable, I am not sure that the bill will make a lot of difference.

Oliver Mundell: The bill makes it easier for debts to be transferred, and it makes it easier for that to happen without a person knowing.

Dr Patrick: At the moment, transfer is done using workarounds such as trust-based methodologies

Oliver Mundell: People know when that happens.

Dr Patrick: No—at the moment, when transfer is done in invoice discounting, people do not know. It happens economically, in business terms, because there will be a trust and a floating charge between the seller and the funder, so the funder will have certain controls and will be able to step in and enforce. That will carry on. People would not adopt the system if the transfer was restricted, which is a different issue altogether. In fact, legislation—which is yet to be implemented in Scotland and not, I think, for policy reasons—in relation to restrictions on transfer of commercial debts is going in the other direction, which means that a restriction cannot be imposed on the transfer of commercial debt.

10:00

The Convener: Before I bring in Mr Dailly, I will ask for clarification from Mr Patrick. In response to Oliver Mundell's question, you mentioned the workaround. Would the bill put in place a consistent approach to transfer, compared with workarounds that might be different depending on particular transactions?

Dr Patrick: Yes. There would be greater uniformity and things would be easier. There might be situations in which people would still use the workaround—for example, if people were operating in several jurisdictions and used the same workaround elsewhere—but that is unlikely. The incentive of things being cheaper and easier will move people towards using the register.

The Convener: So, the point is not just that the register is cheaper and easier, but that it is consistent, too.

Dr Patrick: Yes.

The Convener: Thank you. I bring in Mr Dailly.

Mike Dailly: Mr Mundell raises an important question. Oddly enough, I am sympathetic to what Hamish Patrick has just said. At Govan Law Centre, businesses provide us with supplies, so I have seen invoice financing from that end. I take on board what Jonathan Hardman and Hamish have said and the point that you have made, convener, that from the business-to-business position there is a logic to the bill making that process more effective and streamlined, which is better for Scots law.

However, from the consumer position, the bill provides quite a guddle. The bill operates within existing UK law, so under the Financial Services and Markets Act 2000, the Financial Conduct Authority is empowered to make rules and it has made the consumer credit rule book, which requires that consumer credit agreements be intimated to the consumer on assignation. If the bill were to be passed as drafted, we would have the absurd position in which consumers would be protected in certain circumstances but not in others, which is not logical.

On Mr Mundell's point, it is interesting that the FCA considers small and medium-sized enterprises to be consumers in certain circumstances. I took from his question a concern about smaller businesses that perhaps do not have the resources of a larger company to handle some of the issues.

Oliver Mundell: Thank you. I have a new line of questioning, convener.

The Convener: I have a supplementary question. Can you please provide some examples, Mr Dailly? You have said that consumers might be protected on some aspects but not all. When might a consumer be protected, and when might they not be?

Mike Dailly: I think that it was Hamish Patrick who referenced students' rents. Those rents are not regulated by the Consumer Credit Act 1974—an agreement that has no interests is not regulated by consumer credit law. There is a lot of detail in that, convener. The point that I am making is that we have UK consumer protection law, but the bill has come along and it creates a very odd position.

I think that Hamish said earlier that the bill is not about finance, but about upgrading the specification around possession and securities in Scots law. I fully accept that point, but the law does not operate in a vacuum. In the real world, we have the way in which businesses operate. We have the experience of England in that regard, which is why, from a consumer's perspective, we have not had bills of sale in Scotland, unlike in England.

That point goes back to Roman law. Our Scots law system is based on Roman law, which our common law then replaced, and that is why we never had a non-possessory pledge. If anybody were to ask, "What have the Romans ever done for us?", they would hear that they actually capped interest at 8 per cent 2,000 years ago, so there is a lot to be said for going back to Roman law.

The Convener: Okay. Thank you for that.

Oliver Mundell: I will just leave that there.

The bill would provide for waiver of defence clauses, whereby a debtor agrees with the assignor not to raise defences to payment against the assignee. Are you aware of such clauses being used at present? Is there potential for them to be misused?

Dr Patrick: That relates to section 13. Is that right?

Oliver Mundell: Yes—it relates to section 13(1).

Dr Patrick: Section 13 needs to be completely recast, for technical reasons. It is trying to restate the current position of the law.

The waiver of defences is an interesting matter. You are really talking about a provision for someone saying, "I will pay you this money and, if you owe me money, I will still pay you it," or "If you haven't performed this other contract, I will still pay you the money." There are two contracts, which are unrelated, one of which involves payment going in one direction and the other of which involves performance of services going in the other direction, let us say. If services are not performed well, that gives rise to a claim for defective performance of services. At the moment, the person who was due to pay the money cannot say, for example, "I'm not going to pay you the money because you didn't fix my car properly" because, until he has crystallised that counterclaim for bad fixing of the car, he cannot set it off against the payment and must carry on paying.

When the matter reaches the stage at which it is turned into what is called a liquid claim—that is, the parties have gone to court or have got to the stage when the claim is accepted as valid and quantified—the person can say, "I'm not paying the debt to the extent of X quid, because that's what you owe me in the other direction." That is really the law of set-off, which is what section 13 is about. You can, in theory, waive set-off so that you can say that, although you could otherwise set one liquid claim against another liquid claim, you agree not to. That is common in some circumstances. It is not common in retail contracts but it is common in certain types of financing agreements. There is

a spread of financial markets agreements in particular in which doing exactly what you said that you would do when you said that you would do it is important.

There is a spread of cases where that happens; the bill is not trying to change the current position on that, which has been developed over many years. The basic legislation on that is from 1592.

Oliver Mundell: Why is there felt to be a need to restate it in the bill?

Dr Patrick: There is felt to be a need to restate that in the bill because of the current cut-off time for a set-off when you do a transfer. If you owe me a fiver, and I owe you £2, and I then assign the fiver to Jonathan Hardman, the £2 can be set off against it. If the £2 came into existence after notice, it could not normally be set off, although there are nuances around that.

The drafters of the bill have thought, "Oh, we're doing something funny with notice of assignation." At the moment, notice of assignation has an effect in relation to set-off and how defences and counterclaims operate. We need to do something about that. What the Government has done—to my mind, not very well—is insert a provision that tries to take account of the changes to the way that notice of assignation operates under the bill.

All that section 13 tries to do is restate the existing law to take account of a change within the bill. I do not think that the law is altered. There might be a general policy question about whether the law of set-off should be as it currently is—which is why I suggest in my longer response that the matter should be with the Scottish Law Commission—rather than there being a restatement of a bit of it in a bill that is partly affected by it. It is a bigger question, but it is not something that the bill is trying to change.

Oliver Mundell: What would you recommend for section 13? Should it come out of the bill altogether?

Dr Patrick: I have suggested in my longer amendment that it should say something along the lines that the different types of set-off should continue as they are, provided that the effect of notice within the current law will be "blah, blah", with reference to the notice provisions in the bill. I have tried to set that out in more detail. That is one of the important changes that I suggested, because if that sort of thing is wrong it creates potentially serious problems in financial markets.

Set-off is critically important in closing out derivatives contracts, when prices can change by the minute. If someone did a swap on sterling ten days ago and wants to close it out on Friday instead of on Monday, the timing of set-off is quite important. The current question in some circumstances would be whether there is notice.

Paul Sweeney (Glasgow) (Lab): I am interested in the position of the Faculty of Advocates. The advocates are against the idea of waiver-of-defence clauses because they believe that that would very quickly become established practice across all financial institutions, that transactions would become pro forma on that basis, and that that would diminish the rights of third parties. They say that that is weighing the protection of small businesses against the marketability of claims. Do you recognise that as a major risk? Might that become normal behaviour, thereby diminishing the ability of businesses to protect themselves against faulty products that they might have sought security against?

Dr Patrick: I am afraid that I was so busy seeing that section 13 has being miscast that I did not look at that. Others might have a view on that.

Dr Hardman: Such clauses are pretty common in practice, especially in the business-to-business context. They are often referred to as boilerplate clauses. There are legitimate questions about bargaining disparities and the freedom that people should have to contract out of the default rules for set-off. Some of the protections that we have looked at outside the business-to-business context will help at least to alleviate that.

The Convener: Do you have anything to add, Mr Dailly?

Mike Dailly: No.

The Convener: Oliver, are you finished?

Oliver Mundell: I am.

The Convener: I move to questions from Bill Kidd.

Bill Kidd (Glasgow Anniesland) (SNP): I thank our guests for the enlightening discussion so far.

I have a question about what I think is a positive aspect of the bill. How might the bill's provisions on pledges help businesses to access finance?

Dr Patrick: Jonathan Hardman already referred to whisky. There are various types of whisky producer. At the moment, you have to jump through various hoops to create the equivalent of one of those pledges over whisky or whisky barrels. There are some situations in which it is quite difficult at the moment to access finance at all. Sheep are another example. I recall doing a hire purchase agreement in relation to sheep when I was a trainee. That is not a common method of financing sheep, but the bill would be useful. Joking apart, fish farming, for example, is a big industry. How do fish farms go about that at the moment? The way that people deal with commodities such as grain or hydrocarbons when

they seek to create security over them is a little convoluted and difficult. The provision will be very useful for a lot of people.

10:15

Mike Dailly: I will play devil's advocate in relation to what Hamish Patrick said. I accept everything that he said about whisky, sheep and fish, but I question how many of those businesses are sole traders. During the committee's discussion with the Law Commission last week, someone—I cannot remember who; it might have been Mr Balfour—asked a question about floating charges. Why did the Law Commission not think about extending floating charges? From a business perspective, I do not disagree with what Hamish Patrick and Jonathan Hardman have said; we need to sort out all of that. Theirs is a cogent argument, but I give the caveat that that applies to businesses that are more likely to be able to use floating charges, for example. I just want to throw that into the mix.

Dr Patrick: Floating charges for sole traders are very difficult because of the method by which they are enforced. I might have been in favour of floating charges for partnerships, but that was seen as a distraction because of the way in which floating charges fit in with Scots law.

However, the bill will be very useful for sole traders—for example, for a small agricultural business to raise working capital for livestock, crops and so on. That is a benefit, because such businesses will have something that they can provide to a funder.

Dr Hardman: I will mention manufacturing again. In relation to an SME that has a valuable piece of kit that makes gears, shoes or whatever it is that the business sells, a financial institution might be willing to lend to that SME only on the basis that, if things go wrong, it will be able to sell that valuable piece of equipment. A creditor would want some preferred right to it, and the bill provides that without having to deliver it to the creditor in order to create it. That is another tangible benefit.

Bill Kidd: That is extremely helpful.

My next question is about something that might not be quite so helpful, but I will ask it anyway. There are concerns that the statutory pledge provisions in the bill could in Scotland open up a high-cost lending market that could target vulnerable consumers. Do you have any idea of whether that is likely to happen?

Mike Dailly: That is Govan Law Centre's concern. We have the benefit of looking at the experience in the rest of the UK. The Law Commission for England and Wales looked at bill of sale provision, which is what the Scottish bill would introduce through the statutory pledge provisions. It is interesting that that commission did a piece of work that looked at reforming the position in England. Its report said:

"Bills of sale are fraught with problems, both legally and practically."

For example, they

"allow goods to be repossessed on a single default, with

basically no protection

for borrowers."

That is what we would introduce if the bill as drafted were to be passed by the Parliament.

It is interesting that logbook loans have taken off in the rest of the UK. Such a loan is, in effect, a non-possessory pledge or bill of sale on a motor vehicle. I think that that is what would happen if the bill was passed. We already have logbook loans in Scotland, but you do not have to give over your logbook to the lender; in effect, you get a hire purchase agreement, which provides lots of protections for consumers.

I will give a quick example on that point, because I think that it is important. I went online in Glasgow to look at borrowing £1,000 over three years, and the annual percentage rate that I was quoted was 204.2 per cent. I never actually hit the button. I would have had to pay about £100 a month, so I would have had to repay £3,660 over the three years.

Let us say that I did that on the back of a £1,000 old banger of a car, and that I paid my first payment but missed the next one because I got into all sorts of difficulties for the reasons that apply to people in real life. What would happen in the real world under the bill is that my car would be taken away and sold at an auction, and we would see whether anyone would pay £600-plus for it—you always get less than expected. The Law Commission talks about auctions getting the best value, but in the real world, people know what is going on and go to such auctions to get a discounted deal. Let us say that the car is sold for £600; I would still be due to pay £3,060 on my loan plus the costs of recovery and so on. I simply ask, "How would that benefit consumers in Scotland?"

Dr Hardman: The Law Society is very concerned about consumers, which our response reflects. We think that we need to protect them in a number of ways, in that regard. It is important to clarify that the law of debt and the law of security are inextricably linked but separate. The lending market should be regulated—indeed, it is regulated—and loans that are made in that way would fall under that regime.

There is an argument for changing that system and tightening up the protections, but at the moment we have roadblocks to access to finance through our security laws, which is like regulating debt by putting in legal restrictions on people who might want to lend to you. That is perhaps not the best way to regulate the market, but we are very concerned about consumers, as I have noted.

Dr Patrick: Can I play devil's advocate on what Mike Dailly said? I will come back to my modernisation thesis. Opportunities are provided for innovation in the provision of financial services. In itself, that is a neutral thing; it is how the technology is used that is the bad thing. There are good and bad new entrants to the funding market, and there are people who provide good products and people who provide bad products. Therefore, there is the argument that consumers are deprived of an opportunity for innovation, because they will not be able to do things online, for example.

It is clear that risks are attached to that. For example, some point-of-sale finance is regulated anyway because it is a consumer loan. There are also deferred purchase price structures, which are not currently regulated but which the FCA is about to regulate. Should we have banned Klarna in the first place and made it impossible to have that type of deferred structure, or should we, once such an innovation is there, regulate it to make sure that it operates properly?

Another example is online payment systems and push payment fraud. Obviously, that is a big thing. If online payment systems were not available to individuals, we could not have online push payment fraud, so what is the balance between innovation and protection, and where do you set it?

See—I gave it a go, Mike.

Mike Dailly: I will come back to Hamish on that point, because I am very sympathetic to his philosophical view, which is "What if the world was only wonderful and beautiful?"

Dr Patrick: I accept that it is not.

Mike Dailly: But that it was.

Hamish raised a very interesting point. Here is a question: who uses pawnbroking in Scotland? I see people who do, often because they have lost their ticket to reclaim the goods from the pawnshop. Govan Law Centre does that for free. People need a notary public to do that—to produce a document so that people can get their stuff back. We have been doing that for decades.

The people who use pawnbroking in Scotland are people who cannot get credit any other way. They have a really bad credit rating and are desperate. I could today—touch wood—get a zero per cent interest credit card, ask my bank for an overdraft or get a personal loan at a low rate, but people who are in financial distress and are vulnerable cannot do that. Traditionally, they have used moneylenders—which is illegal. Coming back to Hamish Patrick's point, what are they going to do? If the bill is passed, they will use virtual pawnbroking: that is what the bill would lead to. Who will be interested in that? Predatory lenders will be interested, because the only way to make money out of this is to charge several hundred per cent interest.

I know that the Scottish Parliament is here to protect the interests of the people of Scotland. I simply say that the provision is very dangerous for ordinary members of the public.

The Convener: Jeremy Balfour has a supplementary.

Jeremy Balfour (Lothian) (Con): Good morning to you all. I will follow up on that point, Mr Dailly. If we accept your argument, how would you see that provision being taken out? Would you simply take all individuals out of the bill? Would you go down the other route of saying one cannot go against any household goods and define that in the bill, as well as other areas? As a third option, would you go for higher amounts? We have a £1,000 threshold; would you raise that to, say, £5,000, £6,000 or £7,000? I am wondering which of those three options you would choose—or have you come up with a fourth option—if we accept your argument?

Mike Dailly: That is a really interesting question. Again, one could get into the semantics of arguments about increasing thresholds to high figures. "Just so you do not prejudice Mr Smith, who has a Stradivarius and wants to borrow against it", is the sort of argument that gets wheeled out.

I think that the easiest, cleanest and best solution would be simply to take out the word "consumers". "Consumer" is defined in law in different places. The Civil Jurisdiction and Judgments Acts of 1982 and 1991 on jurisdiction in Scotland define "consumer", as do other bits of legislation. Effectively, "consumer" is defined as an individual who is not operating as a trader or in a business function. I have become more convinced from listening to Jonathan and Hamish; especially given the example of an agricultural business. I think that I am convinced and can see the benefit. We do not want to exclude individual traders, but if we use the definition "consumer", we could protect the ordinary members of the public whom I am talking about, as opposed to not restricting businesses.

Jeremy Balfour: Dr Hardman and Dr Patrick, what would be your response to Parliament taking that course of action for the long term—if we did

not remove individual sole traders from the bill, but took out consumers?

Dr Hardman: From the perspective of the Law Society of Scotland, that would protect consumers. Whichever one of the three metrics that you go with, you will end up slightly overprotecting in some places and you will risk underprotecting in others. If you carve out consumers from the bill, you will overprotect the wealthy consumer who might want to use their assets. If you go down your suggested route with household items, you will not protect every consumer, but you might overprotect in certain areas.

In respect of businesses that use things in the course of their business that we typically think of as household items, such as a washing machine in a laundromat, if you were to carve out washing machines, such businesses could not use something that is, in effect, how they make money.

If you increase the threshold, you will overprotect in some areas and underprotect in others. That will happen whichever way you do it, because they are all kind of rough heuristics. The perspective of the Law Society of Scotland is that any of those options would work to protect consumers.

Jeremy Balfour: Does the Law Society of Scotland have a preference for one of the three options?

Dr Hardman: I would need to speak to our consumer sub-committee about that. I could then provide follow-up evidence in writing, if that would help.

Jeremy Balfour: If you could do that, it would be helpful. Thank you.

Dr Patrick: I am pretty much with Jonathan Hardman on this. As I said earlier, the principal benefits of the reforms are commercial, but there are big benefits for sole traders. Therefore, it is important to get the boundary right and not to preclude availability of something that would be useful for them.

I come back to my argument from a minute ago. Yes: the provision prevents potential innovation in retail situations. Clearly, though, there is a policy decision to come to as to whether the best approach to that is to say, "You can't do it" rather than, "Here is how it is regulated and here is how it is otherwise restricted."

10:30

Theoretically—I think that Professors Gretton and Steven said this last week and before—most jurisdictions do not exclude consumers. That is my inclination, although I can see that the practical arguments might run the other way and it is not the most important thing in the bill, as I see it.

The Convener: Oliver Mundell has a supplementary question. We will then go back to Bill Kidd.

Oliver Mundell: Obviously, I, too, am concerned about pawnbroking. I have seen in my own constituency work the situations that arise from it. However, we have heard from others—it is not necessarily their view, but it is an argument that is put forward, and I think that Mike Dailly also touched on it—that it is perhaps preferable to some other finance agreements that are available to people. From the Parliament's point of view, I guess that the issue is how we might find a balance.

At the moment, people who use pawnbroking have to hand over the item. We heard that one of the potential benefits of the proposal is that they would not have to hand over their possession. To use Mike Dailly's car example, someone could continue to drive their car or, in other instances, they could continue to use high-value items and would not have to give them to someone else. Would that be of benefit? My own view is that it would be quite hard to ask people to borrow against something that they could not live without.

Mike Dailly: That is a really important point. Hamish Patrick said that it involves a policy decision. I think that that is right. However, why do we have consumer protection law in the first place? Why do we have law on that subject that is completely different from that applying to, for example, businesses, which is much more laissez-faire and leaves people to negotiate freely and have their choice? It is because consumers do not have choice that they are potentially vulnerable. I would go so far as to say that if the bill, as passed, included consumers in the way that is proposed, there would not only be legal problems but a question about morality would have to be asked. We know from the experience in the rest of the UK that the only companies that get into the area will charge several hundred per cent APR. For me, there is not only a moral question; there is also an ethical question, which is: do we really want our most vulnerable and disadvantaged fellow citizens to be exposed to that?

Interestingly, I remember that, a matter of only weeks or months ago, in defending the idea of consumers being included in the bill, the Scottish Government said publicly:

> "Consumers would benefit from these proposals because securing the debt against previously untapped moveable assets would generally result in lower interest rates".

I say to Oliver Mundell that all the evidence says that that is not true. I know that the committee has—

Oliver Mundell: I guess that the question is whether people would be borrowing at a lower interest rate than that which they might get from an unregulated lender. If people are desperate, we would be cutting off any access at all to finance for them. I am not saying that including consumers is right, but I wonder whether the pushback would be that we would be taking away people's only chance to borrow in a regulated market. Does that not raise a question? Someone could be desperate for money and have items that they could borrow against at a lower rate than they could get somewhere else.

I guess that, in the same way that businesses are already finding complex workarounds involving trusts and accessing other jurisdictions, the most vulnerable people in our society, who do not currently have access to regulated lending, are finding their own workarounds, too. It is just that they are not necessarily as obvious. We have no idea what they are paying in order to borrow that money. In terms of the morality question, would it be better to move that practice into the light rather than leave it unregulated altogether?

Mike Dailly: I fully accept that you raise an important point. Companies such as Provident, which used to go round people's doors, lend them money and maintain relationships with them, have disappeared. When I was at the FCA, I was involved in work on illegal moneylending, which we know is an absolute evil in this country. You are right to say that virtual pawnbroking with 300 per cent APR under the bill would be better than illegal moneylenders going round to threaten people if they do not pay. However, we have made that a crime. All that I am saying—

Oliver Mundell: Given that we are not very good at identifying and stopping that, I guess that the question is whether it would be better to cast some sunlight on the practice so that we know what is happening.

Mike Dailly: I will try to be brief, convener. We need to do something about that. You are absolutely right, and I do not disagree on that. However, there are things that we could do.

To me, there are two options. One is that we pass the bill as it is and allow that predatory lending to take off in Scotland, in which case we will become like a page from a Charles Dickens novel. The other is that the Scottish Parliament and the Scottish Government take a lead. They have done great work on credit unions, for example, but they could do more.

Today, the Parliament published the Scottish Government's Cost of Living (Tenant Protection) (Scotland) Bill, which covers rent freezes and the winter eviction ban. That is the kind of thing that we need—innovative solutions that can make people's lives better. I accept your premise, but I think that there is a better solution. That is the short answer.

Sorry, convener. That answer was not very brief.

The Convener: That is okay. I will bring in Mr Hardman and then go back to Bill Kidd. I am conscious of the time that we have this morning.

Dr Hardman: I will be as brief as I can.

We all agree that predatory lending needs to be fought against wherever possible. The question is: how do we fight it? Do we fight it by regulating the lending market or by, as at present, having such out-of-date security laws that nobody wants to lend in that situation? That might reduce opportunity for consumers as well, I suppose.

I return to the point that security is linked to access to lending. The best way to regulate lending is by regulating lending, not by putting road blocks in the way of lending in respect of our security laws.

Bill Kidd: Thank you for the depth of your responses. There is general agreement—in fact, there is total agreement—that the £1,000 asset protection threshold for consumer statutory pledges is too low these days, and it is expected that that will be replaced. I think that most people are looking forward to alternatives for achieving protection for essential household goods, including, specifically, the exclusion of what are termed ordinary household goods or the creation of an index-linked accelerator to ensure that the threshold is updated. Do you have any views on the strengths or weaknesses of those approaches?

Mike Dailly: I think that I have made the position of Govan Law Centre quite clear, so I am not going to labour the point. However, I am a pragmatist and, if the Parliament was not minded to remove consumers from the bill, I would rather have something than nothing, so I would accept that it would be better to increase the levels. If that is all that is on offer, the higher the levels are, the better.

Bill Kidd: I thought that it was important to ask that question so that you could comment.

Mike Dailly: Yes.

Bill Kidd: Thank you.

Dr Hardman: From the Law Society of Scotland's perspective, our main driver in that regard is the business-to-business world. Our consumer committee said that it could live with an increased amount. I will go back to it, as I

promised Mr Balfour, and I will provide written evidence on which of the three options the consumer committee of the Law Society of Scotland would prefer.

Dr Patrick: I think that Mike Dailly is in a better position to comment than I am, but there are various protective levels and mechanisms, and also diligence levels, in other legislation. I think that there were some attempts to match them. There is some value in consistency so that people know that their telly and their sofa are not going to be taken. Is that not more easily comprehensible to people? As I say, however, I do not have the expertise to comment more.

Jeremy Balfour: I want to take us back to the role of recording and the registers in general. I think that you dealt with some of that in response to the opening questions, but I would like to hear a wee bit more about that. Some respondents to the committee's call for evidence have stated that the registers could never be comprehensive. Could you explain in layman's language what the limitations might be?

Dr Patrick: It was probably me who said that they can never be comprehensive. We can have a comprehensive register only if the asset that we are dealing with is registered. The land register in Scotland is comprehensive because all land is registered or will be registered at some point—God knows how long that will take—on the land register, with reference to Ordnance Survey maps. We know what the land is and who owns it. All dealings with the land must be registered and, if the land is not registered, there is no dealing. That is the only situation in which we can have a register that is comprehensive.

In this case, it is very hard to work out who owns what. For example, who owns this table? Another example might be a piece of intellectual property, such as an invention—that is not such a good example, because someone might have registered it. I will go back to sheep. Who owns those sheep? We cannot tell from a register who owns them. We are starting from the view that the foundations are away.

Laid on top of that are the practicalities of operating the register. In order for a register to be comprehensive in nature, first of all you have to make everyone use it. We have discussed some of the disadvantages of that being the only way in which to do things. There is lots of history there, which we would have to get on the register at some point. The historical position of long-lasting assets of one sort or another—there are a lot of those out there—would always create uncertainty.

When we pile on lots of information that would have to be provided with a registration so that people can work out what is going on from the register, that creates administration, expense, and risks of inaccuracy and invalidity for everyone. As far as the register is concerned, we have to be conscious not to make the best the enemy of the good. If we have got the basics of what is needed—that is, the identity of the assignee or the security holder on the register, mechanisms in the bill, and information in the documents that are uploaded from which someone can find out other things—and if someone knows that something is probably there, they can do something about it. That would be a lot better than what we have at the moment, which is not having the faintest idea. For example, I do not know whether the Scottish Parliamentary Corporate Body owns this table or has bought it on hire purchase, and I have no way of finding that out, save through making a freedom of information request.

Jeremy Balfour: I want to put a similar question to Mr Dailly. From a practical perspective, when you have clients coming in and making requests, do you think that you will be able to get enough information by searching the register? If I were someone who could not remember that I have got this or that debt, would you be able to find that information by searching the register, or is that not something of interest to you in advising clients?

Mike Dailly: If it comes to pass, it might be something that a money adviser or someone who provides debt advice might want to check.

It is quite remarkable how people who do not have very much manage so well the very little that they have. That is important to people when they are up against the wall financially. I have acted for clients in difficult financial circumstances, and they tend to keep their papers. However, I take your point, Mr Balfour. It could be useful. I can see the absolute logic in it from a business point of view and a lending perspective.

Jeremy Balfour: I will put that question to Dr Hardman, as well. Do you think that there will be sufficient information to identify individual claims or pledges?

Dr Hardman: Yes and no is the answer to that. The no is inherent in the nature of the registers, which will never prove that a claim that was assigned existed in the first place. For example, I could register an assignation to Mike Dailly of the £1 million that Hamish Patrick owes me, even if that never existed, so searching for and seeing something in the register will never show you that a claim existed. Similarly, I could register a pledge over my cold fusion machine, which, again, does not exist. The assets do not necessarily exist; even if they do exist, there is nothing to say that they still exist later on, and there is nothing to say that they vested in the party that claimed to grant it at the time that they did.

10:45

There are some further legal limitations with the registers. As a matter of law, they can capture future assets in a business-to-business context. I could pledge all my future machines that fall within a certain category, for example, so that, when one of those machines comes in, it is, by law, automatically covered by the pledge. However, it will not be on the register. Similarly, we can capture generic types of assets. All of that is important for flexibility, but it will undermine the searchability of the register.

In comparable jurisdictions—there are versions of this in the US, New Zealand, Australia and Canada—they make the point that it is really a diligence exercise. You can search against a person and see whether there is something there. However, if there is, that does not mean that you can take it on face value; it means that you have to ask the person, "The register says this—can you tell us about it?" They might say, "That transaction is completed and I have repaid the debt." It is really a due diligence exercise to trigger you to ask the questions. They are questions that already have to be asked at the moment when anybody lends to anybody else, but they are currently asked without that framework to check an aspect against.

Jeremy Balfour: That is helpful. Obviously, people might register something and then discharge the debt, but forget to go back and take it off. That would be a due diligence exercise that would have to be carried out.

Dr Hardman: Yes. It operates in slightly different ways. In theory, the register of pledges could be discharged. You could say that a pledge has gone, but you would not have to say it. However, a lot of assignations take place in security and are just events, so there is no way to register against an assignation that it has been returned—or retrocessed, in technical legal language. You would have to do another assignation register to say that it had gone back.

That is a valid point to make for both registers, which would work in slightly different ways. However, that does not undermine the utility of the exercise as a creation exercise. There will be effects on searching—you would never be able to search against an asset and prove that it is in the right place or with the people whom it is claimed to be with. That is an inherent but acceptable limitation, and it perhaps needs a bit of publicity when the registers are launched.

Jeremy Balfour: The Parliament is looking at the bill and will come to a view on its different aspects. Are there improvements that could be made to the registers and how they will work? Is there clarity, or will it be a case of everyone going away thinking that they have got what they want and it will only be in practice that we find out who the winners and losers are? Do we need more clarity now on how the provisions will work in practice?

Dr Hardman: I think that we do. There is a risk that the search criteria are so all-encompassing that people will think that they will be able to search for things that they will not be able to search for. Perhaps car financiers are looking at the criteria and thinking that they will be able to search against a chassis number and see whether it is covered by the register, which they will never be able to do.

In part, that could be helped by streamlining that provision in the bill so that it states what people will be able to search against. It could be clarified against that backdrop. In part, it could be resolved by having clear guidance on the registers when they are up and running. At the moment there is a risk, as you say, that people will expect things that might not be achievable.

Dr Patrick: Registers of Scotland is developing a system at the moment, but in some ways it is slightly in the dark, because the bill is broad and the devil will be in the statutory instrument, which will say what should be included. At the moment, the bill will permit all sorts of things. I suggested that the SI should not be too detailed and prescriptive, and I said the same to Registers of Scotland.

Jonathan Hardman and I have seen an early version of the register that Registers of Scotland is developing. It is great that it is engaging with stakeholders with a view to ensuring that what emerges at the end will work for people. That is important, because it would be possible to create a monster that would not help anybody. Registers of Scotland is being very positive in doing that but, as I said, it is slightly in the dark in some ways. It needs a steer on some of the detail, because the SI could specify just about anything to go into the register.

Jeremy Balfour: I will be quick as I appreciate that time is pressing. Should that aspect be dealt with by statutory instrument or should it be in the bill? Are you happy for an SI to follow the bill if it is passed?

Dr Hardman: We would be happy with either approach.

Dr Patrick: The advantage of an SI is that it allows for changes to be made if what emerges is not quite right. Were that to happen, it would not be the first time that something had been produced that did not quite work. However, narrowing the bill down a bit so that Registers of Scotland knew more readily what it was doing would perhaps help.

Jeremy Balfour: Convener, is it okay if I turn to one other issue that might affect Dr Hardman in particular?

The Convener: Yes, if you are brief.

Jeremy Balfour: I want to ask about what is not in the bill before we examine other issues. The Law Commission drafted the original bill to include stocks and shares, but the Scottish Government came to the view that that is outwith the legislative competence of this Parliament and it is therefore working with the UK Government to see whether it can take that measure through by different means.

From the Law Society's perspective, and perhaps from a practitioner's perspective, do we have the legislative competence to cover that in the bill? If so, would you rather have the measure included in the bill or have it taken forward through an appropriate back-door method?

Dr Hardman: We believe that it is very important that shares are included. They must be included. There have been a couple of legal developments that affect companies generally. Basically, they make it less attractive to take a traditional share pledge over shares in a Scottish company. I have written on that issue elsewhere and I can provide further written submissions on it if that would be helpful.

We are agnostic on the method by which that is achieved as long as the measure is implemented at the same time as the new legislation comes in. If the quickest way to achieve that is through a section 104 order under the Scotland Act 1998, the Law Society would be as happy with that approach as it would be with the measure appearing in the bill.

We did not look into the issue in great detail. However, when the Law Commission produced its draft bill, we did not comment that we thought that the measure was outwith the Scottish Parliament's legislative competence.

Jeremy Balfour: I will push you on that. Is the measure within the Parliament's legislative competence?

Dr Hardman: I would need to look into that in more detail.

Jeremy Balfour: If you would not mind getting back to us on that at some point, that would be helpful.

Dr Patrick: I am a practitioner and not a representative of the Law Society. I am also not an expert on legislative competence, but I confess to being surprised when the Scottish Government took the view that it was not within the Scottish Parliament's competence to introduce that measure.

There are various things that overlay one another. Issues relating to shares and other securities are within Westminster's competence, and the Law Commission's draft bill contained lots of stuff on financial collateral and so forth that was designed to fit in with the UK financial collateral regime. It would absolutely be in the UK Government's interest to look at that to ensure that what was happening here was not causing problems for financial markets—that is, to the financial collateral regime and the CREST regime for dematerialised share trading.

There is dual competence for aspects of the bill in which the competences kind of pass each other and one overlays the other. You will be more familiar than I am with how that works, but it is like the competence for consumer issues. Westminster has competence in that area—an example is the Consumer Credit Act 1974, which sets out what consumers cannot do because taking such action would be bad for them—but the Scottish Parliament now has competence there as well. The competences sort of overlap.

I cannot really take a view on competence. That is for the Scottish Government and the parliamentary authorities to do.

Paul Sweeney: I am conscious that we are up against it time-wise, so I will be quick. I have some questions about enforcement issues, which are a major concern.

Mr Dailly has raised concerns about section 63, which entitles a creditor to serve a pledge enforcement notice on a debtor if payment has not been made; section 65, which enables an authorised person such as a sheriff officer to enter someone's home to remove moveable goods subject to a statutory pledge; and section 66, which gives a creditor rights to sell someone's moveable goods at public auction. The main concern is for consumers, but there is potentially concern for small businesses too, as the removal of a critical piece of machinery might shut them down. The bill does not necessarily contain the range of protections that are needed. Something as simple as one missed payment could trigger enforcement action.

Looking at how the bill balances protections against unjust enforcement with the need for the statutory pledge to remain attractive to business lenders, do you think that it strikes the right balance?

Mike Dailly: The short answer to that really important question is that I do not think that it does. Again, that comes back to my submissions and the reasons why I do not think that consumers should be included.

I think that you mentioned to the Scottish Law Commission last week my reference to the

diligence aspects in sections 63, 65 and 66 of the bill being reminiscent of the diligence aspects of warrant sales. I did say that and I stand by it. I will explain why—with the greatest respect to the Scottish Law Commission, which was, as I recall, not in favour of the abolition of poindings and warrant sales back in the day. I drafted the bill on that for cross-party members back in 1999—I have been around for some time—and I remember that the Scottish Law Commission drafted the Scottish statutory instrument to increase the exemptions of goods. That was its initial position.

The interesting thing is that there were never really that many warrant sales in Scotland. I think that there were about 500 in 1999, but there were 23,000 poindings, and it was the threat of that form of diligence that really put the fear of God into people. That is why the Scottish Parliament voted to abolish them and to improve consumer protections. In the 21st century, I do not think that we should find it acceptable for someone to be able to apply to the courts to recover goods that are in somebody's house.

Dr Hardman: I will make two points on that. First, if we resolve the consumer issue in respect of the grant of security, that will resolve a large chunk of it. Enforcement follows the grant of security. If we make sure that the people that we want to protect are adequately protected at the start, that will reduce the need to protect them at the end.

Secondly, it is worth bearing in mind that, once there is a debt, there are existing enforcement mechanisms that can be used. If I owe £1,000 in respect of a television, there are methods by which I can proceed towards insolvency. I do not know much about personal insolvency but, once debt is owed, it needs to be repaid, or it can be recovered through certain mechanisms anyway.

Dr Patrick: I do not have a huge amount to add. If someone has granted a security, there has to be a method by which the secured asset can be realised. If someone is allowed to grant a security over something in their house, it is not a very good security if it cannot be enforced.

For sure, protections around enforcement are important, particularly for consumers, so the issue needs to be addressed. Whether that is actually about a return to poindings and warrant sales is another matter. Various people have written all over the place about whether it is. The auction is only for the purpose of the creditor buying something, so I am not sure that the analogy holds. However, it is clear that going into someone's house to get something is an issue even if it has been secured for the purpose of a debt.

At the moment, of course, a telly that someone has hired can be repossessed. I am not sure that it is radically different from that, although there are clearly recovery issues around that.

Mike Dailly: With respect, it is radically different. Under the Consumer Credit Act 1974, if a client comes to me and says that their car or their big expensive telly on HP is being repossessed, I can apply to the court for a section 129 time order and I can vary the ability to get a warrant from the court. Basically, I can force the creditor to accept a repayment plan and I can retain possession of the goods, including motor vehicles.

It is interesting that the issue has been raised. We have covered many different issues, but it occurs to me that, if consumers are kept in the bill, the obvious route for enforcement will be with regard to motor vehicles. All that I would say to the committee on that is that we already have hire purchase in Scotland, which works really well. It protects consumers with regard to motor vehicles because, even if they get into financial difficulty, they can keep their car using a section 129 time order.

11:00

One of my colleagues at Govanhill Law Centre, which is part of GLC, applied to the court to ensure that someone could do that. It was an interesting case because the member of the public did not know about time orders. He had applied for a time to pay direction under the Debtors (Scotland) Act 1987, but that does not provide protection for the applicant to retain the car; it just gives them time to pay off the debt, and they have to give the car back. He did not fully appreciate the power that exists under the 1974 act, but we managed to save his car in that way. That is my retort to that point.

Dr Patrick: Clearly, one could amend the enforcement provisions. I have commented that there might well be CCA amendments that it would be sensible to make as a consequence.

More generally, there is a huge spread of situations in which there will be enforcement. There are situations in which quite complicated protections are sensible and situations in which speed is critical. For example, once shares are put back into the bill, in cases where the market is falling, people will need to be able to enforce immediately and without having to jump through lots of hoops, although they might be able to fight about it afterwards if, for example, they have enforced at the wrong value.

There is a spread of situations, and that is addressed in the bill. It is important to remember that and not to focus only on consumers, because

the benefits of the bill are principally for businesses.

Paul Sweeney: I want to build on the point that Mr Dailly made. On section 64, even if an individual consumer could agree with the creditor that a court order was not necessary, thereby bypassing the protections of a court, another respondent to the consultation has noted that,

"while a court order may be required before enforcement against a consumer, there were no obvious powers for a sheriff to rely on to provide protection."

They add that

"Section 62(2)b) would allow enforcement against a pledged item if there has been a 'failure to perform the secured obligation'",

which is obviously wildly open to interpretation.

On the point about the Consumer Credit Act 1974, it does not seem clear that it contains protections in relation to specific enforcements.

Based on those points, where a consumer has breached the terms of a secured loan, it is not clear what argument they could use in court—if they even got to court—to persuade a sheriff to stop enforcement action. Do you have any views on how we can enhance that provision in the bill and what we could rely on in consumer protection legislation more generally that could be referenced in the bill as a safeguard?

Mike Dailly: At the risk of repeating myself, I have set out a case that the easiest thing to do is to remove consumers from the bill altogether. There is a powerful case for doing that for the reasons that I have set out. However, if the Parliament was not minded to do that, you would indeed want to increase those protections.

It is an interesting issue because, under the Consumer Credit Act 1974, when the person has paid a certain amount, it becomes necessary for the creditor to apply to the sheriff in order to recover their car. They have to have paid over a certain amount for that to apply. Interestingly, there is some Scots common law that says that the creditor could never recover that property in the sense that they could not just go and get the person's car.

The bill is interesting with regard to sole traders. My understanding of the way that it is drafted is that, if a taxi driver wanted to raise money in relation to a statutory pledge for their motor vehicle, and if they got into a default situation, somebody could just come and take the car. Obviously, they would need the keys, but I think that I am right in saying that, under the bill as it is drafted in relation to sole traders, they would not need a court order. I think that we talked about that earlier when Mr Mundell raised the issue about SMEs. I would argue that a bit more protection is needed for sole traders.

Paul Sweeney: That is very helpful.

Dr Hardman: There are already some protections in the bill for individuals. They are weak and they need to be strengthened along the lines that we have talked about, but there are differences when it comes to individuals rather than the sole trader and consumer aspect. They have to specifically list their assets, so they would lose the flexibility to have categories of assets, which can be more in the corporate lens. These will be securities under the Consumer Credit Act 1974. There may be issues as to whether the 1974 act protects people enough, but they fall within that regime and the court order will be required.

A further thing that is worth noting is that, under section 62(4) of the bill, creditors enforcing a pledge

"must conform to reasonable standards of commercial practice".

Anything that is deemed by a court to be unreasonable in commercial practice in respect of someone hoicking their goods will be something that a lender is going to breach a duty in respect of, so there are protections in there.

Overall, however, the message that the three of us seem to be united on is that, if we resolve who can grant the securities and what they can grant the statutory pledge over, other things will fall into line.

Paul Sweeney: An interesting point was raised about legislative competence. As the conversation has developed this morning, I have been thinking about interest rates. Mike Dailly mentioned the Roman cap on interest rates at 8 per cent. I do not know whether it would be legislatively competent to put a provision in the bill whereby we could cap a maximum APR that could be charged in relation to any form of security.

Mike Dailly: With deep regret, much as I would like to argue for that, I think that it would be reserved, as part of finance and consumer credit, under schedule 5 to the Scotland Act 1998. At one point, we tried to do something on payday loans, before the FCA acted on them. I worked with the late Margo MacDonald on that. Margo said, "What are we going to do with these payday lenders?", but we could not do what you have talked about. We thought about licensing because it is devolved, and we were hatching a plan on that basis, but then the FCA came in and sorted things out in relation to payday lending.

Paul Sweeney: The potential for licensing to provide a product to the Scottish market is interesting.

Dr Patrick: However, there is a question as to whether that would be competent in the financial sector. It is FSMA stuff, so I think that the answer is that it would probably not be competent.

Dr Hardman: There are protections on extortionate credit transactions. We can challenge transactions if somebody becomes insolvent. We have to wait until insolvency, but we can challenge them. However, my personal view is that it is best for restrictions on debt to restrict debt rather than their being inherently linked to the security rights that are associated with them.

Paul Sweeney: If I want to buy a telly from John Lewis, I can do so with zero per cent interest over 24 months. That is an obvious incentive for me to make the transaction, and the shop gets the sale. That is a patient way of financing the purchase because the good will last a long time. On the face of it, it would not seem to be a problem for me to stick £1,000 against my telly, go off on holiday and pay it off over the 24 months. I would have free money, basically, to finance something that I wanted to do on a whim.

However, if we have that interest rate liability, it is clearly going to be targeted towards people who are financially distressed and are much more desperately in need of the money, which will be charged at an onerous rate of interest. It seems that it will inevitably be targeted to people who have no other avenue to access cheap finance.

Dr Patrick: It strikes me that a lot of the mainstream lenders will use it as well. Why would they not, if it is more convenient? We may find that licensed pawnbrokers will do it, to the extent that they can under the bill, and people will be able to find their pawn receipts because they will be online somewhere.

Mike Dailly: I think that you are absolutely right, Mr Sweeney. If we think about mainstream financial services, we have a very robust market in the UK. Consumers and businesses can access all sorts of different products unless they have a really bad credit rating. That is where it disappears off a cliff edge. I think that that is the point that you raise.

In a consumer-perspective world, where is the incentive for any lender to make money out of the provision from consumers? It is not just me saying this as a hypothetical, because this is what has happened in England, Wales and Northern Ireland. The predatory lenders will come in, and the only way that they can make money out of the provision will be by charging APRs of hundreds of per cent. That is of benefit to nobody apart from the predatory lenders.

Jeremy Balfour: I do not want to open a can of worms but, as we heard last week from the Scottish Law Commission, such legislation comes around once in a generation—however we want to define "generation". Is there anything that could have been in the bill but is not in it that it would be worth considering? A yes or no will do. Floating charges were mentioned. Would that be an area for partnerships to consider? Would it be worth considering that, or are we better to leave the bill as it is?

Mike Dailly: It is a complex area of law and one always cautions against trying to introduce something that is very complicated. The bill has taken years. The Law Commission was working on it for a long time. I hope that the committee will take on board some of the suggestions that my colleagues have made on technical aspects. I can see the value in that. I can also see the value in the bill with respect to business-to-business transactions, but not for consumers.

Dr Hardman: There is an argument that the bill could make the floating charge less popular. It will probably not, but there is an argument that it might, which is rather frustrating for me as somebody who has just edited a book on the floating charge.

It is possibly worth while to think of the bill as the functional replacement for floating charges in a business-to-business context. That means that the floating charge should become less fundamentally important to Scottish corporate finance than it is at the moment, and more of a sweep-up, as it is in England as part of the insolvency processes.

I note Mr Dailly's point that the bill has taken a long time. It is now five years since the Scottish Law Commission's draft bill was published, and it was five years before that that the initial discussion paper was published. There is a risk of making the perfect the enemy of the good. We have major issues to protect against—the adequate protection of consumers is the primary thing—but, in terms of more practical operations, there is an argument for having a slightly iterative process whereby we get the bill on the books and work out how to smooth it out once it has been launched.

Dr Patrick: I would just mention again the point that we discussed about shares.

The Convener: Gents, before we close, would you like to make any final comments?

Mike Dailly: No. The discussion has been comprehensive, convener.

Dr Hardman: The Law Society of Scotland appreciates the opportunity to provide evidence. Thank you very much for hearing from us.

Dr Patrick: As do I. There is nothing to add on my part.

The Convener: I thank Mike Dailly, Dr Hardman and Dr Patrick for their help. The committee might follow up by letter on any additional questions that stem from the meeting. There are only one or two points thus far, but we might want to do another letter.

I will suspend the meeting to allow a change of witnesses and a five-minute comfort break.

11:13

Meeting suspended.

11:23

On resuming—

The Convener: For our second panel, I welcome Myles Fitt, who is the strategic lead for financial health at Citizens Advice Scotland, and Alan McIntosh, who is an approved money adviser at Advice Talks.

I will start off with some of my own questions before I move on to questions from colleagues.

I noticed that the submission from Citizens Advice contains a lot of references to the current cost of living crisis, but the bill as introduced and the financial memorandum indicate that, if the bill is passed, it would not be implemented until 2024. Some of the commentary from Citizens Advice appears to be focused on the present day, and we all hope that we are not still in the current crisis by 2024. Do you accept that, Myles?

Myles Fitt (Citizens Advice Scotland): I think that the cost of living crisis could carry on for quite some time. Nobody has a crystal ball and can say when it will end. We think that, even in happier economic times, the bill is not necessarily the right thing for consumers because of the risks that it poses for them. However, in difficult economic times, such a bill, which brings consumers into the equation, will make things even worse.

I would like to set the scene on where we are with the bill and to make our position crystal clear to the committee, which might help as we proceed with the rest of the discussion. I will outline the view of Citizens Advice Scotland, which is supported by many in the debt advice sector.

Essentially, we support the bill for businesses, but not for consumers. We see the need for business to have the bill, but we do not see the need for consumers to have it, because we do not understand what policy gap the bill is trying to fill for consumers. At best, we think that the bill is unnecessary for consumers; at worst, we think that it is harmful to them.

We believe that the bill runs a great risk of creating an unintended consumer harm for several reasons. First, it opens up a new route by which consumers can borrow, but against assets that they need and might lose, which might lead to debt, should they be unable to repay that loan.

Secondly, the bill allows consumers to borrow against assets that they would like to purchase but might not need, and they might not have the ability to repay that loan.

Thirdly, and most importantly for us—this was mentioned in the earlier evidence—the bill will attract high-cost lenders who will target vulnerable consumers who are unable to access mainstream lending, or people will simply be seduced by the effective marketing of such lenders. Members should not underestimate the effectiveness of marketing by those high-cost lenders, which will be much better at marketing than any mainstream, lower-cost lender.

Fourthly—this is absolutely critical and, again, was touched on earlier—those high-cost lenders will create a product that is beyond the reach of FCA regulation. That will lead to years of vulnerable groups getting into financial difficulty, until the FCA catches up with the product. The buy-now, pay-later product is a good example of that. There are no protections in the bill for a scenario in which high-cost lenders target vulnerable people with an unregulated product. We think that that is a critical weakness in the bill.

Finally, the definition of “vulnerable consumer” has widened—it is not narrow. As a result of the cost of living crisis, more people are falling into financial difficulty. Traditionally, people who were in debt got into more debt. Now, people who were just about managing are getting into much more financial difficulty. There is also an additional group of people—those who were comfortably off but who are now starting to get into financial difficulty. Therefore, the idea of vulnerable people should be seen as covering a wider group than has traditionally been the case. That will be a problem when high-cost lenders target that group.

As a consumer organisation, we believe that consumers have no place in the bill and should be removed from it. Consumer need and behaviour are very different from business need and behaviour. Our position has very wide and strong support from the money advice sector, including StepChange, Money Advice Scotland, Christians Against Poverty and the Money Advice Trust, as well as a great number of money advisers that we have spoken to over the past several months. We think that removing consumers from the bill would alleviate all the concerns over unintended consumer detriment, while achieving the bill’s main aim of making the law more modern and less restrictive for businesses.

I am pleased to have been able to say that to you, and I hope that it helps to frame the discussions.

The Convener: Thank you for that. Were the concerns that you just raised, as well as those in your written submission, raised directly with the SLC when it was going through the process and when it produced a draft bill a number of years ago? Did Citizens Advice contact the SLC to raise those concerns?

Myles Fitt: You raise an interesting point about engagement in the entire process. I did a bit of homework on the subject, going back 10 years to the start, and there were 67 opportunities for organisations to engage—or 67 moments when there was engagement by stakeholders. Only one of those was a consumer organisation, which happened to be Citizens Advice Scotland a couple of years ago, in relation to the Economy, Energy and Fair Work Committee's inquiry. The rest were all academics, lawyers, legal firms or financial industry representatives. Organisations that represent the consumer or the money advice sector have barely been involved in the process. Now that the issue has come up as part of a bill that has been introduced, we will see lots more interest. That explains why it has now grown into a bit of an issue. We engaged with the process a couple of years ago and put forward the view that consumers should not be in the bill.

11:30

The Convener: Your organisations have argued that the statutory pledge provisions could open up a high-cost credit market in Scotland that will target vulnerable consumers—Myles Fitt just touched on that. How likely is that to happen, and what could be the potential impact on the people who then become your clients?

Alan McIntosh (Advice Talks Ltd): We can make comparisons with different legal systems, such as New Zealand, America and Canada, but we do not really need to look that far. We are already part of a single financial market that includes the whole of the UK. There are many of those companies—companies that would make those sorts of loans—swimming about in that market already. They are sharks. The reason that they do not come north very often is because the waters up here are quite intemperate for them—they are a bit colder towards their business model. If we were to introduce the proposed statutory pledge, which is roughly equivalent to English bills of sale, it would not take long for some of those predatory companies to start swimming north into the Scottish market. They would not need any further regulatory permissions because they are already authorised by the FCA. The only thing that is really stopping them moving into the Scottish market is the lack of something similar to bills of sale, such as the statutory pledge. That is the danger. If we create an environment that is optimal for those companies, they will start to move into the Scottish market.

We do not need to look far to understand what the effect would be. Citizens Advice Scotland's partner organisation in England has already done a lot of work on bills of sale, how they are used by such companies and the effects that that has on people. In England, when they talk about those types of securities they often do not call them bills of sale; they call them logbook loans, because, effectively, that is what they are. English advisers talk about logbook loan securities, which are really bills of sale.

We believe that we understand how those securities will be used in Scotland once the law is changed because we already know how they are used in England. As soon as we create that environment, it will become possible for such companies to come in and operate a bit more easily in Scotland.

Many of the other things that have been found about companies using those types of securities relate to issues such as misselling and consumer detriment. That is the experience, and that is what the English Law Commission found when it did an investigation into bills of sale, which are products that are used against people who are vulnerable. In the consumer context, the product is likely to be used against people who cannot access credit in any other way. Those people would probably be better going to their local citizens advice bureau or council, because there are probably other types of assistance available to them, such as the Scottish welfare fund, or debt solutions, such as the debt arrangement scheme and bankruptcy.

Another thing to bear in mind about those types of securities is that, a lot of the time, people who take them out do so as a last resort—it is after they have had the credit cards, the loans and everything else—when their credit rating has been damaged and they cannot get credit anywhere else. They take out a statutory pledge security because it is the only credit that they are gonnae get.

I said to Mike Dailly when we were coming here on the train, "I'm probably wan ae the few people in Scotland that still own their car, because the vast majority of people get their car on finance these days. I could raise finance on my car tomorrow, but why would I dae that?" I would need to be totally incapable of getting credit any other way before I would ever raise security on my car because I would have to pay interest at 300 or 400 per cent, because that is what that market is.

When people take out those securities and then go to the local citizens advice bureau or money advice centre to get help, at the moment we could probably put the debt in the debt arrangement scheme or into bankruptcy. The problem is that, once someone takes out a security for one of those debts, if we put that debt into bankruptcy or in the debt arrangement scheme, the car—or whatever it is—will be repossessed. In reality, it creates more problems for money advice services. Even if more of the people who take out those securities come to money advice centres for help, we will struggle to help them because the securities give the creditors the preference.

I support the comments made by Myles Fitt and Mike Dailly. I urge the Government to take consumers oot the bill altogether, because I do not see any benefit.

Myles Fitt: If the question is why high-cost lenders would come into the market, the answer is because that is what they do. The bill will allow people to use an asset that they cannot use at the moment to raise money.

There are predators who prey on people's instincts. People are gonnae think, "That's right—I've got that thing in the house that I can use." I know that there will be thresholds, but my point is that the high-cost lenders prey on that consumer motivation. They look for people who might be seduced or tempted into getting money based on an asset that they have. It could be an asset that they need. They could be doing it because they have no other means of raising that money. They could be doing it as a desperate measure. The lenders prey on that—that is the first thing. We see it time and again; they do that all the time.

Thankfully, the high-cost lending industry is in decline because it is getting regulated and some of the companies are going bust, which is good. The bill will be a shot in the arm for the high-cost credit industry, which is always waiting for the next opportunity. As we have seen with Wonga, Satsuma Loans, doorstep lending from Provident and so on, they pop up. When they see this, they will pop up again. It is dangerous.

Also, they will find a product that is beyond the reach of the FCA. Once they do that, this Parliament will have no control over it. You cannot regulate that—you will have to ask the FCA to do so. The FCA will take a few years to catch up with it, and by that time, once more, vulnerable people will have been sucked into a really poor form of borrowing.

Alan McIntosh: Myles Fitt is absolutely correct. We have found that the finance companies in this sector move a lot faster than the legislators and the regulators. There was never a law to create payday loans; those companies just took advantage of the opportunity to create them. There was never a law to create consumer guarantor loans; they just took that opportunity. There was never a law to create the personal contract purchase market; existing hire-purchase law, which had been there for 40 or 50 years, was used. There was never a law to create buy noo, pay later; they just took that opportunity.

As Myles Fitt will tell you, all that has happened over the past 10 years is that the FCA has been chasing those companies. If you make this law, we know what the consequences will be. We do not need to look far; we can see the consequences south of the border. If you introduce statutory pledges for consumers, we know what will happen. Myles is absolutely right: the regulators are gonnae be chasing them.

Why would you do that? I think that Myles made the point that there is no evidence that the bill is needed for consumers. For business, it absolutely is needed—although I am no gonnae get involved in the business side; other than in relation to maybe sole traders, I have no interest in the business side. However, there is no evidence that the bill is needed for consumers.

This is like an academic exercise. It is aesthetically pleasing, in that there is a gap in the law in Scotland, so it is felt that we need to fill it—that is what this is. There is no empirical evidence or research to show that we need this kind of security in Scotland for consumers.

Myles Fitt: The need for the measure is greatly outweighed by the risks and the harm that could come from it. If there were a strong need for it but we were saying that a big problem might arise from it, that would be a different debate. We just do not see an overwhelming need that would outweigh the risks that we foresee.

The Convener: Other stakeholders have suggested that there are existing protections in the Consumer Credit Act 1974 and via the FCA. From what you are both saying, the regulations and the FCA are not strong enough.

Alan McIntosh: The issue is the type of product, which is a security. There are different types of products. Hire-purchase comes under the consumer credit regulations. That is also a type of conditional sale, as is PCP, which people use to buy a car. That is called a quasi-security. It is widely used in Scotland; over 90 per cent of all cars that are bought in Scotland are bought using hire-purchase or PCP. Very few of us actually own our cars now—that is the reality. They are bought using what is called a quasi-security. It is a quasi-security because you actually never own the thing until you pay it off, whereas with a real security, you own it; you cannot really sell it because it is a full security.

A statutory pledge is a fixed security. In Scotland, we do not have that over moveable property—and that is the point of the bill—but we do have quasi-securities. Quasi-securities are widely used and there are a lot of protections for people under them. Theoretically, it is possible that a person could use a form of quasi-security and a fixed security, but there is no real reason to do that. A statutory pledge will only be used against a fixed-sum loan, under the Consumer Credit Act 1974. A person will be given a fixed-sum loan and then a statutory pledge will be taken over it. The big difference is that there are a lot more protections under the Consumer Credit Act 1974; hire-purchase, PCP and quasi-securities are all regulated under that act.

To explain how a fixed-sum loan with a fixed security would work, Mike Dailly gave the example of a person buying a car, taking £3,500-worth of finance out on the car, getting into trouble making the payments, having the car taken off of them and sold for £500 and maybe still being left owing £3,000 and having no car.

Let us say that someone has a £3,500 loan under hire-purchase. They have the right to voluntary surrender under their hire-purchase agreement. If a person knows that they are getting into trouble, under that agreement they can say they want to give up their car because they cannot pay for it and would give the car back. If they had paid £500 off, the reality is that they would only owe about £1,250, because under the voluntary surrender rights of hire-purchase, a person can hand their car back at any point and no be liable for more than half the full amount that is owed—£1,750—under the agreement, less what they have already paid. That cannot be done with a fixed-sum loan.

I am sorry that that was quite technical, but my point is that the type of product that these securities will be taken out over do not have as many protections as those that are currently available in Scotland, which are hire-purchase and quasi-security. A lot more consumer protections are built into those.

The Law Commission's report says that car finance companies might prefer the type of finance that the bill would allow. Of course they would—it would be in their interest, because hire-purchase and the other products that are currently used offer far more protections for consumers. The bill would do nothing for consumers.

Myles Fitt: I will add to the point—I am like a stuck record—that a product will be designed that is outwith FCA regulation. You can talk all you like about all the protections in the bill, but they will not apply to that product, which is a risk and a danger.

The Convener: The FCA has announced its intention to introduce a new consumer duty that would make it easier to take action against harmful products. Does that allay any of your concerns?

Alan McIntosh: No, I do not think so, because the problem is that, although there is nothing wrong with a fixed-sum loan—if I were to go to a bank or finance company and take out a loan, it would be a fixed-sum loan—the Parliament is going to create the power to let these people secure that loan over people's movable property, and there is nae need for it.

If I want to buy a car using a logbook loan, I could take my phone oot the noo and have the money paid into my phone by the end of the day; it is possible to do that just now. Finance companies target Scottish customers and tell people that they can have the finance on the same day, but the way it works is that the person will sell them their car and they will get a hire-purchase agreement back—with the protections that come with that—and the money will go into their bank account.

In England, that is done through a bill of sale, so it is done in one transaction. In Scotland, there are two transactions involved: there is a sale and then a hire purchase. That means that the person keeps the car and has the money in their bank account at the end of the day. The Law Commission said that the two transactions make the process unnecessarily complex and that there is more cost involved, but that is not true, because if a person can get the money by the end of the day, how complex can it be?

I accept that the bill started its life more than 10 years ago, but as we all know, the difference is that, since Covid, people can do electronic signatures on their phones, so it is costless and there is one signature for both transactions.

At the moment, there are companies that will tell me that, if I want to raise finance on my car, I can do that and I could get it paid today. They say that, if I do it today, they will pay me today. However, the point is that that would involve two transactions. Basically, I sell the car to the company—I keep possession of it, but I sell it to the company, which becomes the owner—and it gives me a hire purchase agreement. If, halfway through that finance agreement, I realise that I cannot afford it, I have the right to voluntary surrender. I can give the car back and I do not need to pay any more than half the total amount owed, minus what I have already paid. If I take out a fixed sum loan, I am in the situation that Mike Dailly was talking about, where the company can take the car, sell it and offset that against how much I am owed, but I still have to pay the rest of the debt. That is no in my interest. I would rather have a hire purchase agreement, please.

11:45

Myles Fitt: The new duty is a good thing. The only point that I would add to what Alan McIntosh said is that we do not think that it will cover the example that I have continually given you about products being created that are beyond the reach of the FCA. The duty is fine, but we do not think that it will cover those.

Oliver Mundell: I will push back a bit on that with the same line of questioning that I used in the earlier evidence session. In my constituency work, I see people who are accessing bad lending all the time. It is not that I think that these products are good, but, as you have said, when people are in desperate straits, they are at the end of their options for accessing safer products. It is a case of balancing that moral question—why do we think it is okay to let people access existing products but not this?

The other issue is that we know that there is a problem with unregulated debt: there is a black market in debt where people borrow illegally. For people in that very vulnerable position, is there any advantage in bringing some of that into the open? For example, to take your example of a hire purchase agreement on a car, there are people who cannot access hire purchase agreements because of their credit records or because they are not allowed to borrow at all. This is not my personal view, but, in scrutinising the bill, I feel that I should push back on that and ask for your thoughts on it.

Alan McIntosh: That is a good point. To give you an example, BrightHouse provided hire purchase agreements for household goods. As we know, BrightHouse went into administration because it had so many misselling claims made against it, and the Financial Ombudsman Service was upholding 80-odd per cent of them. Like Provident and Wonga, BrightHouse ended up going oot ae business because it was giving hire purchase loan agreements to people that couldnae afford them. The first point is that action is taken against these companies—we have got the Providents and the Wongas oot ae business, and Satsuma Loans has gone oot ae business. I think that Amigo Loans is hingin oan—I think it is trying to get a scheme of arrangement through the English courts whereby it will pay a reduced amount of compensation to the people that have claims against it. However, so many other companies—BrightHouse and aw those different companies—have went oot ae business.

They went oot ae business because they were lending to people that, according to the Financial Ombudsman Service, they shouldnae have been lending to, because they had bad credit ratings and default notices and they knew that they werenae gonnae be able to afford it. If there had been a basic affordability check, they would have looked at these people and thought, "You shouldn't be lending to them." The point is that that is who these creditors are. A lot of them are going oot ae business. The point that Myles Fitt is making is that we could be creating an opportunity for these businesses and giving them a shot in the arm by creating a new product when the Financial Conduct Authority has spent 10 years trying to get them oot the market.

On the issue whether we push people into the arms of illegal lenders, I remember speaking to a Glasgow organisation—I cannot remember the name, but it specialised in tackling loan sharks in Scotland—and its point was that it thought that, when payday lenders went oot ae business, it might see a big upsurge in people using payday loans. However, it didnae see that happen. It thought that it might see that when BrightHouse went oot ae business. Its point was that people who take out illegal loans tend to be certain types of people who are in contact with illegal lenders. Just because aw the payday lenders went oot ae business, that didnae necessarily result in a rise in illegal loans or an increase in loan sharks.

There are certain types of people who might be able to access that credit. You need to know how to access that credit. Most of us probably do not know how to access loan sharks. There is a danger in using that argument to say that we will protect people, and they end up using these legal lenders, which are, equally, causing a lot of consumer detriment.

The key thing is that there is a lot of help for people if they go to a money advice centre, which can advise people on bankruptcy. We have minimum asset bankruptcies and the debt arrangement scheme—we can bring people's payments down. If somebody is saying, "I can't afford to pay," that is because they are paying £600 a month to their debt so they will have to borrow more money this month to own their car and to pay their rent.

The point is that, if they went to a citizens advice bureau, they could maybe get a debt arrangement scheme and then they might be paying only £200 a month to their debt and their interest and charges are frozen, or they could maybe go into a minimum asset bankruptcy and all their debts would be written off after six months because they are on benefits.

The key thing is that, if people arenae suitable for borrowing, we need to get them help. Also, there are things such as the Scottish welfare fund, crisis grants and fuel banks—there are other things that we can do to help people.

The danger is that, as Myles Fitt said, it is all about marketing. These people, these companies,

these high-cost predatory lenders, will target vulnerable people whose interests we would be serving better if we could get them to advice agencies or get them to their local authority so that they could maybe access grants and so on.

Myles Fitt: The question for us is, who will use this option? We are not convinced about who will take this option of using an asset to secure lending on, because we—

Oliver Mundell: I do not want to interrupt you, but that already happens with pawnbroking; it is just that people have to give the asset away and they are not able to use it. Do you think that that is better?

Myles Fitt: The key difference here is that the person gets to keep something that they arguably need. When you pawn something, you probably do not need to use it and you do not still have it. The temptation, from a consumer perspective, is that you get to keep the thing that you are securing a loan on—you will get the money that you are looking for, but you still have the ability to use that thing. That opens up a consumer behaviour of thinking, "This is tempting."

If someone can go down this route, the chances are that they can go down the route of borrowing unsecured as well. If you can borrow unsecured, why would you choose to attach borrowing to something that you need? Who is this for? We are not convinced by it. We may have to see it in practice. In the case of someone who is borrowing from a mainstream bank, yes, there might be a lower cost of lending, but why would they do that when they have other options?

The question for us is—who is this for? What is it going to turn into in reality? It will be for people who cannot access mainstream lending and that takes us back into that issue of high cost.

Alan McIntosh: Mainstream lenders arenae gonnae touch this; they do not touch it in England and they are no touching it in Scotland. I do not think that there is any suggestion that mainstream lenders might get into this. If you need this kind of security of moveable property, you probably arenae gonnae pass an affordability test and you probably shouldnae be getting a loan in the first place. That is why mainstream lenders—respectable lenders—are no gonnae touch this. They are no gonnae lend to these people because it is no affordable. It is no because they want the security. That will not change it.

The people who will use this are the people who are basically misselling loans to people that cannot afford them.

Oliver Mundell: Thank you. It is helpful to have that on the record. I am not asking you to come back on this, but I think that people do pawn things that they need, because they are desperate, so I think that there is a question around what is better, but you have been very clear that you think that this is the wrong approach.

I have some other quick questions on assignation. It came up in the first session and in some of the responses that we have had. How do you feel in relation to intimation? Does how the bill is currently set out cause you concern in terms of notification in particular?

Myles Fitt: Yes. We believe that the debtor should be notified. It is as simple as that. We want them to continue to be notified. We do not necessarily have any issues with anything else. We would not want anything else changed on that front, in terms of registers and so on, although there were some suggestions in the previous session that there were some weaknesses.

We believe that a debtor should be notified. Morally, it is the right thing to do—it is the right thing to do practically, too.

Oliver Mundell: You think that they should be notified before it goes on the register.

Myles Fitt: Yes, they should be notified. The lack of notification makes it difficult when clients come to the CAB service, because much of the work is about identifying who people owe debts to, if the debt is getting passed on. All we are asking for is a simple notification. We should keep the intimation.

Oliver Mundell: Again, that is very clear. Although the provision addresses some of the concerns, do you think that it goes far enough for consumers to be protected if they pay the wrong person? Does it need to go further?

Myles Fitt: There is a mitigation if someone pays the wrong person in good faith. However, I find it interesting that three mitigations or workarounds are being put forward because of the removal of the intimation. Why do we need those three workarounds when we could just not remove intimation? That would go some way to avoid having to find ways to clear up the confusion and problems that come from its removal. It doesnae make sense to me.

Oliver Mundell: I understand that you heard bits of the previous panel's evidence. We heard about the confusion that it causes people, such as people who are paying student rent, when they find out that the person to whom they owe money has changed. Is it a valid argument that finding out about the change can confuse people about who they have to pay and how to pay them?

Myles Fitt: It is a recipe for confusion if you do not tell the debtor and you do not have a register that is fully comprehensive. The two things work together. If you have a system of registration that

is as good as it can be, as well as intimation, you cover—

Oliver Mundell: I worry about mischaracterising what was said, but what I heard from the previous panel was that, if a person is in a student block of flats and they are paying money, it is easier for them not to know that the person to whom they owe money has changed. As long as they have the account details to pay it into, it is actually easier for the person not to get a notification every time that the future debt changes hands. Do you think that that is right or are you saying very firmly that it is wrong?

Myles Fitt: I think that it is in the best interest of the debtor to be notified every time. That way, they have that knowledge and—they might be being helped by a citizens advice bureau—at least it is fair on those who have done the notifying. If they have notified, the debtor might have an idea of who now has the debt. From an adviser perspective, that allows the problem to be more easily fixed.

Alan McIntosh: I can give you an example. One of the problems that we have as money advisers, with regard to the debt arrangement scheme, is that we have to notify the creditors, give them offers and confirm the balances that are owed to them. Obviously, if we do not know who the creditors are, how do we make them an offer? Money advisers need to know who the creditor is, because we need to be able to say, "This is the offer, which you have three weeks to respond to. If you do not respond to that within three weeks, you are deemed to consent to that offer." A citizens advice bureau money adviser who uses the debt arrangement scheme needs to know who they are making the offer to because, otherwise, they might send the offer to somebody who no longer owns the debt. How can those people respond to say whether they accept the repayment plan?

Oliver Mundell: Thank you; that is a good solid example for us to take further.

Bill Kidd: I thank the witnesses very much for their evidence so far. You have answered quite a few things that I was going to ask, so I will go off on a bit of a tangent from where we have been so far. My question is more about businesses in communities. Do you think that the proposals in the bill, as presented, should apply equally to all businesses or should there be additional protections for small traders and small businesses?

Alan McIntosh: I do not have a lot of opinions about limited companies and partnerships, although there obviously has to be a cut-off line. However, I do have concerns about sole traders. I accept the point that a previous witness made about a farmer who has valuable stock and wants to put a fixed security over it; I think that Mike Dailly made the point that the farmer might still be trading as a sole trader.

The other side of it is the example of a delivery driver or Uber driver. I suppose the question is, what is a sole trader?

12:00

I will touch on a point that Mike Dailly made. One of the issues with the bill is that the sole trader doesnae have the same protections as the consumer; therefore, no court order is required to go and seize the goods and put them up for sale. Although I want to see consumers taken oot the bill, if sole traders are left in, it has to be mandatory that they get a court order.

I will touch on one other point that Mike Dailly made in reference to the common law position in Scotland—there is a common law position in Scotland. I think that it was one of the institutional writers—Erskine or Bell or somebody like that—that said that the Scottish courts do not like creditors using self-help remedies. If somebody tries to use a self-help remedy by coming and taking possession of something without a court order, you are allowed to defend it.

As Mike Dailly pointed out, the Consumer Credit Act 1974 says that unless one third of the goods have been paid for, they are unprotected goods and the lender can come and take them without a court order. However, every single consumer credit agreement in relation to hire purchase will say in brackets after that point, "except in Scotland, where you may always need a court order". If you speak to any consumer credit lawyer in Scotland, they will tell you that you always need a court order in Scotland. That is because, if you look back at the common law and institutional writers, you see that the Scottish courts do not like self-help remedies. If somebody tries to come and take possession of your goods without a court order, you are entitled to use self-defence to protect the goods.

The point is that the bill allows them to come and take the goods without a court order. That is a serious point that Mike Dailly touched on. It was only when I was sitting there that I thought about it, but it is true. At the moment, there would need to be a court order—that would be the common law position. However, if we create a piece of legislation that says that someone can come and get the goods without a court order, we will diminish the rights of sole traders.

Myles Fitt: We do not have too much to say on that. We are looking at it more from a consumer perspective—we are looking at the consumer element in the bill. Clearly, we have said that what is being applied for businesses is good, but there

is maybe an issue around sole traders. We do not have too much to add to that.

Bill Kidd: That is fair enough. Thank you very much for that. Thank you to Mr McIntosh for the outline as well.

Jeremy Balfour: Good morning. I absolutely understand that your position is that consumers should be taken out. That is very clear. However, in case the Parliament does not go with you on that, for our scrutiny, I have a couple of follow-up questions about what should happen if consumers are left in, particularly around the register. Do you have concerns as money advisers about who can access the register? Is there enough information in the register for you to help your clients?

Myles Fitt: Alan, you are the money adviser.

Alan McIntosh: There are ways of doing it. For example, the register of statutory moratoriums is a public register operated by the Accountant in Bankruptcy that you can search. The thing about a public register is that it obviously has to be searchable—otherwise, what is the point in having it? The register of statutory moratoriums is searchable, but you can search it only if you know somebody's first name, second name and date of birth—actually, I think that it is their postcode that you need. If I was looking for Paul Sweeney, I couldnae just type in "Paul Sweeney"; I would also need Paul Sweeney's postcode to find him.

There are probably ways in which you could add in extra protections to make it harder for somebody to just trawl through and search for all their neighbours—well, maybe they could do that if they had their postcodes, but there are probably ways to make it harder. There were issues with people trawling the register of statutory moratoriums in Scotland, so the AIB put in those additional protections.

The point about a public register is that it has to be searchable and you have to be able to find people in it. Lessons could be learned from looking at the register of statutory moratoriums and the experiences of the Accountant in Bankruptcy to try and protect people.

We also find that people do not tend to go and search those things unless they have a reason to. That is true for the register of insolvencies as well.

Myles Fitt: The only point that I will add is that it should be free of charge to search.

Jeremy Balfour: I think that it is not at the moment—is there a £20 charge?

Myles Fitt: I am not sure, but the charge is for the individual who is in debt and who maybe needs to go and search it—or, indeed, the adviser who is having to search it on their behalf. It should be free of charge.

Jeremy Balfour: In practical terms, you think that the fee should be covered by the Scottish Government.

Myles Fitt: It has to be covered by someone, yes.

Jeremy Balfour: That is the point. People are there to be employed, but if there is not to be a fee, it would not be done by anyone else—it would be a Government agency that would be funded by the Government.

Alan McIntosh: Obviously, the creditors could be charged an administrative fee for registering it. Having the creditors pay for it could be a way of recovering the costs.

Bill Kidd: I am sorry to come back in. I think that this might have been covered earlier, but there is a general agreement about the £1,000 threshold in the bill. Obviously, that has been in place for quite a while. I have heard a few people say certain numbers; for example, I believe that £3,000 was mentioned last week. It will be updated to some degree, but do you have an idea or a clue as to what the best direction that it could go in might be?

Myles Fitt: That is a good question. If consumers do not come out of the bill, we will be looking to build in as many protections and mitigations as possible. We are looking at that as a second stage, because many other things could probably be done as well.

The sum could be £3,000 or £5,000. The more you increase it, the more you protect household items, which is fair enough. However, at the end of the day, it will come down to cars, the value of which will be upwards of £4,000 or £5,000. What do we do? Do we take it up to £12,000? However, if you take it up to £12,000, you might as well just remove consumers from the bill, because it will take out so much that there will be no point. We would certainly come back to that issue at the point of asking what the sum should be. There should be a discussion about that.

Alan McIntosh: I add that the £3,000 figure comes from 2010 when the Home Owner and Debt Protection (Scotland) Act 2010 went through. In relation to attachment and the law of diligence, Fergus Ewing increased the minimum protection for a car for which there was a reasonable requirement, which went from £1,000 to £3,000. It has, in fact, stayed at £3,000 since 2010-11. An obvious thing would be to link to that. I think that it is currently being consulted on by the Accountant in Bankruptcy in relation to the bankruptcy and diligence bill that is planned for this parliamentary term.

However, there is obviously a problem there as well. If we look at wage arrestment legislation as

an example, the amount that is protected in relation to wage arrestments and bank account arrestments is updated every three years by whatever the average rate of inflation has been over those three years. Will we no half get caught out this year?

We just updated bank arrestments in April, where we looked at levels of inflation over the past three years. Obviously, inflation has gone up massively since then. The point is that, even if you link the amount to something and update it every so often, you can get caught out. We see that in relation to diligence against earnings and bank arrestment legislation. Although bank arrestments have just been upgraded, in relation to diligence against earnings, we will look at the average rate of inflation over the past three years.

Cars have suddenly gone up in value recently; the second-hand car market is quite strong at the minute, efter comin oot ae Covid. For years it was quite flat, and now it has suddenly gone up. Trying to find the right figure is hard because it fluctuates constantly and there are a lot of different factors.

Bill Kidd: Everybody is pretty much of the opinion that it needs to be higher than the £1,000 threshold that has been broached. As Alan McIntosh mentioned, the more important element is possibly not so much where it starts—although it has to be higher than £1,000—but how it increases over time. That is really the important element. It is useful to have heard that.

Alan McIntosh: Again, I would rather that consumers just came oot the bill, as that would make it easier. However, I will add another example. If I put somebody into the debt arrangement scheme and they have one of those securities, the problem is that the car can still be repossessed. I am therefore no gonnae want to put that debt into the debt arrangement scheme because they would lose their car and, if they lose their car, they cannae go to work and they cannae pay their debts and all that stuff. It creates a problem.

At the moment, the debt arrangement scheme wouldnae prevent the car from being repossessed. If the bill does include consumers, there maybe needs to be something in it to say that, if the debt was included in the debt arrangement scheme, the security, in effect, couldnae be called up. The debt would go in, but they wouldnae be able to use the security, because, at the end of the day, the debts went into the debt arrangement scheme. It would be about putting an additional level of protection into the debt arrangement scheme.

Similarly to what Mike Dailly talked about in relation to time to pay directions, it is about allowing people to keep possession while they reschedule their debts. Something such as that might be necessary. However, again, I would rather that the consumer just came oot; that would make it simpler. Fundamentally, the bottom line is that we do not see the need for the consumer being in the bill at all. That is the point. If we genuinely saw a need for that, we would be working on how to make it fairer, but we do not see the need for it.

Myles Fitt: On that point about need, it would be good to see evidence of the work that has been carried out by the Scottish Government or the Law Commission on the impact of the bill on consumers. For example, why do they think that high-cost lenders would not enter the market and that a new form of statutory pledge is needed for consumers? Is there an overwhelming argument that we are not seeing? Why is it believed that mainstream lenders will definitely enter the market with low-cost loans? When the committee gets a chance to speak to the officials, it would be good for it to put those questions to them.

Bill Kidd: That is a useful direction. Thank you very much for that.

Paul Sweeney: I thank Mr Fitt and Mr McIntosh for coming in and offering such helpful contributions so far. I am mindful of your overall position regarding consumers being removed from the proposed bill.

Concerns have been raised in written correspondence in relation to the enforcement implications in particular. Those concerns are around the fact that people could agree not to be subject to a court order to recover goods with the security attached, and around what arguments people would be able to offer in defence in court against a move against them by a creditor. Being mindful of those issues, are the processes in the bill sufficient to protect consumers? Do the enforcement issues present concerns?

Alan McIntosh: There are problems. As Mike Dailly pointed out, under the Debtors (Scotland) Act 1987, you can apply for a time to pay direction or a time to pay order; the time to pay direction is what you apply for when it gets brought to court. The problem is that it still doesnae prevent it. It means that you still get a court order against you; it is simply an instalment decree and the lender can still call up the security and, basically, take the car.

Again, I would obviously rather just take the consumer oot the bill, but there are things that we could dae. For example, in Scotland, we can use statutory moratoriums, which would currently prevent a sheriff officer from arresting your wages, freezing your bank account or attaching your car. We could extend the powers in statutory moratoriums to make it that they couldnae take you to court or call up a security while you seek

advice. At the moment, it is six months, so you would get six months to speak to a citizens advice bureau or local adviser, for example.

Additional protections could be put into the bill. As I said, we could also look at legislating. Obviously, we would need to come back to that, but we could probably look at whether there are devices that could be used to protect the consumer, which would allow them to pay off the debt and keep possession.

The key point is that people want to keep possession. As Myles Fitt said, the security is probably something that they cannae dae without. They wouldnae have given it to a pawnbroker, because they wouldnae have been able to give it up. They have kept possession, which has let them do that.

If we were to introduce any sort of protections, they would have to allow the person to keep possession. That is the key point; they need their goods. Otherwise, that is where the real detriment arises, on top of the debt.

Myles Fitt: I agree. The critical difference in all of that is that people get to keep items. Although the need to keep an item might not be as strong for some people, others will need that item. It could be an essential item that they are using, which will probably be based around a car. That is the issue.

The process of enforcement broadly makes sense. If you have pledged something on a security, you need to have a means to get it back, but there are usually other measures in between times to get support and time to pay. That is more pertinent because the item might be something that is essential to the individual and there would be a further detriment to removing it, so we should do everything that we can to help them.

12:15

Paul Sweeney: That is an important point. It also carries over to the point about sole traders. If you remove the means by which they can earn money to service the debt, you are compounding the problem, not solving it. There is no public interest in that happening.

Alan McIntosh: We have to remember that, when we remove somebody's ability to earn a living, whether they are a consumer or a sole trader, we cause a detriment to other creditors because that living may be paying their debts as well. That is a danger, because we might have a sub-prime lender who has lent irresponsibly and now has a strong position where they can go and take the car. They take the car to enforce their position and, as a result of that, the responsible lenders—the credit unions, the housing association that has been waiting for its rent to be paid or the local authority that has been waiting to get its council tax—suffer a detriment as well because the debtor suddenly doesnae have a way of making a living and might start to default on their debts.

The danger is that sort of contagion spreading. That is why irresponsible lending causes a lot of detriment, not just to the consumer. A lot of the time, as money advisers will tell you, we end up making people bankrupt because it affects all the creditors. It gets to a situation where it is the only solution left.

Paul Sweeney: I will rest on that.

The Convener: I have one final question, which has partly been touched upon. Your position is clear on the need for consumers to come out of the bill. Is there anything else that you would like to be in the bill? You touched upon the statutory moratoriums in response to Paul Sweeney's question.

Alan McIntosh: No. Only what I would not like to see in the bill, but I have already said that.

Myles Fitt: It is more about what we do not want to see in the bill. We cannot foresee at this point whether consumers will be removed. If they are not, that puts us in a different ball park where we need to work out what we would say about what needs to happen. There might be something that we want to see in the bill if consumers do not come out of it, but we are concentrating on getting consumers out of it.

The Convener: Are there any final comments that you would like to put on the record?

Alan McIntosh: I respect the huge amount of work that the Scottish Law Commission has done. I read the reports. I do not want to be flippant and turn up at the last five minutes. A lot of the consumer sector was blindsided because the focus has been purely on business, which is right, because that is what the bill is really about. We have been blindsided, turned up at the last minute and said, "Hold on, we've got a problem here." However, I do not want to be disrespectful to the huge amount of work that the Law Commission has done. It is an extensive amount of work—unfortunately, I have read most of it now. On consumers, the commission has it wrong.

Myles Fitt: Even proponents of the bill have concerns about consumers. You had evidence on that from one of last week's witnesses, a previous member of the SLC in his submission and the earlier witnesses. I will not quote the earlier witnesses, but I will quote the other two people, who basically said that—I am paraphrasing a little bit—if the inclusion of consumers is such a political hot potato, although they would like them

to be kept in the bill, they would accept it if they were taken out, because the bill is ultimately for businesses. If we get the situation fixed for businesses, that is fine; it might be regrettable if we take consumers out, but it can be done.

Even people who advocate for the bill are saying that it would be fine to remove consumers. That opens up an opportunity for the Parliament and the Government to go down that route as well.

The Convener: I thank Myles Fitt and Alan McIntosh for their help. As with the first panel of witnesses, the committee might wish to follow up in correspondence any additional questions stemming from the meeting.

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

12:20

Meeting suspended.

12:21

On resuming—

Instrument subject to Affirmative Procedure

The Convener: Under item 3, we are considering one instrument, on which no points have been raised.

Greenhouse Gas Emissions Trading Scheme (Amendment) (No 3) Order 2022 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

12:21

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

Financial Assistance for Environmental Purposes (Scotland) (No 2) Order 2022 (SSI 2022/278)

Rural Support (Simplification and Improvement) (Scotland) (No 2) Regulations 2022 (SSI 2022/279)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

12:21

The Convener: Under item 5, we are considering one instrument, on which no points have been raised.

Fireworks and Pyrotechnic Articles (Scotland) Act 2022 (Commencement No 1) Regulations 2022 (SSI 2022/280 (C 16))

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

The Convener: As agreed earlier, we now move into private.

12:22

Meeting continued in private until 12:45.

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