Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No.173)

Discussion Paper on Heritable Securities: Default and Post-Default

discussion paper

Scottish Law Commission
promoting law reform

Discussion Paper on Heritable Securities: Default and Post-Default

December 2021

DISCUSSION PAPER No 173

This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

NOTES

1. Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

2. Where possible, we would prefer electronic submission of comments. A downloadable electronic response form for this paper as well as a general comments form are available on our website. Alternatively, our general email address is info@scotlawcom.gov.uk.

3. Please note that all hyperlinks in this document were checked for accuracy at the time of final draft.

4. If you have any difficulty in reading this document, please contact us and we will do our best to assist. You may wish to note that the pdf version of this document available on our website has been tagged for accessibility.

5. © Crown copyright 2021

You may re-use this publication (excluding logos and any photographs) free of charge in any format or medium, under the terms of the Open Government Licence v3.0. To view this licence visit http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3; or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU; or email psi@nationalarchives.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available on our website at https://www.scotlawcom.gov.uk/.

Any enquiries regarding this publication should be sent to us at info@scotlawcom.gov.uk.

ISBN: 978-1-9989963-1-5

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Right Honourable Lady Paton, *Chair*
David Bartos
Professor Gillian Black
Kate Dowdalls QC
Professor Frankie McCarthy.

The Chief Executive of the Commission is Charles Garland. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

The Commission would be grateful if comments on this Discussion Paper were submitted by 1 April 2022.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

Stephen Crilly
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

Tel: 0131 668 2131

Contents

Contents ... iv
Abbreviations ... x
Glossary ... xiii

CHAPTER 1 INTRODUCTION ...
General ... 1
Project structure ... 1
Background to this Discussion Paper ... 3
Methodology ... 4
Structure of this Discussion Paper ... 4
Legislative competence ... 5
Impact assessment ... 5
Acknowledgements ... 5

CHAPTER 2 PRELIMINARY ISSUES ...
Introduction ... 6
Components of a standard security arrangement ... 6
Terminology ... 8
Enforcement and exercise ... 8
Parties ... 8
Property ... 9
Exercising standard securities: a new regime ... 10
Mechanisms for enforcing the secured obligation ... 10
Bespoke enforcement regime ... 11
A duty to conform with reasonable standards of commercial practice? ... 11
Outline of the scheme ... 13
Redemption ... 15
Enforcement of older forms of heritable security ... 16

CHAPTER 3 RANKING ....
Introduction 18
Current law.. 18
Prior tempore, potior jure... 18
Section 13 19
Ranking by agreement 22
Discussion.. 23
Statutory restatement of the general rule 24
Restricting the priority of an earlier security 24
Ranking by agreement 26

CHAPTER 4 DEFAULT ....
Introduction 28
Default under the 1970 Act.. 28
Standard Condition 9(1)(a)... 28
In what circumstances can a calling-up notice be served?.................................. 28
In what circumstances must a calling-up notice be served?................................. 30
Conclusion on Standard Condition 9(1)(a) 31
Standard Condition 9(1)(b)... 32
Standard Condition 9(1)(c) 32
Problems with the current law 32
"Default" elsewhere in the 1970 Act 33
Default and the pre-action requirements 34
Default under the 1894 Act.. 35
Discussion.. 36
Default in relation to other rights in security in Scots law 36
Comparative law... 37
Future law 38

CHAPTER 5 NOTICES...
Introduction 41
Current law.. 41
Retaining a notice requirement 42
Form and content of notice.. 44

Notices under the 1970 Act 44
Discussion 44
Service of notice 46
By whom? 46
On whom? 46
Methods of service 49
Time limit for compliance with notice 52
Deviation from statutory notice requirements 54
Current law 54
Discussion 55
Challenges to the validity of a notice 56
Current law 56
Discussion 56
Extinction of a notice 57
Prescription 57
Remedying of default 58

CHAPTER 6 COURT ORDERS ....
Introduction 60
Current law 60
Property not used to any extent for residential purposes 60
Property used to any extent for residential purposes 61
Problems with the current law 62
Discussion 63
Court orders in relation to other rights in security in Scots law 63
Comparative law 63
Options for reform 64
Prescription 66

CHAPTER 7 ENHANCED DEBTOR PROTECTION MEASURES: APPLICATION
Introduction 67
Current law 67
Development of the current law 68
Case law and commentary 72

Debtor and residential property protection in other enforcement processes 76
Debt Advice and Information Package 76
Insolvency processes 76
Diligence 78
Proceeds of crime legislation 80
Comparative material 80
Consumer Credit Act 1974 81
Discussion 84
Person criterion 84
Property criterion 86
Notification of occupiers 87

CHAPTER 8 ENHANCED DEBTOR PROTECTION MEASURES: CONTENT ....
Introduction 89
Pre-action requirements 89
Warrant of the court 90
Application for warrant 90
Determination by the court 92
Entitled residents 93
Waiver of the requirement for warrant 94

CHAPTER 9 REMEDIES: GENERAL PRINCIPLES ....
Introduction 96
Which remedies are available? 96
Current law 96
Receivership 97
Choice between remedies 99
Variation of remedies 101
Who may exercise remedies? 102
Application of the proceeds of remedies 103

CHAPTER 10 EJECTION ....
Introduction 105
Current law 106

Problems with the current law 107
Discussion 107
Private residential tenants 109
Liability for moveables 111

CHAPTER 11 POSSESSION ....
Introduction 113
Entering into possession 113
Lawful possession: two approaches 114
Current law 115
Discussion 118
Possession in Scots law 118
Statutory rights and liabilities of heritable creditors in possession 119
Comparative law 122
Possession: future law 123
Rights and liabilities following on entry into possession 124
Rights of a security holder in possession 125
Liabilities of a security holder in possession 126

CHAPTER 12 RENTS AND LEASES ....
Current law 128
Collecting rents 128
Granting and administering leases 130
Granting a lease 130
Administering a lease 132

CHAPTER 13 SALE ....
Introduction 134
Current law 134
Duties on the security holder 135
Breach of duties: remedies available to debtor 137
Protection for purchasers 138
Consequences of sale 140
Future law 140

Should a court order be required? 141
Method of sale 141
Duty to obtain the best price 143
Purchaser protection 144
Consequences of sale 146

CHAPTER 14 FORECLOSURE ....
Introduction 148
Current law 148
Discussion 150
Comparative position 150
Future law 151

CHAPTER 15 EXPENSES ....
Current law 153
Discussion 153
Future law 155

CHAPTER 16 SUMMARY OF QUESTIONS 157

APPENDIX…… 169

Abbreviations

1868 Act

Titles to Land Consolidation (Scotland) Act 1868

1894 Act

Heritable Securities (Scotland) Act 1894

1924 Act

Conveyancing (Scotland) Act 1924

1970 Act

Conveyancing and Feudal Reform (Scotland) Act 1970

1988 Act

Housing (Scotland) Act 1988

1990 Act

Environmental Protection Act 1990

2001 Act

Mortgage Rights (Scotland) Act 2001

2010 Act

Home Owner and Debtor Protection (Scotland) Act 2010

2016 Act

Private Housing (Tenancies) (Scotland) Act 2016

A1P1

Article 1 of the First Protocol to the European Convention on Human Rights

Anderson, *Assignation*

R G Anderson, *Assignation* (2008)

Anderson, *Scots Commercial Law*

R G Anderson (ed), *Scots Commercial Law* (2nd edn, publication due in 2022)

Bridge et al., *Megarry and Wade*

S Bridge, E Cooke and M Dixon, *Megarry and Wade: The Law of Real Property* (9th edn, 2019)

Cusine and Rennie, *Standard Securities*

D J Cusine and R Rennie, *Standard Securities* (2nd edn, 2002)

DAIP

Debt Advice and Information Package

DCFR

C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (6 vols, 2010). The DCFR is a set of model rules on a number of areas of private law, designed to be used as a common frame of reference for European institutions seeking to harmonise or resolve disputes between the laws of different European jurisdictions. The DCFR was commissioned by the European Commission and prepared principally by academic lawyers.

DP1

Scottish Law Commission, Discussion Paper on Heritable Securities: Pre-default (DP No 168, 2019)

FCA

Financial Conduct Authority

Gloag and Irvine, *Rights in Security*

W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable, including Cautionary Obligations* (1897)

Gretton, *Inhibition*

G L Gretton, *Inhibition and Adjudication* (2nd edn, 1996)

Gretton and Reid, *Conveyancing*

G L Gretton and K G C Reid, *Conveyancing* (5th edn, 2018)

Gretton and Steven, *Property, Trusts and Succession*

G L Gretton and A J M Steven, *Property, Trusts and Succession* (3rd edn, 2017)

Halliday, *Conveyancing Law and Practice*

J M Halliday, *Conveyancing Law and Practice* (2nd edn, by I J S Talman, 2 vols, 1996 and 1997)

Gordon and Wortley, *Scottish Land Law*

W M Gordon and S Wortley, *Scottish Land Law* (3rd edn, 2020)

Halliday Report

Scottish Home and Health Department, Conveyancing Legislation and Practice (Cmnd 3118, 1966)

Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*

J M Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* (2nd edn, 1977)

Higgins, *Enforcement*

M Higgins, *The Enforcement of Heritable Securities* (2nd edn, 2016)

Macleod, *Enforcement*

J MacLeod, *Research Paper on Enforcement of Standard Securities (Scottish Law Commission, 2018)*

MCOB

Financial Conduct Authority, *Mortgages: Conduct of Business Sourcebook*

Notes on Clauses

Conveyancing and Feudal Reform (Scotland) Bill 1970, House of Commons, Notes on Clauses (held in the Scottish Government Law Library and not fully paginated). These are equivalent to today's Explanatory Notes.

PARs

Pre-Action Requirements

Paisley and Cusine, *Unreported Property Cases*

R Paisley and D J Cusine, *Unreported Property Cases from the Sheriff Courts* (2000)

Reid, *Property*

K G C Reid, *The Law of Property in Scotland* (1996)

Report on Moveable Transactions

Scottish Law Commission, Report on Moveable Transactions (Scot Law Com No 249, 2017) (3 vols)

SME

Small or Medium Sized Enterprise

Glossary

Accelerating the debt: When the creditor unilaterally brings forward the time for performance of the secured obligation. I.e. making a debtor immediately liable for repayment of all outstanding sums. Typically this is as a result of failure to comply with the obligations under the security and provided for in the contract.

Accessoriness principle: The principle that a security right has no independent existence, but is merely accessory to, or parasitical upon, another right, namely the obligation whose performance it secures. An Arizona court put it thus: "The note [= personal obligation] is the cow and the mortgage the tail. The cow can survive without the tail, but the tail cannot survive without the cow." (*Best Fertilizers of Arizona Inc v Burns*, 117 Ariz 178, 571 P 2d 675 (App 1977)). The secured obligation does not have to be an obligation owed by the grantor of the security: one person can grant a security for another's debt.

All sums security: A *standard security* granted over all sums due or which may become due by the debtor to the creditor. These securities cover any advances made by the creditor at the time at which the security is granted and all future advances until the security is discharged.

Assignation: The deed used to transfer a *standard security*. More broadly, the transfer of *incorporeal property*.

Bailee: A person who receives temporary possession of moveable property without being transferred ownership. Typically a bailee serves a purpose such as custody or repair. They are in a contractual agreement with the owner whereby they have legal responsibility to safeguard the property.

Bond and disposition in security: Older form of heritable security in which the debtor retained ownership of the property and the creditor obtained a subordinate *real right*. The debt had to be a fixed amount which was contracted for prior to the grant of the security. Not competent since 1970.

Bond of cash credit and disposition in security: Similar form of *heritable security* to the *bond and disposition in security* but which allowed credit given by a bank in relation to an account to be secured up to a maximum figure. Not competent since 1970.

Catholic and secondary securities: If a debtor grants to X security over two assets, and later grants to Y a postponed security over one of them, X is the "catholic" secured creditor and Y is the "secondary" security holder. If the debtor defaults on the debt owed to X, X owes a duty at common law to Y to resort in the first instance to the property over which Y has no security, and to resort to the latter only to the extent that the former is insufficient.

Cautionary obligation: An obligation by a party ("the cautioner") to guarantee a debt or debts owed by another ("the principal obligant"). This can be referred to as "personal security" in contrast to "real security" where an asset is used to secure a debt or debts. Cautionary obligations are often known as "guarantees", this being the relevant term in English law.

Company charges registration regime: Part 25 of the Companies Act 2006 (the current version of which has been in force since 1 April 2013) requires that certain security rights ("charges") in which the debtor is a company must be registered in the Companies Register

within 21 days of their creation, on pain of invalidity against certain parties. Also applies to LLPs.

Consignation: The deposit of money in court or with a third party under court authority.

Companies Register: Each company registered under the Companies Acts has its own file. We refer to the totality of these files as the "Companies Register", though that term is not used in the Companies Acts. Most types of security rights granted by a company must be registered in this register: this is the *company charges registration regime*. There are three such registers (England & Wales, Scotland, Northern Ireland), each with its own Registrar, though in practice they are closely connected, and share a website at http://www.companieshouse.gov.uk.

Corporeal property: Property with a physical presence, such as a piece of land or a book.

Discharge: The deed used to extinguish a *standard security*.

Diligence: The broad term for debt collection processes such as adjudication, arrestment and inhibition.

Entitled resident: A resident (other than the debtor) of security property used to any extent for residential purposes who is entitled to defend enforcement proceedings raised by the security holder, and to have their circumstances taken into account by the court when it is determining how to dispose of such proceedings. The current definition of entitled resident is set out in the 1970 Act section 24C. It covers a person whose sole or main residence is the object of the standard security and who is either (i) owner, (ii) a non-entitled spouse or civil partner of the debtor or owner where the secured property is a matrimonial or family home, (iii) a cohabitant of the debtor or owner, or (iv) a cohabitant who has lived with debtor or owner for at least 6 months prior to end of the relationship and who continues to live there with a child of the relationship aged under 16. The term "entitled resident" in the 1970 Act is unrelated to the term "entitled spouse" (and the associated term "non-entitled spouse") used in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and defined in section 1 of that Act.

Equity/equitable: In English law, some rights have a double existence: they may exist "at law" or "in equity". (In the ordinary sense of the word "law" they are both part of English law.) Rights in security can be either legal or equitable. In general, equitable securities are created by simple agreement, without any external act. An equitable security is generally valid in the debtor's insolvency. But it is often defeasible (ie capable of being defeated or overridden by the right of a third party), for example if the debtor sells the property to a purchaser who is in good faith then the purchaser takes the property free of the security. Thus it is often weaker than a legal security. The legal/equitable distinction does not exist in Scots law. "Equity" also means the market value of an asset, less the amount of debt secured over it. Thus if land is worth £1,000,000 and there is over it a standard security, securing a debt of £400,000, the "equity" of the property is £600,000.

***Ex facie* absolute disposition:** Older form of *heritable security* in which the property was transferred to the creditor but with the right to a reconveyance on the secured debt being paid. Not competent since 1970.

Extractor of the Court of Session: The official assisting the Principal Extractor, who is responsible for running the Extracts department of the Court of Session. The department issues extracts, court documents which allow judgments to be enforced.

Financial Conduct Authority (FCA): The regulator for financial services firms and financial markets in the United Kingdom. The FCA is an independent body funded by the firms it regulates, and accountable to Parliament.

Foreclosure: The process by which a creditor takes ownership of the security property, having been unable to sell it. A court order is required. In some jurisdictions the word "foreclosure" is used more broadly to mean enforcement.

Heritable property: Immoveable property, i.e. land and rights in land. Strictly, the term "heritable property" also applies to other very limited types of property such as pensions.

Heritable security: The general term for security over *heritable property*. There is a broad statutory definition of "heritable security" in section 3 of the Titles to Land Consolidation (Scotland) Act 1868. That definition, however, excludes the *ex facie* absolute disposition which in functional terms can be regarded as a heritable security. The term "heritable security" would not normally be used to refer to a floating charge. While that form of security does affect land, it is typically granted by a company over all its assets.

Hypothec: A non-possessory right in security over *corporeal property*. E.g. a landlord obtains a hypothec, arising by operation of law, over a bankrupt tenant's corporeal goods, to the extent of their unpaid rent. While security over land is in principle a hypothec, in practice the term is used in Scotland for a non-possessory security over corporeal moveables. By contrast in many countries, particularly in continental Europe, the term is used mainly for security over land.

Incorporeal property: Property without a physical presence, such as a lease or a patent.

Judicial security: A form of involuntary security created by grant of the court. Also known as a diligence.

Juridical act: Any act of will or intention which has, or which is intended by the maker of the act to have, legal effect, but not including any legislative or judicial act.

Juristic person: An entity or body recognised in law as having independent legal personality akin to natural persons. E.g. a company.

Keeper of the Registers of Scotland: Commonly referred to as "the Keeper". The official who heads the Department of the Registers of Scotland and in whose name all acts and decisions are made.

Land Register: The register of title to land in Scotland. A *standard security* must be registered in this register to give a creditor a real right. (The Land Register is gradually replacing the Register of Sasines, a register of deeds.)

LLP: Limited liability partnership. (Limited Liability Partnerships Act 2000.) Not to be confused with limited partnerships. (Limited Partnership Act 1907.)

Maills and duties: A remedy which was available to heritable creditors under older forms of heritable securities, requiring payment of rent due to the debtor to be paid directly to them. No longer a valid remedy available to security holders.

Mortgage: A term in the law of England and Wales for the main form of security over land, which has come into general usage including in Scotland.

Mortgagee: The party in whose favour a mortgage is created. E.g. a bank or building society.

Mortgages: Conduct of Business Sourcebook (MCOB). A set of rules issued by the Financial Conduct Authority to regulate the relationship between mortgage lenders and borrowers in the United Kingdom. The current version of the MCOB can be accessed at https://www.handbook.fca.org.uk/handbook/MCOB.pdf.

Mortgagor: The party who provides the security constituting the mortgage. E.g. a borrowing homeowner.

Moveable property: All property which is not *heritable property*. Moveable property may be *corporeal property* or *incorporeal property*.

Obligation *ad factum praestandum*: Obligation to do something, such as to convey land.

Offside goals rule: A general doctrine of property law. If X contracts to transfer a right (eg ownership of land) to Y, but in fact transfers it to Z, and Z knew that X was acting in breach of the X/Y contract, then Z has "scored" an "offside goal". The result is that Y can have the X/Z transfer set aside. Thus Y's personal right prevails over Z's real right. The doctrine can apply not only to transfers but also to certain other types of transaction, but its exact parameters, including in relation to security rights, are unclear.

Person: In law a person is the subject of rights and obligations. So as well as (i) natural persons, such as Jennifer Henderson or Andrew Steven, there are (ii) juristic persons (also called legal persons) such as companies.

Personal right: A right against a person. Also called a "claim". Contracts create personal rights, but such rights can also have other sources. A personal right is as good as the person against whom it is held. A personal right against the Bank of England to be paid £1 is better than a personal right for the same amount against a person who has become insolvent. A right may still be personal even if it relates to property. For example if X owns land and contracts to transfer it to Y then Y has a personal right against X. A *real right* is a right directly in a thing rather than against a person. Thus when Y's name replaces X's in the Land Register, Y has a real right in the land, and the personal right against X to have the land transferred is now spent. Real rights are as good as the thing in which they are held.

Pre-action requirements (PARs): Where a standard security is held in property used to any extent for residential purposes, a standard security holder cannot begin enforcement proceedings until it has complied with the pre-action requirements (PARs) set out in section 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970. The PARs are designed to help resolve the dispute between the security holder and the debtor without the need for court action, and include obligations on the security holder to provide the debtor with information about local sources of financial advice and to make reasonable efforts to come to an agreement about fulfilment of the secured obligation.

Proprietor: Term used by the 1970 Act for the owner of property.

Publicity principle: The principle that what affects third parties should be discoverable by third parties. It is not an absolute principle. Different legal systems apply the principle with varying degrees of enthusiasm.

Queen's and Lord Treasurer's Remembrancer: The body that deals with ownerless property in Scotland. This includes the assets (but not liabilities) of dissolved companies and the estates of those who die intestate and with no known successors.

Real burden: An obligation affecting land. These can be positive, such as an obligation to maintain the land, or negative, such as the obligation not to conduct trade on it. Real burdens are said to "run with the land", meaning that the land continues to be affected by the obligation when ownership of the land changes.

Real right: See also *personal right*. Real rights divide into (i) ownership and (ii) the subordinate real rights (or "limited") real rights, which are rights held in something that is owned by someone else. For example if X owns land and borrows money from Y, granting to Y a standard security, there are now two real rights in the property, X's real right of ownership and Y's subordinate real right of security. A subordinate real right is also called a *jus in re aliena*.

Redemption: The right of the grantor of the security to have it extinguished on the secured debt being paid.

Register of Sasines: The older register of land in Scotland, with the full name the General Register of Sasines. Established by the Registration Act 1617. Has been gradually replaced by the Land Register since 2012, and is due to close by 2024.

Restriction: The deed used to restrict a *standard security* to only part of the property over which it was initially granted.

Security property: The property which is subject to a security. The Conveyancing and Feudal Reform (Scotland) Act 1970 uses the term "security subjects".

Standard conditions: A set of statutory conditions found in Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970 which are incorporated into every *standard security*. Most are variable by the parties to the security but some, in particular in relation to enforcement are not.

Standard security: The only type of *heritable security* which can be granted under the current law. It gives the grantee a limited right in the property, leaving ownership with the grantor. A standard security is created by registration in the Land Register. The governing legislation is the Conveyancing and Feudal Reform (Scotland) Act 1970.

Sunset rule: A rule in terms of which a right is extinguished after a fixed period of time. (This can be contrasted with negative prescription which requires a right not to be enforced for a period of time before it is extinguished.)

True security: A security right that is a subordinate *real right*, leaving title to the property in the provider of the security. Also known as a "proper security". A *standard security* is a true security.

Unregistered holder: A person who is not registered as owner of land, or holder of a right in land, but who could complete title and become registered owner or holder. Typical examples of unregistered holders are executors, who acquire the deceased person's estate by means of confirmation from the Sheriff Court but are not registered as owner on the Land Register.

Variation: The deed used to amend a *standard security* other than to reduce the extent of the encumbered property where a *restriction* must be used.

Chapter 1 Introduction

General

1.1 The availability of finance secured on land is essential to the economy of Scotland and the UK. In Scotland, the technical term for security over land and houses is "heritable security." Colloquially, the term "mortgage" is often used.[1] In 2020, mortgages allowed approximately 300,000 first-time buyers to purchase a home in the UK.[2] During 2020, figures from UK Finance show that in Scotland there was around £3.54 billion of mortgage lending for first-time buyers, £4.77 billion for home movers and £3.39 billion for remortgaging.[3] In 2020/2021, there were 108,139 mortgage transactions registered in Scotland.[4] Although the term "mortgage" may first conjure thoughts of home ownership, finance secured on land is also integral to the commercial and agricultural sectors. This economic backdrop helps to explain the importance of the law of mortgages – or to use the correct term in Scots law, heritable securities – in daily life.

1.2 The purpose of a heritable security is to ensure performance of the obligation which it secures. If the debtor defaults in performance of that obligation, generally by failing to make agreed repayments on a loan, the security holder may exercise the security to enforce the obligation, most commonly by selling the property in which the security is held and using the proceeds to repay the loan. The most recent Scottish Government civil justice statistics[5] record the initiation of 2,204 "repossession" cases[6] in 2019/20,[7] noting that difficulties with data collection mean this figure is likely to be an underestimate.[8] No data is available on the frequency with which steps towards the exercise of a security which fall short of raising court action[9] are taken in Scotland. However, it may safely be assumed that negotiations to avoid enforcement are conducted in the shadow of the heritable securities legislation on a day-to-day basis.

Project structure

1.3 The law of heritable securities was first identified as a project in our Eighth Programme of Law Reform,[10] and carried over into our Ninth programme,[11] with work beginning under our

[1] This is the term used in English law and in other jurisdictions including South Africa and New Zealand.
[2] Source: UK Finance.
[3] *Ibid.*
[4] Source: Registers of Scotland, correspondence on file.
[5] Scottish Government, *Civil Justice Statistics in Scotland 2019-20* (2021) available at: https://www.gov.scot/publications/civil-justice-statistics-scotland-2019-20/.
[6] Cases in which the security is exercised by selling the security property in order to recoup the amount outstanding on the secured debt from the proceeds of the sale.
[7] *Civil Justice Statistics 2019-20*, 25.
[8] *Ibid*, 31.
[9] For example, because the debtor cooperates in the sale of the security property without the need for court action.
[10] Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010) available at: https://www.scotlawcom.gov.uk/files/9412/7989/6877/rep220.pdf.
[11] Scottish Law Commission, Ninth Programme of Law Reform (Scot Law Com No 242, 2015) available at: http://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf.

Tenth (and current) programme[12] in 2018. Our review of the law will be carried out in three Discussion Papers, drawn together into a single Report and draft Bill at the conclusion of the project in 2025.

1.4 Our first Discussion Paper,[13] published in June 2019, focused on pre-default issues, chiefly creation, assignation and extinction of heritable securities. We received 22 responses to this paper from a mixture of law firms and practitioners, academics and organisations including the Royal Bank of Scotland and UK Finance. Responses to questions in the first Discussion Paper have influenced our approach in the second Discussion Paper in certain areas, and we include consideration of those where relevant in the chapters which follow.

1.5 In this Discussion Paper, we focus on default and post-default issues. The main work of the paper is a systematic review of the processes by which a secured obligation is enforced through the exercise of a standard security.

1.6 The third Discussion Paper will focus on two complex issues in this area, namely sub-security arrangements and security in respect of non-monetary obligations. We took the decision to include a third paper in 2020, based on the work we have conducted to date, responses to the first Discussion Paper and follow-up consultation meetings with stakeholders.

1.7 In the context of heritable securities in Scotland, sub-security arrangements describe the situation where a security is taken over an existing standard security. The creation of sub-securities is integral to high-value securitisation and debt warehousing transactions in the commercial finance sector. At present, it is probably the case that sub-securities in Scotland can be created only by taking a "piggyback" standard security over the existing standard security,[14] but question marks arise over the conceptual soundness and practical utility of this approach. The third Discussion Paper will look in detail at the current law as it applies to sub-securities in Scotland and consider options for reform, for example by allowing for assignation in security of standard securities.

1.8 Standard securities in respect of non-monetary obligations are competent under the current law.[15] In our first Discussion Paper,[16] we noted that the type of non-monetary obligations commonly secured in this way are options and other agreements related to the transfer of land in which the security is held. The purpose of taking the security in such cases is primarily to give the obligation third-party effect by making it visible on the Land Register. Such an outcome might be considered a "by-product" of a standard security, rather than its core purpose, which is to ensure performance of the secured obligation. In some jurisdictions, bespoke legal mechanisms are available to achieve third party effect for obligations of this kind.[17] From the perspective of legal clarity and certainty, it may be preferable to have a bespoke mechanism for this purpose in Scots law also. The third Discussion Paper will consider options for reform along these lines.

---

[12] Scottish Law Commission, Tenth Programme of Law Reform (Scot Law Com No 250, 2018) available at: https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF.
[13] DP1.
[14] For discussion, see *ibid,* paras 5.25-5.30.
[15] Conveyancing and Feudal Reform (Scotland) Act 1970 ss 9(3) and 9(8)(c).
[16] DP1 paras 4.15-4.21 and 4.36-4.65.
[17] *Ibid*, paras 4.47 and 4.64-4.65.

1.9 The third Discussion Paper is intended for publication in early 2023. All three Discussion Papers will be drawn together in a single Report and draft Bill intended for publication in 2025.

Background to this Discussion Paper

1.10 When this project was first included in our reform programme, we set out five reasons why the work was required, amongst which were difficulties with the drafting of the key piece of legislation in this area, the Conveyancing and Feudal Reform (Scotland) Act 1970, and questions about the overall fairness of the regime.[18] Perhaps the principal reason for the project's inclusion was, however, the lack of clarity in the law on exercising a standard security. The programme noted that "the rules about enforcement are complex and hard to understand, and indeed it may be open to debate whether even after exhaustive study they really make sense." This statement pre-dated the decision of the Supreme Court in *Royal Bank of Scotland v Wilson*,[19] the effect of which was to overturn the long-held understanding of what requires to be done to allow a standard security to be exercised following a failure in performance of the secured obligation.[20] In that case Lord Rodger of Earlsferry quoted with approval Professors Gretton and Reid's description of the enforcement provisions as a "veritable maze".[21] The statement in the Eighth Programme also pre-dates the significant amendments made for residential cases by the Home Owner and Debtor Protection (Scotland) Act 2010, which have added to the complexity. This Discussion Paper will address these issues.

1.11 The focus of the project, as set out in the first Discussion Paper, is the law of rights in security rather than the law of credit.[22] The primary objective of the project is to modernise and improve the law of standard securities as set out in the 1970 Act, producing a draft Bill which could be passed by the Scottish Parliament.[23]

1.12 In policy terms, the first Discussion Paper noted that the Scottish Parliament legislated relatively recently to enhance the protection of particular vulnerable debtors where secured obligations are enforced by the exercise of a standard security.[24] We intend to respect these policy choices, and consult later in this Discussion Paper on proposals to align any new legislation more closely with the policy intent.[25]

1.13 More generally, the approach taken in the project is one of "evolution, not revolution," recognising that although the current law can clearly be improved upon, it is not fundamentally broken.[26] In terms of the practicalities of reform, respondents to the first Discussion Paper universally supported repeal of the 1970 Act and replacement with a new statute rather than amendment of the current legislation. We have proceeded on that basis in this Discussion Paper.

---

[18] Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010) paras 2.29-2.33 available at: https://www.scotlawcom.gov.uk/files/9412/7989/6877/rep220.pdf.
[19] [2010] UKSC 50, 2011 SC (UKSC) 66.
[20] This case and its consequences are discussed in detail in Chapter 4.
[21] [2010] UKSC 50, 2011 SC (UKSC) 66 at [15]. See Gretton and Reid, *Conveyancing* paras 23-31. In the same vein, Lord Hope of Craighead in the same case at [70] referred to their statement in K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 179 that the law here is of "labyrinthine complexity".
[22] DP1 paras 1.9 and 1.13.
[23] *Ibid,* para 1.13.
[24] *Ibid,* para 1.20.
[25] See Chapters 7 and 8.
[26] DP1 para 1.19.

Methodology

1.14 As noted in the first Discussion Paper, in working on this project we are helped considerably by the existing literature on heritable securities in Scotland.[27] With specific regard to the 1970 Act we have been assisted by looking at the Parliamentary Debates when this legislation was being enacted and the Notes on Clauses held in the Scottish Government Law Library, the equivalent of today's explanatory notes. We have also received great assistance from discussions with our advisory group.

1.15 One reason for the inclusion of this project in our Eighth programme was the opportunity to consider comparative law in this area. Comparative research had not been undertaken in previous reviews.[28] Under the Memorandum of Understanding between this Commission and the Scottish Law Schools,[29] Dr John MacLeod, formerly of the University of Glasgow and now of the University of Edinburgh, produced a comparative research paper on enforcement of heritable securities which can be found on the project webpage.[30] In his paper, Dr MacLeod systematically reviews the law in five jurisdictions – England and Wales, New Zealand, Germany, France and South Africa[31] – which we refer to in this Discussion Paper as our "comparator jurisdictions". Dr MacLeod's research has been of considerable assistance to us in our preparation of this Discussion Paper and we refer to his findings throughout.

Structure of this Discussion Paper

1.16 This Discussion Paper is composed of 16 chapters. Following this introductory chapter, Chapter 2 deals with some preliminary issues and provides an overview of the procedure by which a security may be exercised under our provisional proposals for reform. Chapter 3 deals with ranking of standard securities where more than one has been granted over the same property. Chapter 4 deals with default as the trigger for exercise of a security, considering how this term should be understood in any new legislation.

1.17 The following four chapters deal with the procedure by which a security may be exercised. Chapter 5 focuses on the content and service of enforcement notices. Chapter 6 discusses the circumstances in which a court order will be required for the exercise of a security. Chapters 7 and 8 deal with cases to which the enhanced debtor protection measures apply, with Chapter 7 addressing which cases fall within this regime, and Chapter 8 reviewing the detail of the measures.

1.18 Chapter 9 addresses some overarching issues relating to the remedies available under a standard security. The subsequent chapters look at the detail of specific remedies. Chapter 10 addresses ejection. Chapter 11 considers entry into possession. Chapter 12 deals with collection of rents and the grant and administration of leases. Chapter 13 focuses on sale of the property in which the security is held. Chapter 14 reviews the law of foreclosure.

---

[27] E.g. Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970*; Cusine and Rennie, *Standard Securities* and Higgins, *Enforcement.*

[28] Notably the Halliday Report.

[29] See Scottish Law Commission, Annual Report 2016 (Scot Law Com No 246, 2017) 23 available at https://www.scotlawcom.gov.uk/files/2414/8827/0829/Scottish_Law_Commission_Annual_Report_2016_Report_No_246.pdf.

[30] See https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/.

[31] The choice of jurisdictions is explained in MacLeod, *Enforcement* at para 1.04.

1.19 Chapter 15, the final substantive chapter of the paper, addresses some issues in relation to the expenses of the enforcement procedure. Chapter 16 lists the consultation questions asked earlier in the paper.

Legislative competence

1.20 As we noted in the first Discussion Paper, our aim is to produce a draft Bill which is within the legislative competence of the Scottish Parliament. The law of heritable securities, as an aspect of Scots private law,[32] is not a reserved matter under Part II of Schedule 5 to the Scotland Act 1998. In so far as there are areas relevant to the project reserved to the UK Parliament[33] we will work within these.

1.21 An Act of the Scottish Parliament is not law so far as any provision of the Act is outwith the legislative competence of the Parliament and a provision is outside that competence in so far as it is incompatible with any right under the European Convention on Human Rights.[34] In suggesting reforms we require to ensure that these would be ECHR-compliant. We deal with potential human rights concerns as they arise in subsequent chapters.

Impact assessment

1.22 When our Report is published it will be accompanied by a BRIA (Business Regulatory and Impact Assessment). We require therefore to assess the impact, particularly the economic impact, of any reform proposal that we may eventually recommend in the Report. Information on the impact of the current law is helpful in making this assessment. For example, uncertainty in the meaning of statutory provisions may necessitate litigation and therefore increased costs. In the first Discussion Paper, we asked for the help of consultees in this respect in relation to pre-default issues, and are grateful for all the useful information we received in response. For consultees who did not respond to the earlier paper, or who have additional information to put forward at this stage in the project, we make a further request for assistance here.

1. What information or data do consultees have on:

(a) the economic impact of the current legislation on heritable securities, or

(b) the potential economic impact of any option for reform proposed in this Discussion Paper?

Acknowledgements

1.23 We are grateful to the members of our advisory group, whose names appear in Appendix B. Listed there too are the names of others who have helped, to whom we would also express our thanks. We have had particular help from Registers of Scotland and the office of the Queen's and Lord Treasurer's Remembrancer, and thank the staff of both for their assistance.

[32] Scotland Act 1998 s 126(4).
[33] Such as the subject matter of the Consumer Credit Act 1974.
[34] Scotland Act 1998 s 29(2)(d).

Chapter 2 Preliminary issues

Introduction

2.1 In this Chapter, we address some preliminary issues which underpin discussion of the law in later chapters, and some miscellaneous matters. First, building on the consultation responses received to our first Discussion Paper, we outline the understanding we have adopted in this Discussion Paper of the basic components of a standard security. These building blocks have consequences for the enforcement regime which follows. Second, we explain some of the terminology we employ in subsequent chapters. Third, we provide an overview of the new scheme we provisionally propose for exercise of a standard security. Each aspect of this scheme will be discussed in detail in the chapters which follow. The outline given here, which makes clear how all parts of the procedure relate to one another, should be a useful precursor to that discussion. In this section, we also ask whether a new duty to conform with reasonable standards of commercial practice should be introduced in relation to the exercise of a security and consider the debtor's right to redemption following default. Finally, we seek views on reform of the rules of enforcement applying to one of the older forms of heritable security in Scotland, namely the *ex facie* absolute disposition.

Components of a standard security arrangement

2.2 In our first Discussion Paper, we asked a series of questions about the central components of a standard security arrangement.[1] In essence, such an arrangement requires an obligation, in respect of which a right in security over heritable property is granted with the purpose of ensuring performance of that obligation. Consultees universally supported the proposal that a standard security should continue to be the only form of heritable security which can be granted.[2] All but one of the respondents who expressed a view agreed that it should continue to be known as a standard security.[3] None of the respondents who expressed a view supported the introduction of a non-accessory form of standard security (briefly put, a security which is not tied to an underlying obligation.)[4] This Discussion Paper proceeds in line with these responses, considering an enforcement regime for a single, accessory form of heritable security known as a standard security.

2.3 A standard security arrangement will most commonly involve two parties. The first will be the debtor in the secured obligation, who also grants security over their heritable property in respect of that obligation. The second will be the creditor in the secured obligation, who also holds the security and may exercise it in the event of default to ensure the obligation is performed. In the first Discussion Paper, we explored more complex three- and four-party security arrangements found in practice and arguably supported by the current law.[5] First, we

---

[1] See DP1 Chapters 3-6.
[2] DP1 para 3.12.
[3] *Ibid,* para 3.20.
[4] *Ibid,* para 3.27. The accessoriness principle is defined in the Glossary. The extent to which a standard security conforms to this principle is the subject of discussion, for which see DP1 paras 3.21-3.27, but it is clear that the standard security is accessory to some extent. Non-accessory forms of security are not known in Scots law but can be found in some other jurisdictions, for which see DP1 para 3.25.
[5] *Ibid,* paras 3.28-3.40.

noted that the debtor and the granter of the security need not be the same person. For example, a parent may grant security for the debt of their child, or one company may grant security for the debt of another company in the same group. Second, we noted the development in practice of arrangements whereby the creditor and the holder of the security are not the same person. This tends to occur in commercial lending, where an institutional creditor engages a specialist company to hold and administer securities on its behalf, with the relationship between creditor and company regulated by contract or by the creation of a trust. A three-party security will result either from the grant of security by someone other than the debtor, or from the security being held by someone other than the creditor. Use of both these arrangements will result in a four-party security.

2.4 All respondents who expressed a view on our question in relation to this issue in the first Discussion Paper[6] agreed that the granter of a standard security should not require to be the same person as the debtor in the secured obligation. All but one of the respondents who expressed a view agreed that the grantee of a standard security should not require to be the same person as the creditor in the secured obligation. Our discussions in this paper accordingly allow for three- or four-party security arrangements to be provided for in any new legislation.

2.5 Which obligations can be secured by a standard security? There was universal agreement from respondents to the first Discussion Paper that it should be competent for monetary obligations, including ancillary monetary obligations (such as interest on the principal debt), to be secured.[7] Amongst those who responded to the relevant question, there was also majority support for the proposal that it should be competent to secure non-monetary obligations on the basis that it is damages for breach of the obligation which are actually secured. In many cases, support for this proposition was contingent on additional work being carried out by us in relation to a legal mechanism by which third-party effect could be given to the types of non-monetary obligation in respect of which security is commonly granted, such as option agreements.[8] We will explore the possibility of a separate mechanism for this purpose in our third Discussion Paper in this project.[9] In this Discussion Paper, we accordingly proceed on the basis that the exercise of a security, regardless of the type of obligation secured, is intended to result in payment of money.

2.6 In terms of the property over which a standard security can be granted, our first Discussion Paper accepted that it should continue to be competent to grant a standard security over ownership of heritable property. Consultees universally supported the proposal that it should also continue to be competent to grant a standard security over a registered or recorded lease.[10] There was no support, however, for it to become possible to grant a standard security over real burdens, proper liferents[11] or other forms of immoveable property.[12] As discussed in Chapter 1,[13] although there was a clear demand amongst respondents for a

---

[6] DP1 para 3.40.
[7] *Ibid,* para 4.33.
[8] *Ibid,* paras 4.85 and 4.86.
[9] See paras 1.8-1.9.
[10] DP1 para 5.24.
[11] Proper liferent, sometimes known as usufruct, is a real right which allows the holder to enjoy the use of the property in which the liferent is held for the duration of their lifetime: see Reid, *Property* para 5. The historical stereotype is that this right would have been held in a family estate by a widow, allowing her to live out her days there, while ownership of the estate was in the hands of her eldest son.
[12] DP1, paras 5.9, 5.15 and 5.31.
[13] See para 1.7.

mechanism by which security can be taken over a standard security, further research is required into how that may best be achieved, and we will carry out this work in our third Discussion Paper. This Discussion Paper accordingly deals only with standard securities over ownership of heritable property or the tenant's interest in a registered/recorded lease.

Terminology

2.7 The terminology employed in discussion of standard securities can sometimes contribute to a lack of clarity in the law. We think it may be useful at the outset to explain some of the language we use in this Discussion Paper and the reasons behind it.

Enforcement and exercise

2.8 First, MacLeod draws attention to the words "enforcement" and "exercise" as they are used in the standard securities context.[14] A standard security arrangement is made up of two parts, namely the secured obligation and the standard security. The secured obligation can be enforced in a number of ways depending on its content. For example, an obligation to pay money may be enforced by raising an action for payment, then executing the decree by way of diligence. The standard security also gives rise to various rights and obligations, including the obligation to maintain the property in which it is held and the right to sell that property in certain circumstances. The purpose of a standard security is to enforce performance of the secured obligation. The obligation is enforced by exercising the rights and remedies available under the standard security, or to put it more briefly, by exercising the security.

2.9 Amongst lawyers, these aspects of the security arrangement are often elided, so that we speak of "enforcing the security". We agree with MacLeod's observation that doing so tends to obscure the relationship between the two parts of the security arrangement. This opacity contributes to confusion in law, perhaps best represented by the definition of "default" in the 1970 Act.[15] Standard condition 9 defines default by reference to a failure to perform a term of the standard security, rather than a failure to perform the secured obligation.[16] This runs counter to the normal use of the term "default" by laypersons as well as lawyers, and has caused a number of difficulties in interpreting other provisions in the legislation.[17]

2.10 In the interests of clarity, we accordingly refer in this paper to exercise of the security,[18] and to enforcement of the secured obligation.

Parties

2.11 Second, terms are needed to refer to the parties to the security arrangement. In our first Discussion Paper, we noted that the Conveyancing and Feudal Reform (Scotland) Act 1970 uses the terms "debtor" and "creditor" to refer to both the parties to the secured obligation, and the parties to the standard security.[19] In the typical case, where the creditor in the secured obligation also holds the security, and the debtor in the secured obligation also owns the property over which the security has been granted, these terms are relatively

---

[14] MacLeod, *Enforcement* paras 2.06-2.14.
[15] 1970 Act Sch 3, SC 9.
[16] The issues here are discussed in detail in Chapter 4.
[17] See paras 4.20-4.28.
[18] In a recent Outer House decision, Lord Summers notes that the defender "exercised its rights in security". See *G1 Properties Ltd v The Royal Bank of Scotland Plc* [2021] CSOH 78 at [3].
[19] 1970 Act ss 9(8)(c); DP1 para 3.28.

unproblematic. However, use of the same terms may tend to obscure the fact that there are two different relationships between the parties involved, who are parties to an obligation, and separately parties to a security. In addition, use of the same terms becomes difficult in the three- or four-party security arrangements described above, where separate terms to refer to each of the parties involved would obviously aid clarity.

2.12 In our first Discussion Paper, we suggested that the terms "debtor" and "creditor" should continue to be used in any new legislation to refer to the current parties to the security. "Proprietor" could be used, as under the current law, where the security is in property owned by someone other than the debtor.[20] Consultees who responded to this question were broadly supportive, with many noting the benefit of the familiarity of the terms. A few consultees preferred the term "owner" to "proprietor", with one pointing out that this is the term used in the Land Registration etc. (Scotland) Act 2012.

2.13 As work on the project has moved onto consider how a security may be exercised, however, the need for terminology which distinguishes between the parties to the secured obligation and the parties to the standard security has become more pronounced. The inability to easily identify the source of rights and obligations between parties creates difficulty in discussing reform. This is particularly the case when discussing the remedies of ejection and entry into possession,[21] where distinguishing the basis on which parties including tenants and other occupants do or may have rights and obligations in relation to the property plays a critical role in how the remedies are exercised. It is also useful when discussing the enhanced debtor protection measures,[22] where understanding the policy basis for the measures requires distinguishing between protections aimed at supporting consumer debtors to get out of debt, and protections aimed at preventing the homelessness of owner-occupiers in certain circumstances.

2.14 Against that background, in this Discussion Paper we employ the terms debtor and creditor to refer to the parties to the secured obligation. The parties to the standard security are referred to as the security holder and the owner (or, where the security is held in a registered or recorded lease, the registered tenant) of the property in which the security is held.

Property

2.15 A term is needed for the heritable property in which the security is held. In our first Discussion Paper, we noted that the language used in the 1970 Act is inconsistent here, referring sometimes to "land or a real right in land", and at other points to the "security subjects".[23] Our proposal that new legislation should use consistent terminology received unanimous support from consultees. We asked whether one of the terms employed in the existing legislation should be retained for this purpose, or an alternative such as "encumbered property" adopted.[24] Responses were divided. Respondents noted that "security subjects" is familiar to legally trained persons, but not readily understandable to laypersons. "Encumbered property" was noted to sit uneasily with the definition of the word "encumbrance" in the Land Registration etc. (Scotland) Act 2012, section 9(2), which specifically excludes heritable

---

[20] DP1 para 3.42.
[21] Discussed in Chapters 10 and 11.
[22] Discussed in Chapters 7 and 8.
[23] DP1 para 5.5–5.9.
[24] *Ibid,* para 5.9 and question 16.

securities. Some respondents suggested “secured property” as an alternative, but as we noted in our first Discussion Paper, this term may be misleading since it is not the property which is secured, but rather the underlying obligation. One respondent suggested “security interest”. We found this suggestion helpful, but were concerned about the comprehensibility of the word “interest” to laypersons.

2.16 Having reflected on the comments in the responses, we have adopted a new term: security property. The word “property” used by laypersons tends to mean a house or other building. The legal definition of the term is wide enough to include all the real rights in which a standard security can be held. We think this range of meaning may be beneficial in this context, since it allows the term to be comprehensible to a layperson in the standard residential case, whilst remaining accurate legally in more complex cases. To a residential consumer debtor, the security property is their house. To a lawyer, the security property is understood more technically as ownership of heritage or a registered lease. The term also has some kinship with others found in the English language, where we understand a “security blanket” or a “security alarm” to be an item which provides security, and we hope that may be an aid to comprehensibility here. We have adopted this term in the remainder of this paper.

Exercising standard securities: a new regime

2.17 In the remainder of the Discussion Paper, we consider reform of the procedure by which a standard security is exercised, and the remedies it makes available to the holder. Here, we address some issues relevant to the enforcement regime as a whole, and provide an overview of what a revised scheme may look like under our preliminary proposals.

Mechanisms for enforcing the secured obligation

2.18 The purpose of exercising a standard security is to enforce performance of the secured obligation. It is important to note, however, that the existence of the security does not remove from the creditor the ability to enforce the obligation through the usual contractual remedies, for example by raising an action for payment followed by diligence or participation in an insolvency process.[25] A creditor may even pursue remedies under more than one of these heads at the same time,[26] albeit that once performance has been obtained via one route, the basis for any other remedy falls away. Nothing in this Discussion Paper is intended to suggest any alteration to these remedies or their availability to the creditor.

2.19 Although the existence of the security does not remove the creditor’s ability to enforce the obligation though other means, Cusine and Rennie note that the range and quality of the remedies available under the security mean “it is obvious that a creditor will attempt to use these first.”[27] It is the remedies available under the security that form the focus of this Discussion Paper.

[25] Specific provision is made to this effect in the 1970 Act ss 20(1) and 21(1), restating the general principle. For discussion, see Gordon and Wortley, *Land Law*, paras 19-51 to 19-58; Cuisine and Rennie, *Standard Securities*, paras 9.02-9.04.
[26] *McWhirter v Rankin and Others (McCulloch’s Trustees)* (1887) 14 R 918; *McNab v Clarke* (1889) 16 R 610; *Promontoria (Chestnut) Ltd v Ballantyne Property Services* [2019] CSOH 21; 2020 SLT 362.
[27] Cusine and Rennie, *Standard Securities* para 9.04. They go on to suggest that contractual remedies are likely to be used only where the proceeds of realisation of the security are insufficient to satisfy the secured obligation, noting however that the contractual remedies are unlikely to have any value in this situation.

Bespoke enforcement regime

2.20 The current law in Scotland provides a bespoke set of rules for enforcement of a secured obligation through exercise of a standard security. However, it is notable that not all of our comparator jurisdictions follow this model. In France, Germany and South Africa, a heritable security holder who is entitled to exercise a remedy such as sale follows the same process as any other creditor who is entitled to execute a decree for payment against the debtor's heritable property.[28] In other words, the security holder's right is exercised by means of judicial execution, the Scots law equivalent of which is diligence.[29]

2.21 In principle, an argument could be made for adopting the same approach here. Multiple sets of procedural rules to exercise the same remedy are obviously undesirable at both a conceptual and a practical level. In practice, however, we have reached the conclusion that such an approach would be unworkable in Scotland. The key difficulty is the current state of the law of diligence in relation to heritable property. An unsecured creditor seeking to execute decree of payment against the heritable property of his debtor must employ the diligence of adjudication.[30] This diligence is rarely used in modern practice. The law is elderly, and in places unclear.[31] The remedies the diligence makes available to an adjudger – essentially the right to take rents, with power of sale available after ten years if the debt remains unpaid – are very limited in comparison with those provided for by the 1970 Act. It seems unlikely that any lender would be prepared to lend on the basis of a security exercisable only by way of adjudication.

2.22 Provision was made in the Bankruptcy and Diligence etc. (Scotland) Act 2007 for adjudication to be replaced by the new diligence of land attachment.[32] This diligence may be more attractive to lenders than adjudication, in that it would make the power of sale available to the attacher after six months. It would remain, however, unattractive in comparison with the current standard security regime. Moreover, the provisions on land attachment have yet to be brought into force. Policy disputes over its availability or otherwise in relation to residential property appear to have resulted in an indefinite pause in its introduction. Although there has been some movement in this respect recently,[33] the position remains unclear.

2.23 Bearing in mind the ethos of "evolution, not revolution" which underpins this project, combined with the difficulties that would result from exercising a security by way of diligence outlined above, we did not see any real justification for breaking with the established position. Accordingly, this paper proceeds on the basis that a standard security should be exercised, as at present, by way of a set of bespoke rules.

A duty to conform with reasonable standards of commercial practice?

2.24 The way in which a security holder exercises its security can have a significant impact on the debtor, the owner or registered tenant of the security property and other creditors of the same debtor. We think it may be useful to set out a broad standard of behaviour expected

---

[28] MacLeod, *Enforcement* paras 3.24 and 3.27.
[29] MacLeod, *Enforcement* paras 2.47-2.48.
[30] For an overview, see F McCarthy, "Judicial Security" in Anderson, *Scots Commercial Law* paras 12.43–12.47. For more detailed discussion, see Gretton, *Inhibition* ch 13.
[31] The key legislation is the Heritable Securities (Scotland) Act 1894 ss 5-7. Some difficulties with this legislation as it applies in the context of standard securities are discussed in Chapters 4 and 5.
[32] 2007 Act ss 79 and 81-128. The detail of these provisions is discussed at paras 7.34-7.35.
[33] For discussion, see para 7.36.

of security holders in exercising their security, intended to protect debtors and other parties from misuse of the security.

2.25 It should be noted from the outset that standard security holders are already subject to a range of requirements intended to ensure sufficient protection of other parties with an interest in the security. All standard security holders are obliged to comply with a number of specific duties set out in statute[34] or common law.[35] Where a security property is used to any extent for residential purposes, additional procedural steps intended to protect vulnerable debtors must be complied with in exercising the security.[36] Security holders who are regulated by the Financial Conduct Authority will also be subject to the extensive requirements imposed by that body, such as those set out in the Mortgages: Conduct of Business Sourcebook.[37] A statutory standard of behaviour would not replace these existing protections. Rather it would identify an overall standard of behaviour which the existing duties and requirements support the security holder to achieve. It would also allow for a basis on which to dispute behaviour by a security holder which is not covered by the existing patchwork of protection. This may be particularly important in relation to security holders who are not obliged to comply with FCA requirements.

2.26 In our Report on Moveable Transactions, which considered enforcement in relation to rights in security over moveable property, we recommended that a secured creditor should have a duty to conform with reasonable standards of commercial practice when exercising its security. This duty would be owed to the provider of the security and to any third parties (such as postponed security holders) with an interest in how the security is enforced.[38] We considered that this duty would protect against, for example, harassment of the provider of the security, and action (or non-action) by the security holder leading to devaluation of the security property.[39] This recommendation was based on equivalent provision in comparator jurisdictions.[40] Difficulties such as harassment and (in)action leading to devaluation of the security property may also arise where the security is held in heritable property. We think there may be merit in taking a consistent approach to this issue across different forms of security within this jurisdiction.

2.27 Our advisory group had mixed views on the imposition of a duty of this kind. The extensive regulation to which security holders are already subject was noted. It was pointed out that, where a new duty is introduced, it results in uncertainty for all parties as to what is required to comply with it. At worst, it may allow unscrupulous debtors to raise highly speculative or even unfounded challenges to the exercise of a security, the impacts of which may ultimately sound in the reduced availability of finance.

2.28 Other members supported the introduction of the new duty. It was suggested that compliance with FCA protocols would seem in itself to indicate that the security holder is conforming with reasonable standards of commercial practice, which might significantly reduce the potential uncertainty of a new duty. The importance of the duty in relation to security

---

[34] For example, the duty when selling the security property to obtain the best price that can reasonably be obtained, set out in the 1970 Act s 25.

[35] For example, the equitable principles applicable in relation to catholic and secondary securities: see para 9.13.

[36] These are discussed in detail in Chapters 7 and 8.

[37] Available at: https://www.handbook.fca.org.uk/handbook/MCOB/.

[38] Scottish Law Commission, Report on Moveable Transactions (Scot Law Com No 249, 2017) para 27.36 and Draft Bill s 68(4).

[39] *Ibid,* para 27.32.

[40] *Ibid.*

holders not regulated by the FCA was noted, and some shown for taking a consistent approach across the different rights in security available in Scotland.

2.29 We seek views. We ask:

2. When exercising a standard security, should a security holder be subject to a duty to conform with reasonable standards of commercial practice?

Outline of the scheme

2.30 The diagram on the following page maps the scheme we provisionally propose in this Discussion Paper for exercise of a standard security. In all cases, the ability to exercise a security becomes available on default. Default arises where there is a failure to perform the secured obligation, or in other circumstances as agreed between the parties. We discuss default in Chapter 4.

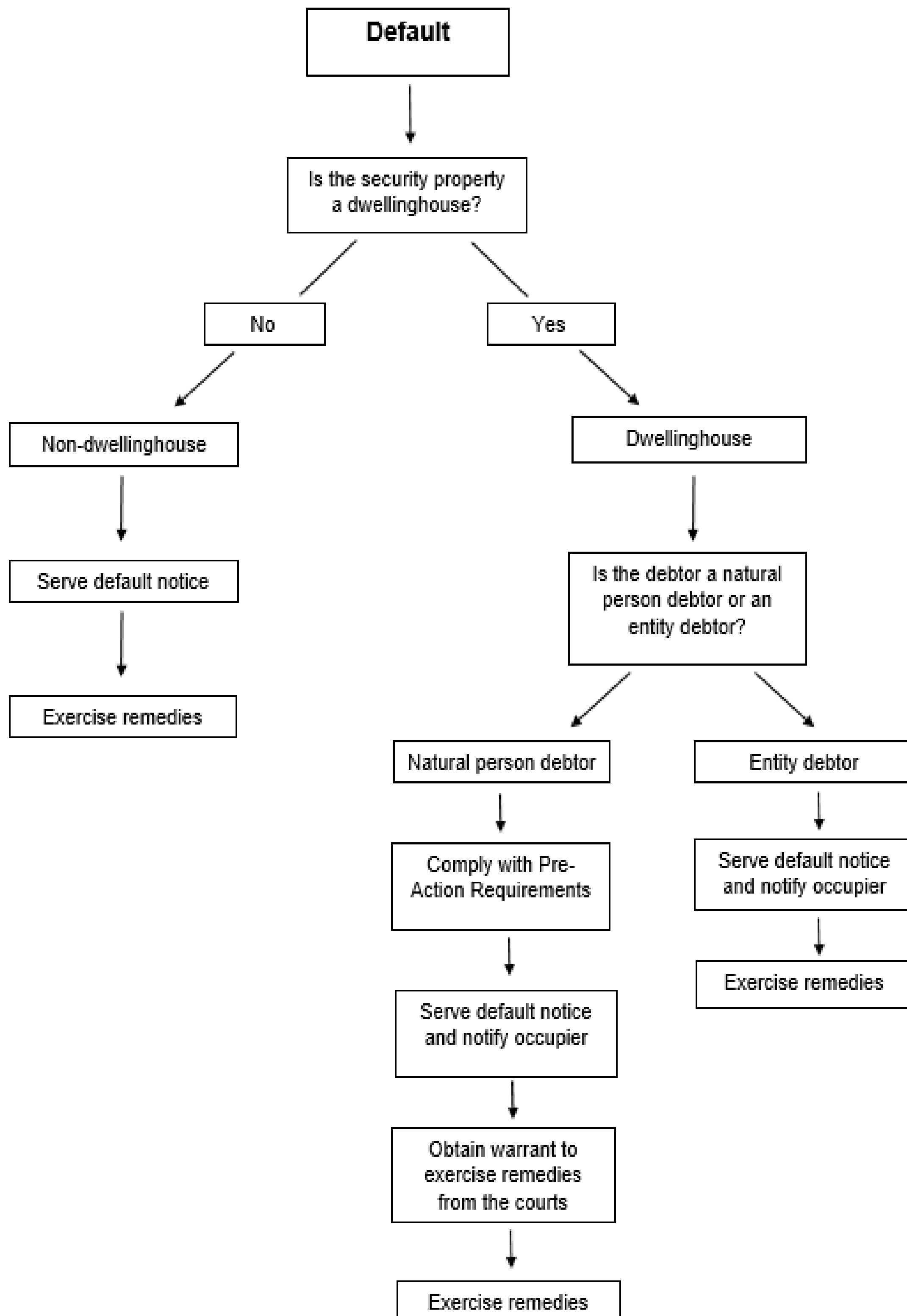
2.31 In order to exercise the security on default, the security holder must follow certain procedural steps. In **the standard case**,[41] it must serve a new form of notice, which we refer to as a "default notice", on the debtor and the owner or registered tenant. If the security property is a dwellinghouse,[42] the security holder must also notify occupants and the local authority that enforcement action is underway. These notice requirements are discussed in Chapter 5.

2.32 If the debtor remains in default following expiry of the default notice, the security holder in the standard case may generally proceed to exercise remedies on the basis of the expired notice, and need not have recourse to the court. There are exceptions to this rule for particular remedies, most notably ejection. Even where a court order is not required by the legislation, it is open to the security holder to seek the assistance of the court should it wish to do so. We discuss the role of the court in the standard case in Chapter 6.

2.33 In **cases where the enhanced debtor protection measures apply**, additional procedural steps are required. Broadly speaking, the enhanced measures will apply where the debtor is a natural person and the security property is a dwellinghouse. We discuss these applicability criteria in Chapter 7. If the security holder wishes to exercise remedies on default in a case where these measures apply, it must first comply with the pre-action requirements. If this does not lead to resolution of the default, the security holder must serve a default notice on the debtor and owner, and notify occupants and the local authority that enforcement action is underway. If the debtor remains in default following expiry of the default notice, the security holder must seek warrant of the court in order to exercise remedies. The court may grant warrant only where the pre-action requirements have been fulfilled and it is reasonable to do so in the circumstances of the case. The court is directed to have regard to certain factors when assessing reasonableness where: (i) the debtor or owner, who occupies the property as their sole or main residence, enters the process; or (ii) an entitled resident[43] enters the process. Remedies may competently be exercised without fulfilment of these procedural requirements

[41] This refers to any case where the enhanced debtor protection measures do not apply.
[42] The definition of dwellinghouse, and whether another term would be preferred, are the subjects of consultation questions at paras 7.60-7.62.
[43] For a definition of this term, see the glossary and paras 8.16-8.18.

where the debtor, owner and any entitled residents have formally waived their right to compliance. The enhanced debtor protection measures are discussed in Chapter 8.



Redemption

2.34 Redemption is the right of the debtor, or the owner or registered tenant of the security property, to have the standard security discharged upon satisfaction in full of the secured obligation. In our first Discussion Paper, we considered the law on redemption prior to default,[44] but deferred consideration of redemption post-default to the current Discussion Paper. We turn to that issue now.

2.35 Under the current law, the debtor has the right to redeem the security at any point until missives for the sale of the security property have been concluded by the security holder, subject to any agreement to the contrary between the parties.[45] The redemption procedure – which cannot be varied – is set out in section 18 and Standard Condition 11. This includes service on the creditor of written notice in a statutory form[46] at least two months prior to the redemption taking place.[47] This notice requirement does not have to be observed where the security holder has commenced enforcement proceedings by way of notice of default, however.[48] Service of notice of redemption by the debtor does not prevent the security holder from exercising its power of sale.[49] If notice of redemption had this effect, a "delaying tactic"[50] would become available whereby a debtor might successively serve such notices, in effect preventing sale indefinitely. Any expenses incurred by the security holder in attempting sale prior to redemption will be recoverable from the debtor,[51] and may be included within the redemption figure.[52]

2.36 In our first Discussion Paper, we asked whether the current rules on redemption prior to default should be replaced with: (i) a general rule entitling the debtor to a discharge on the secured obligation being performed in terms of the contractual arrangements between the parties; and (ii) a court procedure for discharge where the creditor has disappeared or refuses to grant a discharge.[53] This suggestion received unanimous support from all consultees who expressed a view (subject to clarification of what is required for full performance of a secured obligation which includes future debts). We intend to proceed on this basis. We also consider that this approach should apply regardless of whether redemption is taking place prior or subsequent to default. There does not seem to us any reason why the current redemption procedure should be retained post-default. As under the current law, we think a debtor should continue to be able to redeem the secured obligation at any point until missives are concluded.

---

[44] See DP1 Chapter 11.
[45] 1970 Act ss 18 and 23(3). Section 23 makes provision for redemption where the security holder has proceeded to sale by way of default notice procedure. *G Dunlop & Son's Judicial Factor v Armstrong (No 1)* 1994 SLT 199 confirms that the right is equally available under section 18 where calling-up procedure has been employed. See also Higgins, *Enforcement* para 12.21.
[46] 1970 Act Sch 5, Form A.
[47] 1970 Act s 18(1). The creditor may reduce or waive the notice period: 1970 Act Sch 3 SC 11(2). Further complex procedure is set out for the situation where the creditor is dead or absent under ss 18(2)-(3), on which see DP1 para 11.28-11.29. This situation is obviously highly unlikely to arise following the commencement of enforcement action.
[48] 1970 Act s 23(3). We discuss the different forms of notice procedure for enforcement under the 1970 Act at para 5.2-5.4.
[49] *G Dunlop & Son's Judicial Factor v Armstrong (No 1)* 1994 SLT 199 at 208E.
[50] Notes on Clauses (clause 22 para 6).
[51] 1970 Act SC 12 (emphasis added). See also, *Clydesdale Bank Plc v Mowbray* 2000 SC 151 at 157C; D J Cusine, "Expenses under a Standard Security" 1994 JR 18, 24.
[52] Cusine and Rennie, *Standard Securities* para 10.16; Gordon and Wortley, *Scottish Land Law* para 20-41 fn 149.
[53] DP1 para 11.39.

2.37 Our first Discussion Paper also asked whether the owner or registered tenant of the security property should also have a right to have the security discharged on paying the value of the security property.[54] Responses to this question were mixed, with several consultees noting the difficulty of determining the value of the security property amongst other issues. We will give further consideration to this question in our Report at the conclusion of this project.

2.38 We ask:

> **3. Do consultees have any comments on our approach to redemption post-default as outlined above?**

Enforcement of older forms of heritable security

2.39 Since 29 November 1970, it has only been possible to create one form of heritable security in Scotland, namely the standard security.[55] Prior to that time, three older forms of heritable security were available: (1) the bond and disposition in security; (2) the bond of cash credit and disposition in security; and (3) the *ex facie* absolute disposition. We discussed the development and use of these forms of heritable security prior to 1970 in DP1,[56] and noted that relatively few securities in any of these forms remain in existence.[57] Nevertheless, enforcement mechanisms must continue to be available until these forms of security have disappeared entirely.

2.40 In DP1, we considered the nature of these three older forms of security. The bond and disposition in security, and the bond of cash credit and disposition in security, are "true" rights in security.[58] In other words, in these arrangements, the heritable creditor holds a subordinate real right in the security property while the debtor retains ownership.[59] A standard security is also a true right in security. Since the enactment of section 69 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, the enforcement procedure for these two older forms of security has been regulated by the provisions of the 1970 Act in the same way as for standard securities. In DP1, we proposed that a revised enforcement procedure for standard securities in any new legislation should also apply to these two older forms.[60] The proposal received unanimous support from consultees. Accordingly, the reforms to the law we discuss in the remainder of this Discussion Paper in relation to the enforcement of standard securities will apply equally to these two older forms of heritable security.

2.41 The position in relation to the *ex facie* absolute disposition is more complex. The *ex facie* absolute disposition differs from the other forms of heritable security in that it involves a transfer of ownership of the property in which the security is held from the debtor to the creditor.[61] Although the transfer will be qualified by a "back bond" or agreement between the parties, meaning that the creditor's ownership is something of a fiction,[62] nevertheless the creditor's ownership interest is the basis on which it exercises rights over the security

---

[54] DP1 para 11.39.
[55] 1970 Act s 9(3)-(4).
[56] DP1 para 2.7-2.16 and Chapter 12.
[57] DP1 para 12.1-12.3.
[58] DP1 para 12.2.
[59] Alternatively, ownership may be held by a third party who has provided security for the debtor, as discussed above at para 2.3.
[60] DP1 paras 12.7-12.12.
[61] DP1 paras 2.14-2.16.
[62] Gordon and Wortley, *Land Law* para 20-167.

property.[63] Accordingly, the creditor may eject the debtor, enter into possession of the property in which the security is held and grant leases.[64] Alternatively, it may sell the security property.[65] The agreement between the parties would usually be expected to set out the circumstances in which these rights may be exercised.[66]

2.42 The question arises of whether any reform to the law is desirable in relation to enforcement of *ex facie* absolute dispositions. The current law is elderly and may be difficult to find. An argument may be made from the perspective of legal accessibility for restating the law in statutory form. There are also some ambiguities which could perhaps be clarified, for example in relation to the procedure for ejection.[67]

2.43 We are conscious, on the other hand, that the number of *ex facie* absolute dispositions still in existence is extremely small, so much so that the resource implications of putting in place new legislation may be difficult to justify.[68] Our concerns in this respect are amplified by the fact we have not received any representations about this form of security in our consultation on the project so far. There may be an argument for leaving any difficulties which exist in relation to enforcement of such securities to "wither on the vine" along with the existence of the securities themselves.

2.44 We would be grateful for the views of consultees on whether there is a practical mischief here that any new legislation should now seek to resolve. We ask:

4. (a) Do consultees consider that any new legislation should make provision regarding the enforcement of *ex facie* absolute dispositions?

(b) If so, what should the effect of any such provision be?

[63] Stair I.9.25-27; *Rankin v Russell* (1868) 7 M 126 (entry into possession); *Duncan v Mitchell* (1893) 21 R 37 (sale); Gloag and Irvine, *Rights in Security* 159; Halliday, *Conveyancing Law and Practice* para 49-13.
[64] Higgins, *Enforcement* para 9.3 suggests that ejection under an *ex facie* absolute disposition may be founded on the Heritable Securities (Scotland) Act 1894 s 5. However, section 18 of the 1894 Act provides that it applies only to securities as defined in the Titles to Land Consolidation (Scotland) Act 1868 s 3, under which absolute dispositions qualified by back bonds or letters are excluded. See also Gordon and Wortley, *Land Law* para 20-171.
[65] Gloag and Irvine, *Rights in Security* 160.
[66] *Lucas v Gardner* (1876) 4 R 194; Gloag and Irvine, *Rights in Security* 159; Gordon and Wortley, *Land Law* para 20-172.
[67] Gordon and Wortley, *Land Law* para 20-172.
[68] Figures from Registers of Scotland show that there were only eight discharges of *ex facie* absolute dispositions under section 40 of the Conveyancing and Feudal Reform (Scotland) Act 1970 for the 12-month period from April 2020 to March 2021. From April 2017 to March 2018, there were fourteen discharges, as we note in para 12.3 of DP1. As we noted in the same paragraph of DP1, the possibility of a security of this kind being enforced nowadays must be very low.

Chapter 3 Ranking

Introduction

3.1 It is possible for more than one standard security to be held in the same property. A "second mortgage" is a familiar example of this in practice. A couple may take a mortgage loan from one bank at the time of buying their home, then some years later, perhaps particularly if the house has increased in value, may take a second secured loan from a different bank. Both loans are secured against the family home. Where this occurs, the law sets out default rules on where one security ranks in relation to the other, determining each security's "place in the queue" for enforcement. If the debtor defaults and the security property is sold, the first-ranked security is entitled to satisfaction in full of the obligation it secures from the sale proceeds before the second-ranked security has any claim on those funds.

3.2 Our focus in this Chapter is ranking between multiple standard securities held in the same property. As noted in our first Discussion Paper, the treatment of this issue in the 1970 Act leaves scope for uncertainty.[1] In this Chapter, we set out the current law, identify some of its shortcomings and consider options for reform.

3.3 Rules of ranking also apply to standard securities in competition with other forms of security,[2] most obviously floating charges, adjudication and charging orders.[3] In broad terms, a standard security will rank ahead of a floating charge.[4] The order of ranking as between a standard security and an adjudication will be determined by the dates of registration of the standard security and the decree of adjudication, with the earlier ranking first.[5] The date of registration also generally determines the order of ranking as between a standard security and a charging order.[6] Questions of ranking between different forms of security are also affected by broader principles including the rule of catholic and secondary securities[7] and the so-called "offside goals rule".[8] Ranking between different forms of security is a complex matter which engages the balance of insolvency rules more broadly. These issues are beyond the scope of the project and will not be considered further here.

Current law

Prior tempore, potior jure

---

[1] DP1 para 2.62.
[2] For general discussion, see J Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (2018) ch 9.
[3] This term refers to charges (securities) created by statute to secure repayment of a debt owed by the owner to a public authority, usually because the authority has had to make payment of a debt in respect of which the owner was in default. See R Paisley, *Land Law* (2000) para 11.32.
[4] Companies Act 1985 s 463(1)(b) and 464(2). For detailed discussion, see J Hardman and A MacPherson, "The Ranking of Floating Charges" in *Floating Charges in Scotland: New Perspectives and Current Issues* (publication due in 2022).
[5] For detailed discussion, see Gretton, *Inhibition* 221-222; Gordon and Wortley, *Land Law* paras 22-02 to 22-10.
[6] For further discussion, see Gordon and Wortley, *Land Law* paras 22-11 to 22-24.
[7] For an overview with detailed reference to authority, see Gordon and Wortley, *Land Law* paras 19-44 to 19-50.
[8] Discussed in DP1 paras 8.12-8.19. For detailed discussion, see Gordon and Wortley, *Land Law* paras 19-87 to 19-104.

3.4 The basic rule of ranking for standard securities follows the principle *prior tempore potior jure* ("earlier by time, stronger by right"). This principle, which is applicable to all real rights in Scots law, means that a security created[9] earlier will take priority over one created later. Imagine A grants security to B for a debt of £75,000, and later to C for a debt of £50,000, with both securities held in the same property.[10] A defaults, and B exercises the first security to sell the property for £100,000. The effect of the basic rule of ranking is that these proceeds will be used to satisfy B's debt in full, with the remaining £25,000 applied to the debt to C. The outstanding £25,000 balance owed to C is then unsecured.

3.5 Where two securities are created at the same moment, they will rank *pari passu* ("on an equal footing"), meaning they share the same place in the queue.[11] The proceeds of sale of the property are applied proportionately to the two secured obligations in this situation. In the case of A, B and C above, if the securities of B and C rank *pari passu*, £60,000 of the proceeds of sale would be applied to debt owed to B (with the £15,000 balance left unsecured), and £40,000 to the debt owed to C (with the £10,000 balance left unsecured).

3.6 The principle *prior tempore, potior jure* finds statutory form in relation to heritable securities to a certain extent in section 120 of the Titles to Land Consolidation (Scotland) Act 1868. This section provides:

> "Heritable securities may be registered in the appropriate register of sasines at any time during the lifetime of the grantee, and shall in competition be preferred according to the date of the registration thereof."

In our first Discussion Paper, we proposed repeal of older heritable securities legislation such as this, with replacement provision in any new legislation where required.[12] This proposal received strong support from consultees. Consideration must therefore be given to whether it is necessary to provide a replacement for section 120 in any new standard securities legislation. We return to this issue below.

Section 13

3.7 Section 13 of the 1970 Act modifies the application of the general principle set out above in relation to securities which secure future or contingent obligations, the most common example of which are securities for "all sums due or to become due".[13] Section 13(1) allows for the obligation secured by an existing security to be restricted when a subsequent security is registered in respect of the same property, or part of it.[14] Where the subsequent security holder gives notice of the registration of its security, the prior holder's preference in ranking is restricted to the sum due at that date, together with any future advances the creditor is contractually obliged to provide to the debtor, any interest on either of those sums, and any

---

[9] "Created" in this context means "constituted as a real right".
[10] For simplicity's sake, we ignore questions of interest and expenses in this example.
[11] Where standard securities are registered on the same day, the effect of the Land Registration etc. (Scotland) Act 2012 ss 36-37 is that they will rank *pari passu*. In practice, this is unlikely, and *pari passu* ranking will almost invariably result instead from a ranking agreement: see paras 3.16-3.20.
[12] DP1 paras 12.4-12.6.
[13] DP1 paras 4.11-4.13.
[14] It has been noted that the heading of this provision ("Ranking of standard securities") suggests it has a broader ambit than is actually the case: see I W Noble, "Review of The Conveyancing and Feudal Reform (Scotland) Act 1970. Second Edition. By John M Halliday. 1977. Edinburgh: W Green & Son" 1977 JR 169 at 171-172.

expenses or outlays reasonably incurred under the existing security arrangement. This is sometimes referred to as "ruling off" the secured obligation.

3.8 This provision largely reflected the position at common law prior to the 1970 Act, except in relation to interest and non-voluntary further advances. The rule that the preference held in respect of a first ranking heritable security was limited to sums that were due prior to the date of intimation of the second security over the same property was set out in relation to English law by the House of Lords in *Hopkinson v Rolt*.[15] In support of the rule, Lord Chelmsford noted that without it, a debtor might be prevented unjustifiably from raising further finance by the prior security holder.[16] Lord Campbell did not consider the rule to prejudice the prior holder, since it could simply refuse to advance further funds once notified of the second security.[17] The rule was applied to Scots law in relation to the old *ex facie* absolute disposition,[18] again by the House of Lords, in *Union Bank of Scotland v National Bank of Scotland*.[19] Here, the Lord Chancellor (Halsbury) founded on the additional argument that, after granting a second security, the debtor was no longer in a position to impliedly renew the first security in relation to every further advance.[20]

3.9 A subsequent decision of Lord Keith in the Outer House of the Court of Session, *Campbell's Judicial Factor v National Bank of Scotland Ltd,*[21] dealt with interest accrued on the sum due under a first ranked security. It found that the first ranked security would only cover interest accrued prior to intimation of the postponed security. Interest accruing on the first debt after that date would be unsecured. During its review of the law of heritable securities, the Halliday Committee had received representations from practice that the effect of this decision should be amended by legislation. The Committee agreed that this would be desirable, since "it is inequitable that the original creditor should, by the unilateral act of the debtor, be deprived of security for interest which accrues after [intimation of the second security] on advances made prior thereto."[22] Section 13 implemented this recommendation, and went further to include future advances which the first security holder was contractually bound to make after intimation of the second security. This addition followed from a recommendation of Professor Halliday during the process of drafting the Bill which became the 1970 Act.[23]

3.10 Section 13(1) provides for the preference of the prior security holder to be restricted in the same way if the security property is transferred by the owner or registered tenant. For completeness, we note that under the prospective section 13A of the 1970 Act,[24] intimation to a prior security holder of registration of a notice of land attachment[25] would also restrict the preference of the prior security. This provision will presumably be brought into force at the

---

[15] (1861) 9 HL Cases 514.
[16] *Ibid,* 553.
[17] *Ibid*, 534-535.
[18] Other heritable securities could not be for all sums. See DP1 Ch 12.
[19] (1886) 14 R (HL) 1.
[20] *Ibid* at 2-3 per the Lord Chancellor (Halsbury).
[21] 1944 SC 495.
[22] Halliday Report para 118.
[23] Notes on Clauses (clause 12).
[24] Inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s 85.
[25] Land attachment is a proposed new form of diligence exercisable against heritable property, to replace the current diligence of adjudication for debt. Provision is made for its introduction in the Bankruptcy and Diligence etc. (Scotland) Act 2007 ss 81-128, but these provisions are not yet in force. See further discussion at paras 2.22 and 7.34.

same time as the provisions on land attachment itself. At present, it is not clear when (or if) that will take place.

3.11 The prior security holder's preference will be restricted under section 13(1) only where it receives notice of a subsequent security or transfer. The statute does not prescribe how notice should be given beyond specifying that registration of a subsequent security or transfer is not, in itself, sufficient to satisfy the notice requirement[26] except where the transfer occurs through operation of law.[27] Whether further guidance as to appropriate notice should be given by the statute was a matter of some debate in the First Scottish Standing Committee's scrutiny of the Bill which became the 1970 Act.[28] The government view, that commercial parties such as security holders "do not require Parliamentary guidance as to how best to conduct their affairs in this relationship", prevailed.[29]

3.12 Where the preference of a prior security has been restricted under section 13, but the creditor voluntarily lends additional funds to the debtor after that date, what is the position of those additional funds? An example may help illustrate the problem. In the scenario described above, A had first borrowed £75,000 from B, then later borrowed £50,000 from C, granting securities over the same property in respect of each debt. Let us assume that the security in favour of B was granted for "all sums due and to become due" to B, as would commonly be the case. Let us also assume that, on registration of the second security, C gave notice to B under section 13, restricting the priority of B's security at £75,000. B thereafter lends a further £30,000 to A. How is this additional debt to rank?

3.13 The apparent intention behind the legislation was that new lending in this situation would be secured by the first security, but postponed in ranking to the later security.[30] Accordingly, the proceeds of sale of the property would first be applied in full to the initial £75,000 debt to B, then in full to the £50,000 debt to C, then – should any funds remain – to the later £30,000 debt to B.

3.14 Gretton has argued, however, that the wording of section 13, with its blunt statement that the preference in ranking of the prior security holder "shall be restricted to security for his present advances", could be interpreted to mean that further lending by the prior security holder is simply unsecured.[31] Moreover, he considers this interpretation to offer greater internal consistency when the application of the rule to a situation involving three (or more) security holders is taken into account. If the interpretation apparently intended by the legislation is correct, additional lending by a first security holder would be postponed to a second holder who had given notice, and additional lending by the second holder could in turn be postponed

---

[26] 1970 Act s 13(2)(a).

[27] 1970 Act s 13(2)(b). This would cover, for example, vesting of the sequestrated owner's estate in their trustee in bankruptcy under the Bankruptcy (Scotland) Act 2016 s 78(1).

[28] Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 9 April 1970 cols 312-317. The discussion between legally qualified Members of Parliament on the front benches about potential amendments to what was then clause 12 of the Bill led George Willis, then MP for Edinburgh North, to remark at 312: "As the honourable and learned Gentleman [Norman Wylie MP, later Lord Advocate] knows, I sit at his feet in order to increase my knowledge, but I am bound to say that often when he starts to explain, like so many other lawyers, he makes things far more difficult to understand."

[29] *Ibid*, col 314.

[30] Notes on Clauses (clause 12). This seemed to alter the common law position as set out in *Union Bank of Scotland v National Bank of Scotland* (1886) 14 R (HL) 1 that further advances would be unsecured. As Gretton observes, however, the position taken in that case re further advances seems to have been a misapplication of the rule in *Hopkinson v Rolt* (1861) 9 HL Cases 514, particularly Lord Chelmsford at 553: see G L Gretton, "Ranking of Heritable Creditors: Interpretations" 1980 JLSS 275 at 278.

[31] G L Gretton, "Ranking of Heritable Creditors: Interpretations" 1980 JLSS 275.

to a third holder who had given notice.[32] Taking these rules together, it would seem to follow that the additional lending of the first security holder would effectively be postponed to the third holder, despite the fact the first holder had received no notice of the third security. This result seems clearly inequitable. Gretton suggests a solution to this inequity may be found by application of the common law principles of double-round ranking to the competition between security holders,[33] though there is disagreement between Gretton and Halliday as to whether this remedy is consistent with other provisions of the 1970 Act which might be argued to presume a single ranking for each security.[34]

3.15 In practice, we are advised that a prior security holder will invariably refuse any voluntary advance of further sums if notice under section 13 is received, thereby avoiding these complexities. New legislation must seek to clarify the position here, however, and we return to that issue below.

Ranking by agreement

3.16 Parties to a security who do not wish to rely on the default rules outlined above, including section 13,[35] are free to agree between or amongst themselves how securities over the same property will rank.[36] This is usually how ranking is dealt with in practice. An agreement can be put in place at the time when a security is created or subsequently.[37]

3.17 The 1970 Act does not prescribe the form of any agreement. In practice, agreements are made in writing,[38] either set out within one or more of the security deeds themselves or in a separate document.[39] Such documents are capable of registration in the Land Register,[40] though some doubt has arisen as to the purpose of registration.[41] Halliday suggests that, where a ranking agreement which excludes section 13(1) is made prior to the registration of the postponed security, it should be registered to "negative…any inference which might be drawn from the registration of the second security that the preference of the first creditor has been restricted."[42] Where a ranking agreement is made after registration of the postponed security, however, it is "truly a variation of the [registered] particulars of the first security and, in compliance with the requirements of section 16 of the Act, *must* be recorded."[43] We think there may be scope for clarifying the effect of registration and return to that issue below.

---

[32] Further complications may be envisaged, for example if the third holder gave notice to the first holder but not to the second.
[33] The canons of ranking are complex. Detail can be found in Bell, *Commentaries* (7th edn, 1870) Vol 2 at 407-413.
[34] Gretton argues that double-round ranking is inconsistent with section 27 of the 1970 Act: G L Gretton, "Ranking of Heritable Creditors: Interpretations" 1980 JLSS 275 at 277; G L Gretton, "Ranking of heritable creditors: A reply to a reply" 1981 JLSS 280 at 281-282. Halliday disagrees: see J M Halliday, "Ranking of Heritable Creditors: A matter of interpretation" 1981 JLSS 26 at 27. Further discussion of this issue can be found in Cusine and Rennie, *Standard Securities* para 7-12.
[35] 1970 Act s 13(4).
[36] 1970 Act s 13(3).
[37] Cusine and Rennie, *Standard Securities* para 7.13.
[38] We consider the circumstances in which writing may be necessary at para 3.33.
[39] Cusine and Rennie, *Standard Securities* para 7-03. An example of such an agreement can be found in Registers of Scotland 2012 Act Registration Manual: https://rosdev.atlassian.net/wiki/spaces/2ARM/pages/60490591/Ranking+Agreement+-+Example+Deeds.
[40] 1970 Act s 13(4), inserted into the 1970 Act by the Land Registration etc. (Scotland) Act 2012 Sch 5 para 17(7)(c).
[41] See Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) para 12.16 available at: https://www.scotlawcom.gov.uk/files/1112/7979/8376/rep222v1.pdf.
[42] Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 5-44.
[43] *Ibid.*

3.18 Litigation has resulted from circumstances in which securities came to be created in a different chronological order than was envisaged at the time agreement on ranking was reached. *Scotlife Home Loans (No 2) Ltd v Muir*[44] concerned a competition between two standard securities held respectively by the pursuer and by another lender, Cedar Holdings. The pursuer's security was granted by the debtor in late 1989, but not recorded in the Register of Sasines until early 1991. In the intervening period, Cedar entered into a separate security arrangement with the same debtor, and recorded its security over the same property in 1990. The pursuer sold the property on default by the debtor, and on realising that Cedar's security had been recorded prior to the pursuer's own, paid over most of the proceeds to Cedar as the holder of the higher ranked security. The pursuer then raised an action against its agent, the defender, for their negligent delay in recording the pursuer's security as a result of which its priority in ranking had been lost. The defender argued on various bases that the pursuer was wrong in asserting that Cedar's security ranked first, noting that Cedar was aware of the grant of the earlier security to the pursuer[45] and had intimated the recording of its own security to the pursuer. The intention of both lenders was that the pursuer's security would rank first. Sheriff Principal Maguire QC did not find any basis in these arguments on which to disapply section 120 of the 1868 Act, however, effectively confirming that Cedar's security ranked first.

3.19 A similar situation arose in *Bank of Scotland v T A Neilson & Co*.[46] The debtor had again borrowed sums from two lenders, namely the pursuer and Tennent Caledonian Brewers Ltd. The lenders had agreed that the pursuer's security should rank first, and this agreement was expressly stated in the security deed in favour of Tennent Caledonian. Both standard securities were recorded in the Register of Sasines on the same date in 1983, but the pursuer's security was not also registered in the Register of Charges at Companies House, with the effect under the law at that time that the security was not enforceable against creditors of the same debtor.[47] Lord Maclean held that an agreement on how two valid securities would rank could not alter the position where only one security had been validly created in a question with creditors in terms of the companies legislation.

3.20 There seems nothing in either of these cases to contradict the freedom of parties to contract out of the default rules on ranking by agreeing, for example, that a security created later should nevertheless rank ahead of a security created earlier. The difficulty in each case was that the terms of the agreement in question started from a premise about the dates on which the securities were created which turned out to be false. In that respect, we do not think these cases suggest any need for reform of the underlying law.

Discussion

3.21 The discussion above shows that the basic principles of ranking of standard securities are relatively established. However, certain ambiguities arise which could be usefully addressed in new legislation. In addition, some areas of critique should be resolved.

---

[44] 1994 SCLR 791.

[45] Reference was made to the security granted to the pursuer in the warrandice clause of the security in favour of Cedar in line with the statutory style: see 1970 Act Sch 2 note 4. The purpose of this part of the statutory style is unclear: see Gretton and Reid, *Conveyancing* para 23-27.

[46] 1990 SC 284.

[47] Companies Act 1948 s 106A. See now Companies Act 2006 s 859H. A question arises as to whether the "offside goals rule" (discussed in DP1 at paras 8.12-8.19) may apply in this situation: see Gordon and Wortley, *Land Law* paras 19-98 to 19-99.

Statutory restatement of the general rule

3.22 The first issue to be addressed is whether new legislation should restate the principle *prior tempore, potior jure* as it applies in the heritable securities context, bearing in mind the support for our proposal to repeal the Titles to Land Consolidation (Scotland) Act 1868, section 120. In our first Discussion Paper, we noted that it was open to question whether a general principle such as this required to be placed on a statutory footing in the first place.[48] The benefit of a restatement is the potential to increase the clarity and accessibility of the law. In our Report on Moveable Transactions, we recommended a legislative statement of the application of this principle in relation to pledges and other rights in security, including the proposed new security of statutory pledge.[49] In relation to standard securities, the application of the principle seems already to be well understood in practice, which perhaps makes the case for legislative provision less strong than where a new right in security is being introduced.

3.23 A restatement in statute runs the risk that the meaning or application of the principle may be altered.[50] In our project on Land Registration, we considered the same question in respect of the application of this principle across the creation of real rights as a whole.[51] Our final recommendation in that case, supported by consultees, was that the principle should be left to the general law rather than restated in legislation.[52] Our tentative view is that the same approach may be appropriate here. However, we would be grateful for the views of consultees.

3.24 We ask:

5. Should new legislation restate the principle *prior tempore, potior jure* as it applies to security over heritable property?

Restricting the priority of an earlier security

3.25 In early consultation for this project, some practitioners suggested to us that the rule under section 13 by which a subsequent security holder can restrict the priority of an earlier security should be repealed or amended. The effect of removing the rule can again be illustrated using the example discussed above. A had first borrowed £75,000 from B on an "all sums" basis, then later borrowed £50,000 from C, granting securities over the same property in respect of each debt. B thereafter lends a further £30,000 to A. If there is no rule equivalent to section 13, and no agreement has been entered into by the parties, the proceeds of sale of the security property would be applied first to the entire debt of £105,000 owed to B. If any sums remained after that debt had been repaid in full, they would be applied to the £30,000 owed to C.

3.26 There are competing policy arguments in relation to how this rule should be dealt with in any new legislation. We noted above that the justification for the introduction of this rule in the common law was to prevent the first security holder unnecessarily restricting the debtor's

---

[48] DP1 para 12.5.
[49] Report on Moveable Transactions paras 26.3-26.10 and Draft Bill s 64.
[50] Care would be required to ensure a restatement did not disturb the application of the Land Registration etc. (Scotland) Act 2012 s 59 in relation to the effect of an advance notice on ranking of standard securities, for example.
[51] Scottish Law Commission, Discussion Paper on Land Registration: Registration, Rectification and Indemnity (Scot Law Com DP No 128, 2005) paras 5.51- 5.58 available at https://www.scotlawcom.gov.uk/files/4412/7892/7070/dp128_lr_rectification.pdf; Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 12.19-12.21 available at https://www.scotlawcom.gov.uk/files/1112/7979/8376/rep222v1.pdf.
[52] *Ibid*, para 12.21.

ability to use their property to obtain finance from another lender or lenders. The counter-argument is that, even if a prior security holder cannot be persuaded to reach agreement with a second lender on ranking, it is open to the debtor to refinance in full and obtain a discharge of the prior security. It might also be argued that the preference of a prior security holder should not be capable of unilateral alteration by other parties.

3.27 There are also more pragmatic concerns. The effect of section 13 will almost invariably be neutralised in modern practice by the inclusion of a term[53] in a standard security prohibiting the grant of subsequent security without the standard security holder's permission, with breach of the condition amounting to a default.[54] If permission is sought, parties then have to incur the expense of drafting a ranking agreement that excludes the operation of section 13 to safeguard the priority of the earlier security.[55] These processes add complexity and expense which will ultimately be borne by the debtor. From an efficiency perspective, there may be an argument for aligning the law with the effect which is almost invariably achieved through agreement in practice.

3.28 Retaining a rule similar to section 13 gives rise to a further difficulty, namely the effect it should have on post-notification advances by the prior security holder. If such advances are not simply to be considered unsecured, complex provision is likely to be required to ensure equitable treatment amongst security holders, particularly where there are more than two securities in question.

3.29 The approach to these questions in our comparator jurisdictions is mixed. In England, a slightly modified version of the rule in *Hopkinson v Rolt* now applies in relation to mortgages over registered land.[56] Further advances made under an earlier registered mortgage will maintain priority over a later mortgage (known as "tacking") in four circumstances: where the earlier mortgagee had not received notice of the subsequent charge;[57] where the earlier mortgagee was under an obligation to make further advances and this obligation was entered on the register;[58] where the parties to the earlier mortgage have agreed a maximum amount for which the charge is regarded as security and that agreement is entered on the register at the time the subsequent charge was created;[59] and with the agreement of subsequent mortgagees.[60] A similar position is adopted in New Zealand, with slight variations in the statutory exceptions.[61] The City of London Law Society has recently recommended the abolition of all rules in England which restrict the priority of earlier securities.[62]

---

[53] Sometimes referred to as a "negative pledge" clause.
[54] A security generally becomes exercisable on default, as discussed in Chapter 4.
[55] This issue was also raised by consultees in our project on Moveable Transactions: see Report on Moveable Transactions paras 26.13-26.14.
[56] The position for unregistered land is the same, with the exception of the provision in relation to an agreed maximum amount: Law of Property Act 1925 s 94.
[57] Land Registration Act 2002 s 49(1).
[58] Land Registration Act 2002 s 49(3).
[59] Land Registration Act 2002 s 49(4).
[60] Land Registration Act 2002 s 49(6).
[61] Property Law Act 2007 ss 87-92. See generally discussion in E Toomey, *New Zealand Land Law* (3rd edn, 2017) para 9.17.
[62] See City of London Solicitors, Secured Transactions Code and Commentary, Discussion Draft (March 2020) 84-86 available at: https://www.citysolicitors.org.uk/storage/2020/03/Secured-Transaction-Code-and-Commentary-discussion-draft-March-2020.pdf. The draft Code provides that a charge will have priority to the extent of the entire obligation secured by it regardless of the time that advances are made in order to respect the intent of the parties in entering the security arrangement.

3.30 In our other comparator jurisdictions, the issue does not arise in the same way because it is not possible to create a security for all sums. Instead, the security must be for a maximum amount, and will have priority over subsequent securities for advances up to that level.[63]

3.31 In our Moveable Transactions project, we considered whether a rule similar to section 13 should be included in new legislation on security over moveable property.[64] We noted that legislation on floating charges makes provision for the priority of an earlier chargeholder to be frozen on receipt of notice from a subsequent chargeholder.[65] However, in more recent international comparator legislation on security over moveables,[66] no equivalent provision is found. We noted that a default provision in favour of freezing the priority of an earlier security would inevitably be varied by contract with attendant expense. Ultimately, we did not recommend the inclusion of any such provision in the legislation.[67]

3.32 We consider the arguments to be finely balanced, and would be grateful for the views of consultees on how this issue should be approached in any new legislation. We ask:

> **6. (a) Should a subsequent standard security holder be able to restrict the priority of an earlier standard security by giving notice?**
>
> **(b) If so, should post-notice voluntary advances by the prior security holder be unsecured, or treated in some other way?**

Ranking by agreement

3.33 Parties should continue to be free to enter into agreements in relation to the ranking of securities under any new legislation. We think new legislation should be clearer as to the effect of such agreements and when registration is required.

3.34 A ranking agreement may simply be a contract which binds no one other than the parties to it. Parties may conceivably enter such an agreement to determine, as amongst themselves, how the proceeds realised by the exercise of a security should be applied. A contractual agreement would have no effect on third parties, such as any security holder who was not party to the agreement. Under the Requirements of Writing Act 1995, a contractual agreement of this kind would not have to be in writing.[68]

3.35 We do not think, however, that purely contractual agreements of this kind are often, if ever, sought in practice. Our understanding is that ranking agreements are generally intended to vary the terms of the standard securities themselves.[69] A ranking agreement with this

---

[63] For South Africa, see Deeds Registries Act 47 of 1937 s 51(1) and discussion in R Brits, *Real Security Law* (2016) 46. For France see Civil Code, art 2423. For Germany see Civil Code §§ 1113 and 1190 (mortgages) and §§ 1191 and 1192 (land charges).
[64] Report on Moveable Transactions paras 26.11-26.14.
[65] Companies Act 1985 s 464(5). This rule does not appear to apply where the floating charge contains a negative pledge clause or ranking agreement: Companies Act 1985 s 464(1)-(3). For further discussion see Gordon and Wortley, *Land Law* paras 21-16-21-18.
[66] We considered the Uniform Commercial Code of the USA and statutes based on it, known as Personal Property Security Acts, which exist in Australia, New Zealand and the Canadian provinces of Ontario and Saskatchewan, amongst other places. Discussion of the comparative approach adopted in that project can be found in the Report on Moveable Transactions paras 1-28-1-30.
[67] Report on Moveable Transactions para 26.14 and Draft Bill s 64(5).
[68] Requirements of Writing (Scotland) Act 1995 s 1(1).
[69] In other words, the agreements are intended to have real effect, rather than simply personal effect between the parties.

purpose would have to be set out in writing under the Requirements of Writing (Scotland) Act 1995, section 1(2)(b). To have the effect of varying the securities, it would seem that registration is essential, as it is for other variations of a standard security.[70] We consider that setting out these requirements plainly in any new legislation should resolve the ambiguity which currently exists around ranking agreements and will improve the clarity and accessibility of the law.

3.36 We ask:

7. Do consultees agree that under any new legislation:

(a) The parties to a standard security and any other right in security should be free to enter into a ranking agreement intended to vary the terms of the security?

(b) Such agreements must be set out in writing?

(c) Registration of the agreement in the Land Register is required to vary the terms of the standard securities concerned?

---

[70] 1970 Act s 16. See DP1 paras 9.1-9.14 for discussion.

Chapter 4 Default

Introduction

4.1 A right in security generally becomes exercisable when the debtor defaults on the secured obligation. Exercising the security enables the holder to enforce performance of that obligation, since the debtor is no longer willing or able to perform voluntarily. Under the 1970 Act, default is required in order for the remedies set out in the legislation to become available to the standard security holder. However, the definition of default used in the Act is complex, and it is not always clear when and how default will occur. In this chapter, we consider the circumstances in which a security holder should be entitled to exercise remedies under a standard security in any new legislation. We begin by outlining the approach taken to default in the 1970 Act and some of the difficulties this has caused. We consider the approach taken to default in relation to other rights in security in Scots law, and review the position in our comparator jurisdictions. We conclude with options for reform.

Default under the 1970 Act

4.2 A security holder may exercise the remedies available under a standard security, principally sale of the security subjects or entry into possession and collection of rents, where the debtor is in default.[1] The 1970 Act also allows for variation of the standard conditions unless explicitly excluded under section 11, meaning that parties are free to agree the circumstances in which remedies can be exercised. Standard condition 9(1) sets out three circumstances in which the debtor will be held to be in default:

> "(a) where a calling-up notice in respect of the security has been served and has not been complied with;
>
> (b) where there has been a failure to comply with any other requirement arising out of the security;
>
> (c) where the proprietor of the security subjects has become insolvent."

4.3 In some cases, the security holder may exercise a remedy immediately on default taking place. In others, a court order will be required for the exercise of the remedy.[2] In cases where the security subjects are land used to any extent for residential purposes, additional procedural protections are in place.[3] We consider the procedural requirements that should follow on default in any new legislation in the next four chapters of this Discussion Paper.

Standard Condition 9(1)(a)

In what circumstances can *a calling-up notice be served?*

4.4 The first instance of default under standard condition 9 is the one which has caused the most difficulty in practice. Default occurs where a calling-up notice is served and not

---

[1] 1970 Act Sch 3 SC 10(1).
[2] See paras 6.2-6.8 for discussion.
[3] See para 7.2 for a summary.

complied with. A calling-up notice requires the debtor to discharge the debt secured by the security within two months of service of the notice.[4]

4.5 Two preliminary ambiguities in relation to this procedure are worth comment. The first is that "the debt" which the notice may require the debtor to repay is defined to include "any obligation due, or which will or may become due, to repay or pay money."[5] On one reading, this suggests the demand need not be restricted to payments which have fallen due under the terms of the secured obligation.[6] The notice would instead operate to accelerate the debt, rendering due the whole amount advanced regardless of the repayment terms agreed.

4.6 There is disagreement in the commentary as to whether this interpretation is correct.[7] There is no reported litigation directly in point, perhaps because it is common to expressly include an acceleration clause, triggered by non-payment of agreed instalments, in a term loan contract,[8] or to assume that such a clause is implied.[9] This practice may reflect the assumption seemingly made by the Halliday Committee that a secured loan would generally be repayable in full on demand.[10] A term to this effect is implied into the obligation contained in a Form A security[11] by section 10(1) of the Act. It is interesting to note an amendment proposed during Parliamentary scrutiny of the Bill which became the 1970 Act, which would have substituted an implied obligation for repayment in accordance with the agreed terms of the loan.[12] However, on the basis that the default rule for repayment on demand resulted from advice from the Halliday Committee and was freely variable by the parties, the amendment was withdrawn.[13]

4.7 The second ambiguity in relation to the calling-up procedure concerns the circumstances in which the security holder is entitled to serve a calling-up notice. Standard condition 8 provides that "the creditor shall be entitled" to call up a standard security "subject to the terms of the security and to any requirement of law". Accordingly it seems that the security holder is entitled to call up the security at will, unless some prior condition is placed on this entitlement in the agreement between the parties or by another legal requirement. The legislation does not impose any such condition, nor is any contained in the statutory styles for creation of a security.[14] If it is accepted that a debt must have fallen due before its performance can be demanded in a calling-up notice, the repayment terms in the agreement between the parties will operate to restrict the security holder's entitlement here.[15] However, if the loan is repayable on demand – or more problematically, if the calling-up notice operates to accelerate

---

[4] 1970 Act s 19 and Sch 6. The period of notice may be dispensed with or shortened with consent from relevant parties: s 19(10).

[5] 1970 Act s 9(8), emphasis added.

[6] There is some support for this interpretation in obiter remarks by Sheriff Scott in *AIB Group (UK) Plc v Guarino* 2006 SLT (Sh Ct) 138 at [2] and [8].

[7] Higgins, *Enforcement* para 2.1 accepts this interpretation. Gordon and Wortley, *Land Law* para 20-53 fn 192 suggest this would be an "absurd result" which "cannot be correct". Gretton and Reid, *Conveyancing* para 23-33 suggest that "the validity of a calling-up notice presupposes the maturity of the obligation".

[8] Cusine and Rennie, *Standard Securities* para 8.03; Gretton and Reid, *Conveyancing* para 23-28; *Royal Bank of Scotland v Wilson* [2010] UKSC 50 at para 38.

[9] Gretton and Reid, *Conveyancing* para 23-28.

[10] Halliday Report, para 121 and at p 107.

[11] In a Form A security, the underlying obligation and the security itself are contained in the same document: see 1970 Act Sch 2 and DP1 paras 6.6-6.7.

[12] Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 7 April 1970 col 294.

[13] *Ibid,* cols 297-8.

[14] 1970 Act Sch DP1 paras 6.6-6.10.

[15] This appears to have been Halliday's understanding of the provisions: see Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 8-27.

the debt, as suggested above – there appears to be no such restriction on the security holder's entitlement. The whole debt may be called up regardless of the fact that the debtor has been performing their secured obligations as they have fallen due.[16] If the debtor is not in a position to repay the whole sum secured within two months, they will be in default under condition 9(1)(a).

In what circumstances must *a calling-up notice be served?*

4.8 In the previous section we noted that, on one interpretation, the calling-up provisions might entitle a security holder to create a situation of default even where the debtor had been performing their obligations as required. Conversely, following the decision of the Supreme Court in *Royal Bank of Scotland v Wilson*,[17] non-performance by the debtor of the secured obligation will *not* amount to a default under the 1970 Act *unless* the security is called up.

4.9 *Wilson* concerned a standard security granted to the Royal Bank of Scotland by Francis and Annette Wilson, a married couple, over their commonly owned house in Loanhead. The security was granted on an all-sums basis in respect of their joint obligations to the bank, and also in respect of any obligation either spouse owed individually to the Bank, on a joint and several basis. Mr Wilson subsequently assumed an individual obligation to the Bank in respect of debts owed by the firm of F J Wilson Associates, which he operated alongside his brother and his son. By virtue of the terms of the security, Mrs Wilson took on joint and several liability for those debts, although she was not otherwise involved with the firm.[18] The firm's business accounts became overdrawn, and the Bank wrote to Mr Wilson seeking payment. When no payment was forthcoming, the bank sought warrant to eject the Wilsons from their home under section 5 of the Heritable Securities (Scotland) Act 1894 and to enter into possession of the security subjects as a precursor to their sale under section 24(1) of the 1970 Act.[19]

4.10 The existence of the debt and the Wilsons' failure to repay were not in dispute. In the lower courts, the argument focused on whether the bank's letter to Mr Wilson amounted to the formal requisition for payment required by the 1894 Act prior to ejection.[20] In the Supreme Court, however, attention turned to the bank's application under section 24. An application under this section is competent only where the debtor is in default in the meaning of the 1970 Act. The bank asserted that the Wilsons' non-payment of the debts due was a failure to comply with a requirement arising out of the security, and therefore a default as defined by standard condition 9(1)(b). The Supreme Court disagreed.

4.11 In the leading opinion, Lord Rodger highlighted that section 19(1) of the Act provided that "where a creditor in a standard security intends to require discharge of the debt thereby secured…he *shall* serve a notice calling-up the security".[21] The prevailing view in practice at

---

[16] It is, of course, difficult to imagine why a creditor would choose to do so. Moreover, where the security property is land used to any extent for residential purposes, this would likely breach the creditor's obligations under the Financial Conduct Authority's pre-action protocol for enforcement of mortgages (see discussion at para 7.11), and the court warrant required to exercise remedies against the debtor following calling-up in these circumstances might be refused by the court on grounds of unreasonableness: 1970 Act s 24(5), discussed at para 8.11.

[17] [2010] UKSC 50; 2011 SC (UKSC) 66.

[18] *Ibid*, paras 5-6.

[19] *Ibid*, para 10.

[20] See the discussion below at paras 4.29-4.33.

[21] [2010] UKSC 50 para 35, emphasis added.

that time, supported by Inner House authority in *Bank of Scotland v Millward*,[22] was that "shall", as it was used in the subsection, was to be read permissively, meaning that the creditor might proceed by calling-up notice, or might choose to proceed otherwise.[23] This view was based in part on a passage in *Conveyancing Law and Practice,*[24] in which Halliday wrote that a creditor "may" serve a calling up notice where he intends to require repayment of a debt. Lord Rodger noted that, notwithstanding the weight rightly given to Halliday's views in the interpretation of the 1970 Act, the word actually used in section 19(1) was not "may", but "shall". In any event, having referenced other writings by Halliday, Lord Rodger was not persuaded that Halliday intended to suggest otherwise.[25]

4.12 Lord Rodger also emphasised that the requirement to serve a calling-up notice applied not only, as the court had accepted in *Millward*, where the creditor intended to require discharge of the whole debt secured. Debt is defined in section 9(8)(c) to include any obligation due, which would seem to cover any part of the debt. Elsewhere in the Act (for example section 18(4) and section 27(1)(c)), reference is made to the "whole amount due" where such specificity is required. It followed that a calling-up notice was necessary whenever the creditor sought repayment of any amount owed.[26]

4.13 Finally, Lord Rodger noted that requiring service of a calling-up notice in any case falling within the scope of section 19(1) would ensure that all debtors were treated alike and, in particular, would benefit from the two-month period in which to repay.[27]

4.14 The outcome of the case was that the non-payment of debt due by the Wilsons was not, in itself, a default in the meaning of the 1970 Act. The only mechanism by which it could become such a default was by non-compliance with a calling-up notice. Following Lord Rodger's reasoning, and standing the wide definition of "debt" in section 9(8)(c) to include both monetary and non-monetary obligations, the same would seem to be true in respect of non-performance of any obligation arising under the secured contract.[28]

Conclusion on Standard Condition 9(1)(a)

4.15 It may be helpful at this stage to briefly summarise the rules emerging from the discussion above. The first instance of default under the 1970 Act, as set out in standard condition 9(1)(a), is where a debtor fails to comply with a calling-up notice within two months of it being served. Subject to contrary agreement between the parties, the security holder is entitled to call up the secured obligation at will. Non-performance of a secured obligation is not, in itself, a default in the meaning of the Act. Non-performance will only give rise to a default once its performance has been demanded by way of calling-up notice, and that demand has not been fulfilled within the two-month period.

---

[22] 1999 SLT 901.
[23] This view had been accepted at sheriff court level prior to the decision in *Millward*: see *United Dominions Trust Ltd v Site Preparations Ltd (No 1)* 1978 SLT (Sh Ct) 14 at 16 and *United Dominions Trust Ltd v Site Preparations Ltd (No 2)* 1978 SLT (Sh Ct) 21 at 23.
[24] Halliday, *Conveyancing Law and Practice* para 54-05.
[25] *Wilson* at paras 46-47. See also Lady Hale at para 77; Lord Clarke at paras 84-85. Lord Hope takes a different view of Halliday's intentions at para 68, but agrees with the interpretation of the statute advanced by Lord Rodger.
[26] *Ibid*, paras 38-40. See also Lord Hope at para 73.
[27] *Ibid*, para 50.
[28] See also *Firstplus Financial Group Plc v Pervez* 2013 Hous LR 13 at [46]-[47].

Standard Condition 9(1)(b)

4.16 Standard condition 9(1)(b) provides that a debtor shall be held to be in default where there has been a failure to comply with "any other obligation arising out of the security." The word "other" here appears to refer to standard condition 9(1)(a), so that the debtor will be held to be in default where there has been a failure to perform an obligation other than the obligation to comply with a calling-up notice.[29]

4.17 Following the Supreme Court decision in *Wilson*, it seems that non-performance of the secured obligation cannot meet the definition of default in condition 9(1)(b). Instead, this sub-condition will apply where there is a failure to perform obligations arising from the standard security itself. As Lord Hope noted:[30]

> "Content for [SC9(1)(b)'s] application is to be found in the requirements that are set out in standard condition 1 (maintenance and repair), standard condition 2 (completion of buildings), standard condition 3 (observance of conditions in title) and standard condition 5 (insurance) and any other similar conditions that may have been included by way of variation to maintain the value of the security subjects."

Standard Condition 9(1)(c)

4.18 Standard condition 9(1)(c) provides that a debtor shall be held to be in default where the proprietor of the security subjects has become insolvent. Standard condition 9(2) goes on to specify the circumstances in which the proprietor shall be taken to be insolvent, principally where the proprietor becomes apparently insolvent, where a deceased proprietor's estate has had a judicial factor appointed to it at the instance of a creditor or beneficiary, or where certain corporate liquidation or receivership processes have been commenced.

Problems with the current law

4.19 The approach taken to defining default in the 1970 Act can be criticised on a number of bases. First, as is clear from the discussion above, the drafting is complex and leaves room for significant ambiguity. Secondly, the fact that non-performance of the secured obligation is not a default in the meaning of the Act runs counter to the way that the term is normally used in this area of law. In the following paragraphs, we explore the difficulties this creates in interpreting other sections of the 1970 Act, and in complying with the pre-action requirements placed on creditors where the security property is used to any extent for residential purposes, where this problem has given rise to a series of reported cases.

[29] See Lord Hope in *Wilson* at para 72.
[30] *Wilson* at para 74.

"Default" elsewhere in the 1970 Act

4.20 The decision in *Wilson* led to a flurry of (largely critical) commentary in respect of both the court's interpretation of the provisions and the effect of the decision on settled practice in relation to the exercise of standard securities.[31] A key difficulty which resulted was that it left the meaning of other sections of the 1970 Act in which the term "default" appears unclear.

4.21 One example is section 24(9),[32] which provides:

> "Where-
>
> (a) the default in respect of which an application [for warrant to exercise remedies is made] is a default within the meaning of paragraph (a) or (b) of standard condition 9(1); and
>
> (b) before a decree is granted on the application, the obligations under the standard security in respect of which the debtor is in default are fulfilled,
>
> the standard security has effect as if the default had not occurred."

4.22 If default under standard condition 9(1)(a) means failure to comply with the calling-up notice within the two-month period, it is difficult to see how that default can be remedied after the two months have passed. Even if the provision can be read to ignore that difficulty, in practice a calling-up notice will almost invariably demand repayment of the whole sum due.[33] For most debtors, it will be impossible to comply with this demand without selling the security property. If the debtor does so comply, however, there would be no further need to exercise a remedy. Moreover, where the sum secured was a fixed amount, the security itself would be extinguished as a result of the secured obligation being performed. The ultimate effect, as Higgins notes, is to render this subsection otiose in most cases.[34] Default understood in the colloquial sense, to mean the non-performance which has given rise to enforcement action, appears to give this subsection more bite: a debtor may more easily be able to repay a missed monthly instalment, for example.

4.23 MacLeod[35] identifies a similar difficulty in respect of section 24(7)(b) of the 1970 Act which, in the context of an application for a power of sale over land used to any extent for residential purposes, compels the court to consider "the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default." Again, it is unlikely that most debtors will be able to fulfil their obligations under a calling-up notice in a reasonable time. If "default" here related to the non-performance which presumably triggered service of the calling-up notice, for example the non-payment of a monthly instalment, the potential for a debtor to remedy the problem within a reasonable time seems considerably greater.

---

[31] For example R Rennie, "Law v practice: Royal Bank of Scotland Plc v Wilson" (2010) SLT 219; K Swinton, "Enforcing Standard Securities: Royal Bank v Wilson [No 2]" (2010) 78 Scottish Law Gazette 87; G Gretton, "Upsetting the apple-cart: standard securities before the Supreme Court" (2011) 15(2) Edin LR 251; G Junor, "All for want of a calling-up notice?" 2011 JR 205; J Barnard, "RBS v Wilson: light in the tunnel?" (2012) JLSS 22; Lord Drummond Young, "Scotland and the Supreme Court" (2013) 2(1) CJICL 67.
[32] Inserted into the 1970 Act by the Home Owner and Debtor Protection (Scotland) Act 2010 s 2(5).
[33] See para 4.6.
[34] Higgins, *Enforcement* paras 2.16 and 2.18 fn 96.
[35] MacLeod, *Enforcement* paras 4.31 and 4.32.

Default and the pre-action requirements

4.24 Where a security relates to property used to any extent for residential purposes, the security holder must apply to court for warrant to exercise any of the remedies available on the debtor's default.[36] Prior to such an application, the security holder must fulfil the pre-action requirements (PARs),[37] which include a requirement to provide information to the debtor concerning the standard security, the amount due, and any other obligations under it in respect of which the debtor is in default. The Applications by Creditors (Pre-Action Requirements) Order 2010, article 2(4) specifies that this information "…must be provided as soon as is reasonably practicable upon the debtor entering into default." The question, now raised in a number of sheriff court cases,[38] is when this entry into default occurs.

4.25 In each of the reported cases, the defender disputed the competence of the application.[39] A key challenge was that, where information had been provided to the debtors before the expiry of the calling-up notice,[40] this pre-dated the debtor "entering into default" in terms of standard condition 9(1)(a). The pursuer had accordingly failed to comply with the PARs, rendering the action incompetent.

4.26 The pursuers generally argued for a more purposive interpretation of "default" in the 2010 Order,[41] focused on the debtor's non-performance of the secured obligation, which usually amounted to failure to make one or more monthly mortgage payments. The PARs were therefore met if the pursuer had provided information as soon as practicably possible after a mortgage payment had been missed. It was argued with reference to the Scottish Government's Guidance on Pre-Action Requirements for Creditors (2010) that this was the point in time when the Scottish Government, and probably the Scottish Parliament, had intended the information requirement to be triggered.[42]

4.27 In the majority of cases[43] the court favoured the defender's argument. Where PAR information had been provided to a debtor prior to the expiry of a calling-up notice, that was insufficient to satisfy the terms of article 2(4) of the 2010 Order. Actions falling into that category were accordingly dismissed.[44] In *Dickson*, however, Sheriff Bicket adopted a more

---

[36] 1970 Act s 24(1A)-(1B). A similar application is required where the creditor seeks warrant of ejection under the Heritable Securities (Scotland) Act 1894 s 5(2). We discuss the pre-action requirements in detail at paras 8.3-8.5.
[37] 1970 Act ss 24(1C) and 24A. Where a creditor seeks warrant to eject a debtor under section 5 of the 1894 Act, the same requirements apply by virtue of section 5B of that Act.
[38] Nine individual cases taken by six separate creditors are reported in: *Northern Rock (Asset Management) Plc v Millar* 2012 SLT (Sh Ct) 58 ("*Millar*"); *Northern Rock (Asset Management) Plc v Doyle* 2012 Hous LR 94 ("*Doyle*"); *Accord Mortgages v Dickson* 2013 Hous LR 2 (*"Dickson"*); and *Firstplus Financial Group Plc v Pervez 2013* Hous LR *13* ("*Pervez").*
[39] For references to the specific arguments see *Millar,* paras 5, 6, 9, 10 and 44 to 46; *Dickson,* paras 5, 6, 9, 44 and 45; and *Pervez,* paras 18, 19, 20, 23, 24 and 26. The decision in *Doyle* does not specifically note the Defender's arguments, and the notes of argument referred to in the Sheriff's decision are not reproduced in the case report.
[40] And, in fact, in most cases before the calling-up notice was served.
[41] *Millar,* paras 25-26, 28- 29, 31, 33-34, 39-43, 50-59; *Doyle*, paras 5, 7 (paragraph 7 is, we think, mistakenly noted as an argument of the Defenders' solicitor), 12 and 14; *Dickson*, paras 17-43; *Pervez*, paras 28-34.
[42] See para 14 of the guidance found at: https://www.gov.scot/publications/home-owner-debtor-protection-scotland-act-2010-guidance-pre-action-requirements-creditors/pages/1/.
[43] *Millar, Doyle* and *Pervez. Millar and Doyle* were decided by Sheriff Deutsch sitting at Glasgow. *Pervez* was decided by Sheriff Reid also sitting at Glasgow.
[44] It was held that two of the cases reported in *Doyle* satisfied the PARs because of the terms of certain information that had been provided after expiry of the calling-up notice.

purposive interpretation, taking the view that default referred to the initial failure to make the regular monthly payment – in other words, non-performance of the underlying obligation.[45]

4.28 A related but shorter point concerns the PAR to provide information to the debtor on "arrears".[46] The concept of "arrears" sits awkwardly in circumstances where a calling-up notice demanding payment of the whole sum due under the contract has expired. As Reid and Gretton have pointed out:[47]

> "The concept of arrears is certainly one that can apply before a calling-up notice is issued. But thereafter – assuming the calling-up notice to be valid – the concept ceases to be applicable, or, put in other words, *everything* is arrears."

Default under the 1894 Act

4.29 The remedies available to a security holder are generally provided for by the 1970 Act. One exception is the remedy of ejection, which is instead provided for by the Heritable Securities (Scotland) Act 1894, section 5. We consider this remedy in more detail in Chapter 10. For present purposes, it is important to note that the definition of "default" under the 1894 Act is not the same as the definition under the 1970 Act. The 1894 Act definition has difficulties of its own.

4.30 Section 5 provides that the remedy of ejection is available where the proprietor "has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition." It is clear that non-payment of the principal will amount to a default only once a formal requisition for payment has been made. However, there is ambiguity as to whether formal requisition is also required to convert non-payment of interest due into a default, or whether the simple fact of non-payment of interest is sufficient in itself.

4.31 Halliday appears to read the provision as requiring formal requisition only in relation to payment of the principal.[48] In *Royal Bank of Scotland v Wilson*, the sheriff at first instance found formal requisition to be necessary for both principal and interest.[49] In the Inner House, the Extra Division held requisition to be necessary for the principal only.[50] The Supreme Court[51] did not disapprove of the construction adopted by the Extra Division, although Higgins points to dicta of Lords Hope and Rodger that could be read as taking the opposite view.[52] In *Firstplus Financial Group v Pervez*, the court made obiter comments to the effect that formal requisition was required in relation to both principal and interest but declined to rule on the point.[53] Obiter comments of Sheriff Deutsch in *Northern Rock (Asset Management) Plc v Millar* may suggest otherwise.[54] The position remains confused.

---

[45] Para 48 onwards.
[46] As specified in s 24A(2)(b) of the 1970 Act and art 2(2)(b)(i) of the 2010 Order.
[47] K G C Reid and G L Gretton, *Conveyancing 2016* (2017) 192-196 discussing *Outlook Finance Ltd v Lyndsay's Executors* 2016 Hous LR 75.
[48] Halliday, *Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-61.
[49] 2009 CSIH 36; 2009 SLT 729 at [43].
[50] *Ibid*, [44].
[51] 2010 UKSC 50; 2011 SC (UKSC) 66.
[52] Higgins, *Enforcement* para 5.4.
[53] 2013 Hous LR 13 at [61].
[54] 2012 SLT (Sh Ct) 58 at 89-91.

4.32 Where formal requisition is required, what will satisfy this requirement? A calling-up notice which has expired without being fulfilled will suffice.[55] Lady Hale has suggested this is not the only option, however.[56] Lord Hope suggested that serving a notice of default which was appropriately worded would qualify,[57] though bearing in mind that, per *Wilson*, a calling-up notice is required to exercise any of the 1970 Act remedies on the basis of non-performance of the secured obligation, it is difficult to imagine the circumstances in which a security holder would choose to proceed by notice of default here. The term "formal" is not defined, and Lord Hope suggested that "what will be required to achieve that clarity will depend on the circumstances of the case."[58] Again, the position is unclear.

4.33 A final question concerns whether a period of time must elapse following a formal requisition before default is established. Sheriff Reid in *Pervez* refers to the "mechanics of payment" test under English law[59] to suggest that default may occur as little as an hour after the requisition in commercial cases, and perhaps no more than a few days in non-commercial cases,[60] though these remarks are obiter.

Discussion

4.34 The previous sections have considered the meaning of default under the current law and explored some difficulties with it. In this section, we will consider the approach taken to default in relation to other rights in security in Scots law, and will look at the position in our comparator jurisdictions. In the final section of the chapter, we will consider options for reform.

Default in relation to other rights in security in Scots law

4.35 The basic position in Scots law is that exercise of a remedy under a right in security requires non-performance of the secured obligation. This follows from the accessoriness principle.[61] In relation to pledge,[62] Bell sets this out as follows:[63]

> "Pledge is a real contract, by which one places in the hands of his creditor a moveable subject, to remain with him in security of a debt or engagement, to be re-delivered on payment or satisfaction; and with an implied mandate, <u>on failure to fulfil the engagement at the stipulated time or on demand</u>, to have the pledge sold by judicial authority."

Bell also describes the "essentially conditional" nature of a cautionary obligation,[64] which is:[65]

> "only exigible on the failure of the principal debtor to pay at the maturity of his obligation. It does not render a cautionary obligation a debt in the first instance,

---

[55] 2010 UKSC 50; 2011 SC (UKSC) 66 at [30] and [71].
[56] *Ibid.*
[57] 2010 UKSC 50; 2011 SC (UKSC) 66 at [59].
[58] 2010 UKSC 50; 2011 SC (UKSC) 66 at [60].
[59] *Bank of Baroda v Panessar* [1987] Ch 335; *Sheppard & Cooper Ltd v TSB Bank Plc (No. 2)* [1996] 2 All ER 654.
[60] See *Pervez,* paras 63 to 67.
[61] DP1 paras 3.21-3.27; *Nisbet's Creditors v Robertson* (1791) Mor 9554.
[62] A right in security granted by the debtor over a corporeal moveable asset. In a commercial context, such an arrangement is often referred to as "pawn".
[63] Bell, *Principles* § 203 (emphasis added).
[64] A right in security granted by one legal person in respect of a debt owed by another legal person, sometimes referred to by the English law term of "guarantee".
[65] Bell, *Commentaries* (7th edn, 1870) Vol 1 at 364 fn 3.

irrespective of anything having occurred to state the principal debtor as *in mora* or default."

4.36 The above are examples of rights in security voluntarily granted by the debtor. Rights in security can also be created judicially through diligence processes[66] such as attachment,[67] arrestment[68] and adjudication.[69] The first step in any diligence procedure is to establish the existence of an obligation between the parties which the debtor has failed to perform in line with the agreed terms, usually meaning non-repayment of a loan on agreed terms.[70]

4.37 In our Report on Moveable Transactions, we recommended the introduction of a new form of voluntary right in security over certain types of moveable property, to be known as a statutory pledge. Under our draft Bill, a statutory pledge may be enforced where there has been a failure to perform the secured obligation, or in such other circumstances, if any, as agreed in writing between the parties.[71] We note that this provision follows the definition of default set out in the DCFR.[72]

Comparative law

4.38 In our comparator jurisdictions, a division can be identified in the approach taken to default depending on whether the legal system is primarily in the civil law or common law tradition. In the civil law jurisdictions, where remedies are exercised under a security by way of judicial execution, the existence of a debt which is due and unpaid must be established before the court action can proceed. In France, a creditor who wishes to either sell or acquire the property in respect of which a *hypothèque* has been granted must make a demand for payment of sums due,[73] implying that if there is no debt due and unpaid, no action can be taken.[74] The same is true in Germany in respect of the *Hypothek* and the *Grundschuld*.[75]

4.39 In South Africa, the requirements for default are determined in the contract between the parties,[76] but before a remedy can be exercised, there must be a judgment from the court in the creditor's favour establishing that a debt is due and unpaid.[77]

4.40 In the common law jurisdictions, default is more likely to encompass breach of the terms of the security itself alongside non-performance of the secured obligation. In England,[78] the mortgagee's remedies of sale and receivership become available only when the sum secured is due.[79] These remedies cannot be exercised until one of three conditions is satisfied: the debtor fails to repay money owed under the contract within three months of a written demand to do so; the debtor is at least two months in arrears of interest payments due under

---

[66] See generally F McCarthy, "Diligence" in Anderson, *Scots Commercial Law* Ch 12.
[67] Debt Arrangement and Attachment (Scotland) Act 2002 ss 10-57.
[68] Debtors (Scotland) Act 1987 s 73A-73T.
[69] Heritable Securities (Scotland) Act 1895 ss 5-7.
[70] F McCarthy, "Diligence" in Anderson, *Scots Commercial Law* paras 12.08-12.12.
[71] Report on Moveable Transactions para 27.28 and Draft Bill s 68(2)-(3).
[72] DCFR IX–1:201(5).
[73] French Code of Civil Enforcement Procedures art R321-1 para 1 and R321-3 para 4.
[74] MacLeod, *Enforcement* paras 4.47-4.48. MacLeod notes here that the position is the same in respect of the acquisition rule applicable to the *fiducie-sûreté*.
[75] German Code of Civil Procedure § 704.
[76] R Brits, *Real Security Law* (2016) 64.
[77] Uniform Rules of Court 2009 (HCR) 45(1) and Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa 2010 (MCR) 36(1) and (7).
[78] See generally MacLeod, *Enforcement* paras 4.07-4.11 and 4.39.
[79] Law of Property Act 1925 ss 101(1)(i) and (iii).

the contract; or there has been a breach of some other term of the mortgage agreement.[80] The remedy of foreclosure is also unavailable until the debtor is in default.[81]

4.41 In New Zealand,[82] although there is no explicit statutory provision requiring default prior to the exercise of remedies, such a requirement is implied by the statutory scheme. Section 119 of the Property Law Act 2007 provides:

> "No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise [remedies including entry into possession and sale of the security property] by reason of a default unless–
>
> (a) A notice complying with section 120 has been served…; and
>
> (b) On the expiry of the period specified in the notice, the default has not been remedied."

The notice referred to, which demands performance of the obligations in respect of which the debtor is in default within a set period of time, can only be served in the circumstances set out in para 11 of Part 1 of Schedule 2 to the Act. These include: where the mortgagor fails to pay any amounts secured by the mortgage on the due date; where the mortgagor fails to perform or observe any covenant express or implied in the mortgage; or the mortgagor becomes bankrupt or (in the case of a company) is placed in liquidation.

Future law

4.42 Any new legislation on standard securities should make clear the circumstances in which the security holder is entitled to exercise remedies under the security. Under the 1970 Act, the remedies set out in standard condition 10 become available when the debtor is in default. However, the definition of default in standard condition 9 has caused difficulties. One reason for these difficulties is a lack of clarity in the drafting of that condition read in combination with other provisions of the statute, particularly the definition of debt in section 9(8)(c). Another reason is the focus of standard condition 9 on non-performance of obligations arising under the standard security, rather than non-performance of the secured obligation itself.

4.43 We consider that the approach to default in any future legislation in this area should start from the position that the purpose of a right in security is to ensure performance of the secured obligation. The first instance in which remedies under the security should be available to the security holder is therefore where there has been a failure to perform that obligation. We make a provisional proposal in this respect below.

4.44 Under the standard conditions, the exercise of remedies also becomes available where there is failure by the debtor, or by the owner or registered tenant of the security property, to perform obligations arising under the security itself. These obligations tend to be focused on preserving the value of the security property, for example by maintaining it in a good state of repair and taking out adequate insurance to cover damage. As noted above, this follows the pattern in comparator common law jurisdictions, but is not typical of civil law regimes. The

[80] Law of Property Act 1925 s 103.
[81] *Williams v Morgan* [1906] 1 Ch 84; Law of Property Act 1925 ss 88(2) and 89(2).
[82] See generally MacLeod, *Enforcement* paras 4.12-4.14 and 4.42-4.46.

1970 Act also specifies the insolvency of the owner or registered tenant of the security property as a circumstance in which remedies can be exercised.

4.45 It is important to bear in mind that the 1970 Act allows for variation of the standard conditions unless explicitly excluded under section 11, meaning that parties are free to agree the circumstances in which remedies can be exercised. Cusine and Rennie give examples of a number of common variations in this respect.[83] This aligns with the approach taken in the DCFR,[84] and as recommended in our draft legislation introducing the statutory pledge.[85] We consider that any new legislation on standard securities should continue to give parties the freedom to agree on circumstances beyond non-performance of the secured obligation in which remedies under the security can be exercised.

4.46 Under the current law, the remedy of ejection has a different statutory basis to that of the other remedies, with its own contested definition of default.[86] This adds complexity to the law which it seems undesirable to replicate in future legislation. We consider that the exercise of all remedies should be brought within the same statutory scheme.

4.47 Drawing together the points in the previous paragraphs, we provisionally propose that:

8. A security holder may exercise remedies under a standard security where:

(a) there is a failure to perform the secured obligation; or

(b) in such other circumstances, if any, as are agreed between the debtor, the owner or registered tenant of the security property, and the security holder.

Do consultees agree?

4.48 If this proposal receives support from consultees, the question may arise of what amounts to a "failure" to perform the secured obligation. Would a single missed mortgage payment be sufficient, for example? Our preliminary view is that this is a matter of contractual interpretation, in respect of which parties may choose to make specific provision in their agreement, rather than a matter for standard security legislation. In our first Discussion Paper on Heritable Securities, we proposed that the terms of the secured obligation should be a matter for parties and no longer the subject of default statutory provisions.[87] This proposal was strongly supported by consultees. We think the same approach is appropriate here. Concern that individuals in a weaker bargaining position may agree to unduly onerous terms in this respect is addressed by existing legislative protection including the Consumer Credit Act 1974 and the Consumer Rights Act 2015. Debtors will be protected against the unreasonable exercise of a standard security by the procedural requirements discussed in the following chapters of this Discussion Paper, including a period of time subsequent to the service of a default notice in which any defect in performance can be resolved. Vulnerable debtors will also benefit from the enhanced debtor protection measures discussed in Chapters 7 and 8. Within

---

[83] Cusine and Rennie, *Standard Securities* para 4.33.
[84] DCFR IX–1:201(5).
[85] Report on Moveable Transactions para 27.28 and Draft Bill ss 68(2)-(3).
[86] Heritable Securities (Scotland) Act 1894 s 5, discussed at paras 4.29-4.33 above.
[87] DP1 para 6.30.

this overall regime, we do not think that further specification in the legislation of what will amount to a failure to perform the secured obligation is required.

4.49 On a related point, if the proposal above receives support from consultees, our provisional view is that there is no need for the legislation to specify further circumstances in which remedies can be exercised, for example on the debtor's insolvency. Listing circumstances capable of variation risks reproducing the need, as under the 1970 Act, to refer to multiple sources in order to ascertain the terms of the security arrangement.[88] This outcome seems undesirable. However, it may be that the inclusion of circumstances commonly agreed as triggers for the exercise of remedies within the statute itself serves a purpose which outweighs this concern. We seek views.

4.50 We ask:

9. (a) Should new legislation specify circumstances in which a security holder may exercise remedies under a standard security beyond those listed in question 8 above?

(b) If so, which circumstances should be specified in the legislation?

(c) Should the specified circumstances be subject to variation by the parties to the security?

---

[88] Gretton and Reid note that the rights and duties of parties to a standard security arrangement will typically have no fewer than six sources, making even simple questions about what those rights and duties are difficult to answer: *Conveyancing* para 23-08.

Chapter 5 Notices

Introduction

5.1 Under the 1970 Act, a security holder who wishes to exercise remedies under a standard security may (or in some cases, must) first serve a calling-up notice or a notice of default.[1] In this chapter, we consider the purpose of these notice procedures and outline the difficulties they have given rise to in practice, including difficulties with service. We seek views on a simplified notice procedure to be adopted in any future legislation on standard securities.

Current law

5.2 Under the 1970 Act, provision is made for two forms of notice preceding the exercise of remedies: a calling-up notice,[2] and a notice of default.[3] Where a security holder seeks to exercise remedies based on non-performance of the secured obligation, a calling-up notice must be served as the first step in that process.[4] Where a security holder seeks to exercise remedies based on non-performance (or breach) of obligations in the standard security itself, which usually concern preservation of the value of the security property, a notice of default may be served as the first step in that process provided that the non-performance or breach is remediable.[5] Service of a notice of default is not obligatory in this situation, however. A security holder may instead proceed directly to court action.[6]

5.3 The effect of service of either notice under the 1970 Act is complex. Service and expiry of a calling-up notice will generally allow a security holder to exercise remedies without recourse to court,[7] except in the case where the security property is used to any extent for residential purposes.[8] Service and expiry of a notice of default will allow for exercise of a more limited range of remedies, with entry into possession of the security property possible only if a court order is subsequently obtained.[9] Again, warrant of the court will always be required in the residential case.[10]

5.4 The explanation for the two forms of notice under the 1970 Act is connected to the introduction of the standard conditions. The calling-up notice, as discussed in detail in Chapter 4, was intended to be used where the security holder sought repayment of the secured obligation. However, as the Notes on Clauses relate, it was considered necessary by the Halliday Committee to provide a different system to enforce compliance with the standard

---

[1] Where the security subjects are used to any extent for residential purposes, notification must also be given to the occupier and the local authority in which the security property is located that a calling-up notice or notice of default has been served: 1970 Act ss 19A, 19B and 21(2A). We discuss these notification requirements at paras 7.6 and 7.63-7.66.
[2] 1970 Act s 19.
[3] *Ibid*, s 21.
[4] See the discussion at paras 4.8-4.14.
[5] 1970 Act s 21(1). For discussion of the difficulties in determining whether a default is remediable, see Gordon and Wortley, *Land Law* para 20-66; Higgins, *Enforcement* para. 2.3.
[6] 1970 Act s 24(1).
[7] *Ibid*, s 20. A more detailed discussion of when a court order will be required can be found at paras 6.2-6.8.
[8] 1970 Act s 20(2A).
[9] *Ibid*, s 23.
[10] *Ibid*, s 23(4)(a).

conditions and to indicate the rights of creditors where they were not complied with.[11] The notice of default was introduced for this purpose.[12] Despite its origins, the notice of default procedure was not intended to be restricted to breaches of the standard conditions. Non-performance of other terms of the security, or the secured obligation itself, could, it was suggested, be addressed through this procedure provided that they were remediable.[13] Halliday suggested that a creditor might prefer to take this approach rather than to use "the sledgehammer of calling-up".[14] The drafting of the legislation, as interpreted by the Supreme Court in *Wilson*, seems not to have captured this intention effectively, however. Indeed, the current state of the law has led to some commentators querying whether the notice of default has any utility at all.[15]

Retaining a notice requirement

5.5 Before we consider the detail of calling-up notices and notices of default, a preliminary issue arises: why have a notice requirement at all? The justification for a notice requirement should be clear if it is to be retained in any new legislation.

5.6 Under the 1970 Act, both forms of notice share a number of purposes. They advise the recipient of the nature of the default and how it may be rectified,[16] providing an opportunity for matters to be resolved without the need for further action on the part of the security holder. They also advise the recipient of the potential consequences of failure to purge the default prior to the specified deadline,[17] providing fair warning that the security may be exercised. In addition, both notices generally require to be served on other parties who have an interest in the security property such as postponed security holders,[18] providing another important element of protection.

5.7 MacLeod gives detailed consideration to notice requirements prior to the exercise of remedies in our comparator jurisdictions.[19] He notes a general recognition across jurisdictions that a number of parties will have an interest in being made aware of and participating in an enforcement process. His analysis distinguishes between two approaches. In the first, some form of preliminary notice is required prior to any further steps being taken in the enforcement process. An example would be the requirement under section 119 of the New Zealand Property Law Act 2007 for the creditor to serve a statutorily prescribed notice[20] and to await its expiry before being able to exercise remedies.[21] In the second approach, notice is effectively given by the instigation of court proceedings and the consequent service of court documents upon relevant parties. An example can be found in the German Civil Code which provides for remedies to be exercised by way of judicial execution. Raising proceedings

---

[11] It is not clear why the usual civil remedies were not considered apt for this purpose.
[12] Notes on Clauses (clause 20).
[13] *Ibid.*
[14] Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-20.
[15] Gordon and Wortley, *Land Law* para 20-67; Gretton and Reid, *Conveyancing* para 23-32.
[16] 1970 Act Sch 6 Form A (calling-up notice) and Form B (notice of default).
[17] *Ibid.*
[18] Where two standard securities are held in the same security property, the lower ranked security is described as "postponed" to the higher ranked security: see paras 3.4-3.5. The parties on whom calling-up notices and notices of default must be served are discussed at paras 5.21-5.25.
[19] Macleod, *Enforcement* paras 4.55-4.80 and 4.120-4.173.
[20] Under the Property Law Act 2007 s 120.
[21] There is a partial exception to this notice requirement under s 126 of the Property Law Act 2007 whereby leave of the court may be sought to allow a creditor to enter into possession of the security property or to allow a receiver to demand and recover income from the security property.

requires service of the relevant court documents on the debtor (and any other relevant parties).[22]

5.8 It might also be noted that the Consumer Credit Act 1974 requires service of a default notice on a debtor at least 14 days prior to any enforcement action being taken in respect of contracts to which that Act applies.[23] As we explain elsewhere,[24] obligations secured by a standard security are largely excluded from the provisions of the 1974 Act, and the notification requirement referred to here will accordingly not apply. However, the existence of this requirement is useful in constructing a picture of good practice in relation to the enforcement of debt obligations.

5.9 Our preliminary view is that a form of notice should continue to be required in any new legislation on standard securities, and that it should not be possible for a security holder to exercise remedies under a security unless and until the time period specified in the notice expires without the default specified in the notice being purged. A notification requirement creates an opportunity to resolve disputes or misunderstandings at an early stage without recourse to expensive court proceedings. It provides the recipient with an opportunity to seek appropriate support and advice, and to make alternative arrangements if loss of the security property is likely. Requiring a notice is consistent with current practice and not out of line with the approach in our comparator jurisdictions.

5.10 We do not think the case is made for continuing with two forms of notice as under the 1970 Act. Significant confusion has arisen in practice as to the circumstances in which the different forms of notice can or should be used,[25] and the justification suggested in the Halliday Report for the two forms does not seem to us sufficient for the complexity which has resulted. Instead, we provisionally propose the introduction of a single form of notice which *must* be used in any circumstance where the security holder seeks to exercise remedies under the security. This may be referred to as a "default notice".

5.11 We ask:

10. Do consultees agree with the proposal that:

(a) Prior to exercising remedies under a standard security, the security holder will be required to serve a notice known as a default notice?

(b) The security holder will not be entitled to exercise remedies unless and until the default notice expires?

[22] German Code of Civil Procedure § 750.
[23] Consumer Credit Act 1974 ss 87 and 88.
[24] See paras 7.42-7.48.
[25] See the discussion of *Royal Bank of Scotland v Wilson* [2010] UKSC 50; 2011 SC (UKSC) 66 above at paras 4.8-4.14.

Form and content of notice

Notices under the 1970 Act

5.12 The terms of the calling-up notice (Form A) and the notice of default (Form B) are prescribed in Schedule 6 to the 1970 Act. These provide the recipient with either:

- notice that payment of the principal sum (as specified), interest (as specified) and expenses are required within two months of the date of service of the calling-up notice;[26] or
- notice that the creditor requires the debtor to rectify default in performance of a clearly identified obligation within one month of the date of service of the notice of default.

In both forms of notice, the recipient also receives:

- a warning that failure to make the necessary payment/rectify the identified default may, ultimately, lead to the property being sold;[27]
- a recommendation to seek advice on the notice; and
- information about the pre-action requirements and voluntary surrender procedure in relation to property used to any extent for residential purposes.[28]

5.13 The notice period can be dispensed with or shortened by the recipient of the notice subject to the consent of holders of standard securities *pari passu* with or postponed to the security in question,[29] and the consent of entitled residents[30] where the security is used to any extent for residential purposes.[31]

Discussion

5.14 As under the 1970 Act, we consider that the form of the default notice should be prescribed by legislation. In our first Discussion Paper, we suggested that the statutory forms for creation and assignation of a standard security should be replaced in any new legislation by a set of minimum requirements, beyond which parties would be free to use their own styles. In our discussion, we noted that the different policy concerns which arise in relation to enforcement might argue in favour of retaining statutory forms in that context.[32] From the perspective of the security holder, a prescribed form provides certainty that the statutory requirements are being fulfilled. From the perspective of the recipient, a prescribed form ensures that the same information is received regardless of the identity of the security holder,

---

[26] The notice should state the sums due as at the date of service, but may note that these are subject to adjustment, for example because interest will continue to accrue. Where such a qualification is made, the person in receipt of the calling-up notice may request a final determination of the sums due, failure to comply with which will result in the notice having no effect: 1970 Act s 19(9). Form A states that that it will need to be "adapted accordingly" in the case of a standard security for a non-monetary obligation.

[27] In the case of property used to any extent for residential purposes, the fact that the creditor is required to instigate court proceedings prior to exercising remedies, including sale, is stated. In other cases, it is flagged that court action is not required before sale.

[28] These measures are discussed at paras 8.3 and 8.19.

[29] 1970 Act s 19(10). *Pari passu* securities rank alongside the security in question, postponed securities rank after the security in question: see paras 3.4-3.5. Where the property is a "matrimonial home" with the meaning of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 22, the consent of the recipient's spouse is also required.

[30] As defined in the 1970 Act s 24C: see paras 8.16-8.18.

[31] 1970 Act s 19(10A)-(10B). Where the recipient is not the debtor, the consent of the debtor will also be required. These provisions are applied *mutatis mutandis* to notices of default by s 21(3).

[32] DP1 paras 6.31-6.37.

and uniformity of use should help to make the notice recognisable and accessible. Use of a prescribed form is consistent with the approach we adopted in relation to the Pledge Enforcement notice in our Moveable Transactions project,[33] and with some of our comparator jurisdictions.[34] We think the same approach is appropriate here.

5.15 We ask:

11. Do consultees agree that the form of the default notice should be prescribed by legislation?

5.16 If this approach is supported by consultees, a question arises as to whether the form should be set out in primary or secondary legislation. The advantage of the form appearing in primary legislation is that it serves to keep the relevant law under "one roof" making it more easily accessible. Secondary legislation allows for greater flexibility, however, in the sense that it can be amended more easily. On balance, we think the benefit of accessibility to debtors may carry the most weight here, but we seek the views of consultees below.

5.17 We will work with Parliamentary Counsel on the precise wording of the default notice if consultees support our provisional proposal to have a statutory form. However, it would be useful at this stage to have input from consultees on the key information which should be included. We think the terms of the notices provided for by the 1970 Act offer a useful starting point. On this basis, we would suggest that the default notice includes the following key information:

(i) details of the parties to the security, the security itself, and the security property;

(ii) the default in respect of which the notice is being sent;

(iii) how the default can be remedied;

(iv) the time limit by which the remedy must be effected;

(v) the potential consequences of failure to resolve the default including the specific remedies that the security holder may seek to exercise; and

(vi) a recommendation to seek legal advice.

5.18 We ask:

12. (a) Should the form of the default notice be prescribed in primary or secondary legislation?

(b) What comments do consultees have on the suggested list of key information to be included in the default notice?

---

[33] Report on Moveable Transactions paras 27.44 and Draft Bill s 69.

[34] See for instance section 120 of New Zealand Law of Property Act 2007 which states that the notice must as prescribed, but also sets out key information which be conveyed to the debtor.

(c) What further key information, if any, should be included?

Service of notice

5.19 Any new legislation on standard securities must make provision for service of the default notice. We consider here who may be entitled to serve the notice, on whom the notice must be served, and the methods by which valid service may be made.

By whom?

5.20 The 1970 Act provides that a calling-up notice[35] or notice of default[36] may be served by the creditor, which includes "any successor, assignee or representative" of the creditor.[37] In practice, service is therefore made by the security holder or its agent.[38] We are not aware of any difficulties with the law here and consider that a similar approach should be taken in any new legislation in relation to service of a default notice. We ask:

> **13. Do consultees agree with the proposal that a default notice may be served by the security holder or its agent?**

On whom?

5.21 Under the 1970 Act, a calling-up notice must be served on the proprietor of the security subjects[39] or their representatives[40] and any other person against whom the creditor wishes to preserve a right of recourse in respect of the debt,[41] which will invariably include the debtor where they are not the owner of the security subjects. Under the statute, a notice of default need only be served on the debtor and the proprietor of the security property,[42] though in practice service is likely to be made on all parties who would be entitled to service of a calling-up notice.[43]

5.22 Where the last registered or recorded proprietor of the security subjects is deceased, service should be made on their representative.[44] There are conflicting views on who may be considered the representative of the deceased. The majority view within the written commentary is that the representative in these circumstances is the executor of the deceased's estate,[45] though we understand there is disagreement in practice as to whether the executor must have received confirmation, or whether nomination as an executor is sufficient. An alternative view is that any beneficiary under the deceased's will may be a representative.[46] Where the proprietor is deceased but does not have any representatives,

---

[35] 1970 Act s 19(1).
[36] *Ibid*, s 21(1).
[37] *Ibid*, s 30(1).
[38] Higgins, *Enforcement* para 2.19.
[39] 1970 Act s 19(2) provides that the notice shall be served on "the person having the last registered or recorded title to the security subjects and appearing in the Land Register of Scotland or on the record of the Register of Sasines as the proprietor." "Proprietor" includes a lessee where the security property is a registered lease: s 30(2).
[40] 1970 Act s 19(2)-(4).
[41] *Ibid*, s 19(5).
[42] *Ibid,* s 21(1).
[43] *Halliday's Conveyancing Law and Practice* Vol II, para 54-26.
[44] 1970 Act s 19(2).
[45] *Halliday's Conveyancing Law and Practice* Vol II, para 54-11; Higgins, *Enforcement* para 2.20 fn 105; P Braid, "Remedies on default" in *Standard Securities and their Enforcement* (1999) Post Qualifying Legal Education 208, 209.
[46] Higgins, *Enforcement* para 2.20 fn 105.

service should be made on the Lord Advocate.[47] Alternatively, where the proprietor is deceased, service may be made on their successor as appearing from the last registered title.[48] This is the case even where there has been an alteration of the succession not appearing in the Register.[49]

5.23 Where the proprietor has been sequestrated, service should be made on both the proprietor and the trustee in sequestration (if not yet discharged).[50]

5.24 Where the proprietor is a body of trustees, service may be made on the majority of trustees,[51] and must be served on them in their capacity as trustees.[52] Where the last registered or recorded proprietor is a company which has been removed from the Register of Companies, service should be made on the Lord Advocate.[53]

5.25 Where the address of the person upon whom service is desired is unknown, or it is unknown whether the person is alive, or the notice is returned with intimation that delivery was unsuccessful, service is to be made on the Extractor of the Court of Session.[54] In *Royal Bank of Scotland plc v Jamieson*, it was held that indication by the Royal Mail's online "track and trace" portal that there had been "no answer" upon attempted delivery of a notice was insufficient to allow for service on the Extractor, since the notice had not been returned.[55] Prior to this decision, it had been the practice of the Extractor to accept service in these circumstances.[56] Concern has been expressed that requiring a security holder to wait for the notice to be physically returned by the Royal Mail before service can be made on the Extractor may lead to unnecessary delay in the enforcement process, particularly in light of the uncertainty as to whether letterbox delivery by sheriff officer is a competent alternative option for service.[57] The countervailing policy concern here is to ensure that service on the Extractor is competent only where there is no doubt that service on the proprietor has failed, to minimise the risk of enforcement action proceeding without the proprietor receiving fair notice.[58]

5.26 Broadly speaking, the current law in the 1970 Act as to persons on whom service may be made appear to work well, and we provisionally propose below that similar rules should be made in relation to service of default notices in any new legislation on standard securities. In particular, we propose that a default notice must be served on the debtor, the owner or

---

[47] 1970 Act s 19(3). In this circumstance, service is usually made on the Lord Advocate, and dealt with by the Queen's and Lord Treasurer's Remembrancer as agent. The same applies to service of a notice of default on Scottish Ministers: 1970 Act s 21(2).
[48] 1970 Act s 19(2). This refers to the situation where the title includes a survivorship destination.
[49] I.e. where a survivorship destination has been evacuated.
[50] 1970 Act s 19(3).
[51] *Ibid*, s 19(4).
[52] *Gallagher v Ferns* 1998 SLT (Sh Ct) 79. It may be sufficient for the capacity in which the recipient has been served to be made clear in the body of the notice where it is not clear in the address line: *Legal and Equitable Nominees Ltd v Scotia Investments Ltd Partnership* [2019] SAC (Civ) 23.
[53] 1970 Act s 19(5).
[54] *Ibid*, s 19(6).
[55] *Royal Bank of Scotland Plc v Jamieson* [2019] SAC (Civ) 29; 2019 SLT (Sh Ct) 203. It was noted at [9] that service on the Extractor would have been competent if the portal had read 'gone away' instead of 'no answer', as this would have rendered the recipient's address unknown.
[56] Higgins, *Enforcement* para 2.24.
[57] Discussed below at para 5.33.
[58] C MacKay, "Royal Bank of Scotland v Jamieson: another brick in the protective framework for residential debtors in enforcement of standard securities" (2020) 24(3) Edin LR 405-410, 409-410.

registered tenant of the security property and any other person against whom the security holder wishes to preserve a right of recourse in respect of the secured obligation.[59]

5.27 We suggest that, where the intended recipient is deceased, service may be made on their confirmed executor or successor in title. Specifying the executor as the appropriate party on whom service should be made in these circumstances accords with the majority view of the position under the current law. In addition, confirmation can generally be expected where an estate includes heritable property unless the nominated executor declines to act, in which case service on them would seem inappropriate.

5.28 We do not propose any change to the circumstances in which service may be made on the Extractor. Below, we suggest that future legislation makes clear that letterbox delivery by sheriff officer is a competent method of service for a default notice.[60] With this alternative service option available, we do not think it is unduly burdensome to expect security holders who choose instead to make service by way of recorded delivery to wait until there is no question that that attempt has failed before service on the Extractor becomes available.

5.29 We ask:

14. Do consultees agree with the following provisional proposals?

(a) A default notice must be served on the debtor, the owner or registered tenant of the security property, and any other person against whom the security holder wishes to preserve a right of recourse in respect of the secured obligation.

(b) Where a natural person on whom service should be made is deceased, service must instead be made on any person appearing from the title to have succeeded to the security property, or on the confirmed executor of the deceased estate. If no successor appears on the title and no executor has been confirmed, service must be made on the Lord Advocate.

(c) Where a natural person on whom service must be made has been sequestrated, service must also be made on the trustee in sequestration (unless discharged).

(d) Where service is to be made on a body of trustees, it is sufficient for service to be made on the majority of trustees.

(e) Where a company on which service should be made has been removed from the Register of Companies, service should be made on the Lord Advocate.

(f) Where the address of the person upon whom service should be made is unknown, or it is unknown whether the person is alive, or the

[59] Where the security property is a dwellinghouse, we also provisionally propose service of an "occupiers' notice" to make residents who are not entitled to receipt of a default notice, such as tenants, aware of the fact that enforcement action against the owner of the house may be imminent: see paras 7.63-7.67.

[60] See para 5.40.

notice is returned with intimation that delivery was unsuccessful, service is to be made on the Extractor of the Court of Session.

5.30 One additional issue which has been brought to our attention concerns service on a recipient who is an adult with incapacity. Under the current law, in this circumstance service should be made on both the adult with incapacity and on any guardian or continuing attorney.[61] It has been suggested to us that service of enforcement notices on an incapax party, who is by definition vulnerable, is inappropriate. Provision might be made in any new legislation to exclude this requirement where a security holder has been made aware that a guardian or attorney is acting on the intended recipient's behalf, meaning that service would be made only on the guardian or attorney. We seek views.

5.31 We ask:

15. Where a security holder has been made aware that a guardian or attorney is acting on behalf of an intended recipient of a default notice who is an adult with incapacity, should service be made solely on the guardian or attorney on that adult's behalf?

Methods of service

5.32 Under the 1970 Act, section 19(6), service of a notice may be effected by delivery to the person on whom it is desired to be served. Alternatively, the notice may be sent by registered post or by recorded delivery service to the person at their last known address.

5.33 Conflicting case law exists as to how this provision should be interpreted. One construction is that only the methods of service stated in section 19(6) are competent and "delivery to the person", where the recipient is a natural person, requires the notice to be placed into the recipient's hands. This was the view taken in *Santander UK Plc v Gallagher*.[62] An alternative construction is that section 19(6) should be read permissively such that it allows the stated methods of service, but it does not exclude other forms of service permitted by law. This would include any of the forms of service available to a sheriff officer under the Ordinary Cause Rules,[63] namely delivery into the hands of a recipient who is a natural person,[64] leaving the notice in the hands of a resident at the recipient's dwelling,[65] in the hands of an employee at the recipient's place of business,[66] letterbox delivery following diligent enquiry[67] or by leaving the notice at the recipients dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry.[68] This was the view taken in *Bank of Scotland Plc v Stevenson*.[69] The correct interpretation of section 19(6) remains unclear.

---

[61] Cusine and Rennie, *Standard Securities* para 8.07; Adults with Incapacity (Scotland) Act 2000 s 1.
[62] 2011 SLT (Sh Ct) 203; 2011 Hous. LR 26. This decision followed obiter dicta in *Household Mortgage Corporation Ltd v Diggory* Unreported, Sheriff Court March 1997, in Paisley and Cusine, *Unreported Property Cases* 455-462.
[63] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR 1993") r 5.4.
[64] *Ibid* r 5.4(1)(a), see *Rae v Calor Gas Ltd* 1995 SC 214 at 219; *Macphail's Sheriff Court Practice* (3rd edn, 2006) para 6.25.
[65] OCR 1993 r 5.4(1)(b).
[66] *Ibid*.
[67] *Ibid*, r 5.4(3)(a). Where this method is used, the sheriff officer must, as soon as possible after service, send a letter containing a copy of the document served by ordinary first class post to the address at which they think it most likely the recipient will be found. See r 5.4(4).
[68] *Ibid,* r 5.4(3)(b). Again, under r 5.4(4) the sheriff officer must send a letter containing a copy of the document served by ordinary first class post to the address at which they think it most likely the recipient will be found.
[69] 2012 SLT (Sh Ct) 155; 2012 Hous. LR 60 at [95].

5.34 As regards service by mail, service by registered post has largely fallen into disuse in recent years,[70] and case law in the context of service of a sheriff court writ suggests that use of any postal service which does not require a signature upon delivery is likely to be insufficient for this method of service under the statute.[71] Where service is made by recorded delivery, Inner House authority relating to service of a pre-irritancy notice in the commercial leases context[72] suggests that the Royal Mail's recorded delivery service must be used for service to be effective.[73] The point has not been specifically considered in relation to the 1970 Act and it is unclear whether, given the widespread use of courier services in recent years, Royal Mail could have such a monopoly. Where a recorded delivery service is employed in the context of a calling-up notice, sheriff court authority suggests that it is not necessary for the debtor to actually receive the notice for valid service to have been made.[74]

5.35 Section 19(6) provides that there will be sufficient evidence of service where the recipient signs the statutory form of acknowledgement of service[75] or where a certificate of posting in statutory form[76] is signed by the creditor or their agent and accompanied by a postal receipt. If service is on the Extractor, an acknowledgement of receipt signed on a copy of the notice is sufficient.[77] Where a notice is served by post, it is deemed to have been served the day after posting.[78]

5.36 Any new legislation on standard securities must clarify which methods of service are competent for default notices. A key difficulty with the current law is uncertainty as to whether section 19(6) provides an exhaustive list of valid methods, and this ambiguity in drafting must not be repeated. New legislation should also ensure that common or desirable methods of service are permissible unless there is reason to exclude them.

5.37 The Interpretation and Legislative Reform (Scotland) Act 2010, section 26, provides default rules for the service of documents where required by subsequent Scottish legislation. In brief, this section provides that a document may be served on a person:

- By being delivered personally to the person;
- By being sent to the "proper address" of the person[79] by registered post[80] or by a postal service which provides for delivery of the document to be recorded;
- By being transmitted to an electronic address and in an electronic form specified by the recipient where both the person serving the notice and the recipient have agreed in advance to the use of electronic communication for this purpose.

It also makes provision for what constitutes "electronic transmission" and for the date on which documents served by different methods will be deemed to have been received.

---

[70] Higgins, *Enforcement* para 2.24 fn 119 notes that Royal Mail has phased out its registered post service and suggests practitioners should rely on recorded delivery in its place.
[71] *Ross & Bonnyman Ltd v Hawson Garner Ltd* 2001 SLT (Sh Ct) 134, although see discussion in Higgins, *Enforcement*, *ibid*.
[72] Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ss 4 and 5.
[73] *Kodak Processing Companies Ltd v Shoredale Ltd* [2009] CSIH 71; 2010 SC 113.
[74] *Household Mortgage Corp Ltd v Diggory* (above). See also *Stirling v Landmark Mortgages Ltd* [2016] CSIH 89 at [15]-[25].
[75] 1970 Act Sch 6 Form C.
[76] *Ibid*, Form D.
[77] 1970 Act s 19(7).
[78] *Ibid*, s 19(8).
[79] As defined in the Interpretation and Legislative Reform (Scotland) Act s 26(4).
[80] As defined in the Postal Services Act 2000 s 125(1).

5.38 This section is not without difficulties, however. As with section 19(6) of the 1970 Act, there is uncertainty as to whether the list of methods of service in section 26 of the 2010 Act is intended to be exhaustive, leaving in doubt the question of whether the usual methods of service by sheriff officers are competent.[81] In addition, the definition of registered post relied on in the section may cover services which provide proof of sending but not proof of receipt,[82] which is – correctly, in our view – unlikely to be considered an appropriate method of service for notices in the standard securities context.[83]

5.39 For any new standard securities legislation, it may be that a modified application of section 26 of the 2010 Act would be appropriate, or an entirely new provision may result in a clearer statement of the law. In either case, the ancillary matters dealt with in section 26, including deemed dates of service, can be provided for. For the moment, we seek the views of consultees on the issue of principle, namely which methods of service should be permissible for default notices.

5.40 Drawing together the threads of discussion above, we ask:

16. Should it be competent to serve a default notice by:

(a) Sheriff officer, using the methods specified in the Ordinary Cause Rules 1993, rule 5 (namely delivery into the hands of a recipient who is a natural person; leaving the notice in the hands of a resident at the recipient's dwelling or in the hands of an employee at the recipient's place of business; letterbox delivery following diligent enquiry; or leaving the notice at the recipient's dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry)?

(b) Sending it to the intended recipient by a postal service which provides for delivery of the notice to be recorded?

(c) Electronic transmission where the electronic form of the notice and the electronic address for service has been agreed in writing by all relevant parties in advance?

5.41 In our work to date, we have not been made aware of any other methods of service which would be suitable for use in relation to default notices. Since we consider that it would be desirable to provide an exhaustive list of methods of service in any new legislation, however, it is important to ensure that nothing has been missed in this respect. We ask:

17. Which, if any, other methods of service should be competent for default notices?

5.42 Consideration must also be given to whether and how parties might vary the statutory rules on methods of service by agreement. Under the 1970 Act, it is probably the case that the terms of a security can provide expressly for service in a particular manner, on a particular

---

[81] For discussion, see A Stalker, *Evictions in Scotland* (2nd edn, 2021) 502-503.

[82] The definition of "registered post service" given in the Postal Services Act 2000 s 125(1) is: "a postal service which provides for the registration of postal packets in connection with their transmission by post and for the payment of compensation for any loss or damage".

[83] *Ross & Bonnyman Ltd v Hawson Garner Ltd* 2001 SLT (Sh Ct) 134. See para 5.34 above.

individual or at a particular place.[84] In our Report on Moveable Transactions, we recommended that parties should be entitled to agree that enforcement documents must be served by one (or more than one) of the methods specified in the statute, so that for example only personal or electronic service would be permitted. In addition, we recommended that it should be possible to agree an address at which notice could be served which is not the default "proper address" defined by statute. We recommended that such variations should have to be agreed to in writing in advance of any enforcement action.[85] We think a similar approach makes sense in relation to service of default notices, and is in line with the current law on service of enforcement notices in relation to standard securities. We think that, as under the current law, it should remain incompetent to specify by agreement a method of service which is not provided for in the statute.

5.43 We ask:

18. Should relevant parties be permitted to agree in writing, prior to service of a default notice, that it must be served:

(a) By one (or more than one) of the methods specified in the statute?

(b) At a specified address?

Time limit for compliance with notice

5.44 As discussed above, one purpose of the requirement for notice to be given prior to the exercise of a standard security is to provide the recipient with an opportunity to purge a default without the need for further action to be taken by the security holder. Once valid service of a notice has been effected, the question arises of how much time the recipient should be given for this purpose before the notice expires and the security holder may proceed to exercise remedies.

5.45 Under the 1970 Act, the recipient has two months in which to comply with a calling-up notice, and one month to comply with a notice of default. It has been represented to us by some practitioners that the current notice periods are too long, drawing out the enforcement process in a way that increases costs which will ultimately be borne by the debtor. Reduction of the notice period may, however, be considered to weaken the statutory protection of debtors by lessening the time available to find a resolution to the default. Somewhat counterintuitively, under our proposals, an impact of this kind may be felt most significantly by commercial debtors – individual residential debtors will generally continue to benefit from the pre-action requirements, which include the security holder making reasonable efforts to agree a resolution to a default.[86] In terms of a lower threshold for the statutory time limit, we noted above that the Consumer Credit Act 1974 requires a debtor to be given a minimum of 14 days' notice prior to enforcement action by the holder.[87] Although these provisions generally do not apply in the standard security context, we think they provide a useful guideline. A debtor is similarly given 14 days to repay a debt following service of a charge for payment under the

[84] Cusine and Rennie, *Standard Securities* para 8.08; Paisley and Cusine, *Unreported Property Cases* 461.
[85] Report on Moveable Transactions paras 28.66-67.
[86] See para 8.3.
[87] Consumer Credit Act 1974 ss 87 and 88.

Debtors (Scotland) Act 1987.[88] We would not consider any time limit shorter than 14 days as appropriate for our proposed default notice. Beyond that, we seek views.

5.46 We ask:

19. Should the time limit for compliance with a default notice be:

(a) 14 days after service?

(b) One month after service?

(c) Two months after service?

(d) Some other period, and if so, what?

5.47 As under the 1970 Act, we consider that it should be possible for parties with an interest in the exercise of the security to dispense with the notice period, or consent to its variation, following service of the notice. Under the 1970 Act, the relevant parties are considered to be the debtor, the proprietor (if different) and holders of any standard securities *pari passu* with or postponed to the security in question.[89] Consent of the spouse of the debtor or proprietor will be required where the security property is a "matrimonial home"[90] in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.[91] Consent of any "entitled resident"[92] as defined by the 1970 Act, s 24C will also be required where the security subjects are used to any extent for residential purposes.[93] We think an equivalent list of parties should be required to consent to variation of the notice period under any new legislation, noting that the circumstances in which there may be "entitled residents" will be altered somewhat by our proposals in relation to the application of the enhanced debtor protection measures, discussed in Chapter 7.

5.48 We ask:

20. Do consultees agree that the time limit for compliance with a default notice may be varied or dispensed with following service of the notice where consent is given in writing by all the following parties:

(a) the debtor;

(b) the owner or registered tenant;

(c) holders of any prior or *pari passu* securities;

---

[88] Section 90(3). The period is increased to 28 days if the debtor is outside the UK or its whereabouts are unknown.
[89] 1970 Act s 19(10).
[90] 1981 Act s 22.
[91] 1970 Act s 19(10). It appears that, through oversight, this provision has not been amended to reflect the fact that civil partners now receive protection equivalent to the 1981 Act through the Civil Partnership Act 2004 ss 101-112.
[92] See paras 8.16-8.18.
[93] 1970 Act s 19(10A)-(10B).

(d) the spouse of the debtor, owner or registered tenant where the security property is a "matrimonial home" in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 22;

(e) the civil partner of the debtor, owner or registered tenant where the security property is a "family home" in terms of the Civil Partnership Act 2004 s 135(1);

(e) any "entitled resident" of the security property as defined in the enhanced debtor protection provisions of any new standard securities legislation?

Deviation from statutory notice requirements

Current law

5.49 What is the effect where the requirements of the statute in relation to a notice are not observed by the security holder? Failure to adhere strictly to the forms of notice or methods of service set out in the 1970 Act has the potential to render the notice invalid.[94] However, some leeway is provided by section 53(1). This section provides that, where the Act requires a document or procedure to be in conformity with statutory requirements, the requirement is met where the document or procedure "so conforms as closely as may be." In the Sheriff Appeal Court decision in *Legal and Equitable Nominees Ltd v Scotia Investments Ltd Partnership*[95] Sheriff Holligan[96] noted:

> "…in enacting s.53, Parliament has acknowledged the acceptance of some departure from compliance with the terms of the statute. If one departs from the standard of absolute compliance and admits the presence of error then the determination of what is, and what is not, permissible becomes a question of fact and degree, dependent upon the circumstances of the particular case."

He summarised the approach taken to application of this provision in earlier case law:[97]

> "What were described as "trivial errors", "errors of calculation" and "technical objections" were held not to be a good ground of challenge. "Substantial errors" or "errors of magnitude" were not excusable."

A similar approach was adopted in the case in question, in which a £100 discrepancy between the sum owed stated in figures and stated in words was held not to be fatal to the validity of a calling-up notice.

5.50 More substantial defects in the form or service of notices will not be saved by section 53(1). However, certain defects in form may be rectified under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, sections 8 and 9.[98]

---

[94] *Gardiner v Jacques Vert Plc* 2001 GWD 38-1433 where a discrepancy arose between the sum due stated as a figure and the sum stated in words. This decision was overturned on appeal although no comment was made on this point: *Gardiner v Jacques Vert Plc* 2002 SLT 928.
[95] 2019 SLT (Sh Ct) 193 at [22].
[96] Sheriff Holligan dissented, but all three Appeal Sheriffs were in agreement on this point.
[97] Para [22].
[98] *Outlook Finance Ltd v Lindsay's Executor Nominate* 2016 Hous LR 75.

Discussion

5.51 There appears to be no reason why any new legislation on standard securities should not provide similar leeway for minor deviations from the statutory requirements as the 1970 Act. By default, this issue will be dealt with in future legislation by the application of the Interpretation and Legislative Reform (Scotland) Act 2010, section 21. It reads:

> "Where a form is prescribed in or under an Act of the Scottish Parliament, a form that differs from the prescribed form is not invalid unless the difference materially affects the effect of the form or is misleading."

5.52 We are not aware of any case law directly applying this provision to date, though its terms have been considered in two sheriff court authorities where it was not directly in point. *Beattie v Rogers*[99] dealt with service of a document for termination of a lease under the Sheriff Courts (Scotland) Act 1907 and Housing (Scotland) Act 1988. Although the 2010 Act was not applicable to these pieces of legislation, the court considered the terms of section 26 to provide helpful guidance on whether mistakes in the document in question should render it invalid. The court considered the erroneous replacement of the word "terminated" with the word "determined" at one point in the notice to be immaterial as it was unlikely to mislead the tenant as to the effect of the notice. However, reference in the document to incorrect statutory provisions as authority for its effect was deemed materially misleading, and therefore fatal to the document's validity. In *Balgray Ltd v Hodgson*,[100] the Inner House held that where a letter had been addressed to the director of a company when the landlord was in fact the company itself, valid service had not been made. The provision concerned[101] did not prescribe a form nor a method in which service was required to be given, merely requiring that the notice be given "to the landlord".

5.53 The wording of section 21 of the 2010 Act and the way in which it has been understood in judicial discussion to date align reasonably closely with the approach taken to interpretation of section 53 of the 1970 Act, as summarised by Sheriff Holligan above. We are not aware of any particular difficulties connected to the application of section 21 in the standard securities context, and there are likely to be benefits to drawing on a more generally applicable legal standard in this area, not least the likelihood of a body of interpretative case law developing more quickly than it would do in relation to a bespoke provision for standard securities. In the circumstances, we can see no reason to exclude the application of section 21 from any new standard securities legislation. However, we seek views.

5.54 We ask:

21. Should section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 be excluded from application to any new standard securities legislation, and if so, why?

[99] 2016 Hous LR 107.
[100] [2016] CSIH 55.
[101] Agricultural Holdings (Scotland) Act 2003 s 72(6).

Challenges to the validity of a notice

Current law

5.55 The validity of a notice may be challenged on the basis of failure to comply with the statutory requirements, or on more fundamental grounds such as a challenge to the existence of the default itself. A debtor who seeks to challenge the validity of a calling-up notice may petition the Court of Session for suspension of the notice,[102] or may raise the challenge in defence to any court action following on the notice. The 1970 Act provides a bespoke route of challenge where a recipient is "aggrieved by any requirement"[103] of a notice of default. The recipient has 14 days from the date of service to apply to the court to set aside or vary the order.[104] An application must be served on the creditor and any other person on whom the notice of default was served. The creditor may make a counter application seeking any remedies available under the 1970 Act or any other enactment relating to heritable securities. The counter application may be accompanied by a certificate in statutory form[105] setting out details of the default, which is prima facie evidence of the fact of default,[106] placing the onus on the debtor to refute it. The court has a broad discretion to grant such remedies as it thinks proper in relation to the application or counter application.[107]

Discussion

5.56 If a default notice is provided for in any new legislation on standard securities, as a matter of the general law on civil remedies, the remedy of suspension will be available to a recipient who seeks to challenge the notice, as will the opportunity to defend any court proceedings which follow on the basis of invalidity of the notice. The question to be addressed here is whether new legislation should instead provide for a bespoke route of challenge to the default notice similar to that currently provided for notices of default under the 1970 Act, section 22.

5.57 The primary concern here is default notices served in cases where the enhanced debtor protection measures do not apply.[108] Under our provisional proposals, enhanced debtor protection cases will generally require the security holder to seek a court order for the exercise of remedies, providing an opportunity for any challenge to the validity of the default notice to be heard. In the standard case, however, our provisional proposal is that a security holder will generally be entitled to exercise remedies on expiry of the default notice without recourse to court.[109] Although it would remain open to the debtor to petition the Court of Session for suspension of the notice in these circumstances, this process is complex and costly. Providing for a more straightforward alternative would seem to align with the broad aim of the project to

---

[102] Rules of the Court of Session ch 60. See Higgins, *Enforcement* paras 2.31 and 3.13; G Jamieson, *Summary Applications and Suspensions* (2000) paras 27-08-27-10.
[103] 1970 Act s 22(1). The objection is made by way of summary application to the Sheriff unless the applicant seeks other orders in which case the application requires to be raised by ordinary cause.
[104] 1970 Act s 22(2). The application proceeds by way of summary application: Act of Sederunt (Sheriff Court Rules) (Enforcement of Securities over Heritable Property) 2010 (SSI 2010/324) para 3.
[105] 1970 Act Sch 7.
[106] *Ibid*, s 19(4).
[107] *Ibid*, s 22(3). Higgins points out that, in the context of residential property, this provision may in fact result in an oddity that a creditor could obtain authority to proceed with remedies more quickly than if the notice of default had not been objected to. See *Enforcement* para 3.12 fn 47.
[108] The content of the enhanced debtor protection measures is discussed in Chapter 8.
[109] See paras 6.16-6.19.

streamline the law of standard securities, and is in keeping with the current provision in relation to notices of default.

5.58 Section 22 of the 1970 Act provides for a challenge to be brought under summary application procedure. We would anticipate a similar type of approach being appropriate in relation to challenge of a default notice under any new legislation. We make no specific proposal in this respect at present, however, bearing in mind the ongoing reforms to the summary application rules and the planned transition to simple procedure for some aspects of the standard securities regime.[110] If there is support amongst consultees for a bespoke route of challenge to a default notice, we will develop the detail of that proposal with Parliamentary Counsel at a later stage of the project, when the position in relation to the civil court procedure reforms is hopefully further advanced.

5.59 We therefore ask:

> **22. Should a bespoke route of challenge to a default notice (similar to that found in section 22 of the 1970 Act) be provided for in any new legislation?**

Extinction of a notice

5.60 Under our provisional proposals, if a default notice expires without the default being remedied, the security holder may proceed to exercise remedies under the security (subject to any further statutory requirements).[111] In this section, we consider how the right of action held by the security holder on the basis of the expired default notice may be extinguished through prescription. We also consider whether the right of action held by the security holder should be extinguished if the default giving rise to the notice is subsequently remedied.

Prescription

5.61 Under the current law, a calling-up notice remains valid for the purposes of effecting a sale under a power conferred by the security for a period of five years.[112] Similarly, a notice of default has effect for any of the remedies to which it gives rise for a period of five years.[113] It has been represented to us that five years is a long period of time for a debtor to have the threat of enforcement action "hanging over their head". In early consultation for this project, it was suggested to us by one stakeholder that two years may be a more appropriate prescriptive period, at least in cases concerning property used to any extent for residential purposes.

5.62 The five-year prescriptive period for enforcement notices is of long standing, with the 1970 Act provision drawn from the equivalent in relation to calling-up of a bond and disposition in security under section 33 of the Conveyancing (Scotland) Act 1924.[114] It also mirrors the period of the short negative prescription under the Prescription and Limitation (Scotland) Act

---

[110] See para 8.9.
[111] For example, a court order will usually be required in cases to which the enhanced debtor protection measures apply: see para 7.49.
[112] 1970 Act s 19(12) provides that this period runs from the date of the notice where the subjects are used to any extent for residential purposes. In the non-residential case, s 19(11) provides that the period runs from the date of the notice, or where the subjects have been offered or exposed or sale, from the date of the last offer or exposure.
[113] 1970 Act s 21(4).
[114] Notes on Clauses (clause 18).

1973, which applies to most financial obligations amongst other things.[115] The 1973 Act sought to introduce uniformity to prescriptive periods, simplifying the myriad regimes in place under various pieces of legislation at that time.[116] Although prescription of heritable security enforcement notices is not regulated by the 1973 Act, there may be some value in terms of legal consistency in retaining the same prescriptive period here. In relation to the particular case of residential property, we note that under our provisional proposals, a court order will generally be required for the exercise of remedies where the enhanced debtor protection measures apply. This would provide the court with an opportunity to review the reasonableness of the length of time taken between expiry of the notice and further action by the security holder if appropriate in the circumstances of an individual case.[117]

5.63 On current information, we are not sure there is an argument sufficiently robust to justify a change in the law away from the current prescriptive period of five years. We would be grateful for the views of consultees.

5.64 We ask:

23. (a) After what period of time should the rights of a security holder to exercise remedies on the basis of an expired default notice be extinguished by prescription?

(b) Why?

Remedying of default

5.65 Under the current law, the effect on a calling-up notice or notice of default where the recipient fulfils the requirements of the notice following expiry of the notice period is not always clear.[118] The basic rule appears to be that the security holder may continue to exercise remedies based on an expired notice regardless of post-expiry performance of the obligations specified in that notice. Section 24(9) was introduced into the 1970 Act[119] seemingly to alter this position where the security subjects are used to any extent for residential purposes. It provides that where the default is fulfilled post-expiry, the security has effect as if the default had not occurred. As previously discussed,[120] however, the difficulties with the definition of default under the 1970 Act mean this subsection probably does not have the intended effect.

5.66 The effect of purging the default following expiry of the default notice in the legislative scheme we have provisionally proposed should be clarified. In considering which approach may be appropriate here, we note first that, as a matter of common sense, a security holder is unlikely to proceed with the exercise of remedies where the relevant default is resolved. Remedies are designed to enforce performance of the secured obligation, and enforcement is no longer necessary where performance has been carried out voluntarily. In this circumstance, the rule as to the effect of a post-expiry purge may be largely academic. The more relevant context may be where a debtor who has remedied an initial default following

---

[115] 1973 Act s 6 and Sch 1.
[116] Scottish Law Commission, Prescription and Limitation of Actions (Scot Law Com Memorandum No 9, 1968), para 43 available at: https://www.scotlawcom.gov.uk/files/6113/1221/2684/cm09.pdf.
[117] See paras 8.11-8.14.
[118] Higgins, *Enforcement* para 2.16.
[119] Section 24(9), amended into the 1970 Act by the Home Owner and Debtor Protection (Scotland) Act 2010 s 2(5).
[120] See paras 4.21-4.22.

expiry of a notice subsequently finds themselves in default once again, months or perhaps years later. In this situation, should the security holder be free to exercise remedies based on the expired notice following from the initial default? Or should the security holder be required to go through the notice procedure once again in respect of the “new” default?

5.67 There are arguments on both sides. On the one hand, it has been represented to us that requiring a security holder to begin the notice procedure afresh on repeated occasions may be an undue interference with its entitlement to exercise its security. It may even allow an unscrupulous debtor to engage in delaying tactics by repeatedly remedying a default, only to default afresh shortly afterwards.[121] Pragmatically, requiring repeated notice procedures will increase the costs of enforcement which will ultimately be borne by the debtor. On the other hand, there seems an obvious injustice in allowing the threat of enforcement action to linger over a debtor even after a default has been remedied. Moreover, the value in having a notice procedure is to provide fair warning and an opportunity to resolve matters without further action being taken. This purpose underlying a notice procedure is lost if notice does not have to be given subsequent to every fresh default.

5.68 We would be grateful for the views of consultees. We ask:

24. Should an expired default notice continue to provide a valid basis for the exercise of remedies where the default giving rise to the notice is subsequently purged? Why or why not?

[121] We note that this risk would be unlikely to eventuate where, as would commonly be the case, the secured obligation contains an acceleration clause triggered by non-payment of agreed instalments.

Chapter 6 Court orders

Introduction

6.1 This chapter will consider the role of orders by the court in relation to the exercise of remedies under a standard security. Under the current law, although it is always open to the security holder to seek the assistance of the court when exercising a standard security, it is not always the case that a court order is necessary. This chapter will consider whether and when a court order should be required in order to exercise a security. It will then consider the procedure to be followed when a court order is sought, including potential reforms in this area.

Current law

6.2 There is no general requirement under the 1970 Act for court authority to exercise remedies under the security. Where the security property is not used to any extent for residential purposes, remedies may be exercisable by the security holder without any recourse to court, though the position varies depending on the nature of the default and the remedy in question. Where the security property is used to any extent for residential purposes, the enhanced debtor protection provisions mean that a court order will almost invariably be required. We consider each category in turn.

Property not used to any extent for residential purposes

6.3 Where the security property is not used to any extent for residential purposes, a court order is required to exercise certain remedies in certain circumstances. First, regardless of the nature of the default, if a security holder wishes to eject any person in natural occupation of the security property, it must obtain decree of ejection, usually under the Heritable Securities (Scotland) Act 1894, section 5.[1] Secondly, if a security holder seeks to foreclose, it must obtain decree of foreclosure under the 1970 Act, section 28.[2] Thirdly, warrant of the court will be required under the 1970 Act, section 20(3) where the security holder seeks to grant a lease of the security property for seven years or longer.[3]

6.4 Where the debtor is in default under standard condition 9(1)(a), meaning that they have failed to comply with a calling-up notice, the security holder is in principle entitled to exercise any of the remedies set out in standard condition 10 (principally sale of the security property or entry into possession and collection of rents) without the need for a court order.[4] Higgins notes that a security holder may nevertheless find it useful, when dealing with third parties such as tenants of the debtor or prospective purchasers of the security property, to obtain a

[1] We discuss ejection in Chapter 10. Where the occupier is a private residential tenant, a court order should be sought under the relevant tenancy legislation: see the discussion at paras 10.14-10.21.
[2] 1970 Act Sch 3 SC 10(7). Foreclosure is the process by which a security holder directly acquires ownership of the security property. See Chapter 14 for detailed discussion.
[3] 1970 Act Sch 3 SC 10(4). We discuss the grant and administration of leases in Chapter 12.
[4] 1970 Act ss 20(1)-(2).

declarator confirming, for example, that the debtor is in default or the security holder is entitled to exercise particular remedies.[5]

6.5 Where the debtor is in default under standard condition 9(1)(b) (which covers non-performance or breach of a condition of the security itself) and has failed to comply with a notice of default, the security holder is in principle entitled to sell the security property without the need for court authority.[6] If the security holder seeks instead to enter into possession and collect rents, warrant of the court will be required.[7] Where default has arisen under standard condition 9(1)(b) but no notice of default has been served, or where the default is due to the security property owner's insolvency under standard condition 9(1)(c), warrant of the court will be required prior to exercise of any remedies.[8] In any case relating to default under standard conditions 9(1)(b) and (c), an application for warrant can be made under section 24(1). It is open to the security holder to seek warrant under this section even where it is not a pre-requisite to exercise of a remedy if the warrant may be useful for the types of practical purposes mentioned above.

6.6 Where the court receives an application for warrant under section 24(1), its competence may be challenged by the debtor on the basis of failure to adhere to the procedural requirements relevant to the application, potentially including those relating to a calling-up notice or a notice of default.[9] The debtor may also present a substantive defence to the application, for example that the security is void or no debt is owed.[10] If no such challenge or defence is established, the court must grant the application: it has no discretion to refuse on grounds of reasonableness or otherwise.[11] In other words, the role of the court here is simply to verify that the circumstances exist in which the statute provides for the remedy to be used.

Property used to any extent for residential purposes

6.7 Where a security property is used to any extent for residential purposes, a court order will usually be required to exercise remedies. The 1970 Act provides that warrant of the court must be sought in respect of any of the remedies set out in standard condition 10,[12] unless there has been compliance by the debtor and entitled residents[13] with the voluntary surrender procedure set out in in section 23A.[14] A court order will also be required to exercise the remedy of ejection, usually under the Heritable Securities (Scotland) Act 1894, section 5, where the security property remains occupied.[15]

6.8 As with court proceedings in the non-residential case, an application for warrant in these circumstances may be subject to a procedural challenge or substantive defence. If no

---

[5] Higgins, *Enforcement* para 8.6.
[6] 1970 Act s 23(2).
[7] *Ibid*, s 24(1). Alternatively, the security holder may serve a calling-up notice and exercise the power of sale on its expiry as set out above.
[8] *Ibid*.
[9] *J Sykes & Sons (Fish Merchants) Ltd v Grieve* 2002 SLT (Sh Ct) 15.
[10] For an overview of relevant defences, see Higgins, *Enforcement* ch 10.
[11] *United Dominions Trust Ltd v Site Preparations Ltd (No 1)* 1978 SLT (Sh Ct) 14; *Halifax Building Society v Gupta* 1994 SC 13.
[12] 1970 Act ss 20(2A), 23(4) and 24(1A)-(1B).
[13] Defined in the 1970 Act s 24C: see paras 8.16-8.17.
[14] Discussed at para 8.19.
[15] We discuss the remedy of ejection in chapter 10. Where the occupier is a private residential tenant, a court order should be sought under the relevant tenancy legislation: see the discussion at paras 10.14-10.20.

such challenge or defence is raised, the court may continue the proceedings or make any other order that it thinks fit, but may not grant the order unless: (a) the security holder has complied with the pre-action requirements;[16] and (b) it is reasonable in the circumstances of the case to do so.[17] Where the debtor is represented at a hearing in respect of such an application, the court is directed to consider various factors in making its assessment of reasonableness, including the nature of and reasons for the default, the ability of the debtor to fulfil the underlying obligation within a reasonable time, and the ability of the debtor and any other person residing at the security property to secure reasonable alternative accommodation.[18]

Problems with the current law

6.9 The preceding discussion serves to demonstrate the complexity of the current law in relation to court orders. At present, the question of whether a court order is required to exercise a security turns on a number of factors, namely: (i) the nature of the default; (ii) the notice procedure employed in relation to the default; (iii) the remedy sought; and (iv) whether the property is used to any extent for residential purposes. Some of this complexity derives from the approach taken in the 1970 Act to defining default,[19] and its provision of two forms of notice procedure.[20] Earlier in the Discussion Paper, we provisionally proposed that any new legislation should provide for a simplified definition of default[21] and a single form of default notice to be mandatory in all contexts.[22] If these proposals are supported by consultees, they should go some way to simplifying the procedure for exercising remedies as a whole. However, further streamlining in relation to the circumstances in which a court order is required may be possible, and we discuss that below.

6.10 A further criticism which has been made[23] of the current law concerns the lack of judicial supervision of the existence of default. At present, even where a court order is necessary, the action focuses on confirmation of the creditor's right to exercise remedies.[24] Default is presumed on the basis of service and expiry of a calling-up notice or notice of default, or the creditor may lodge a certificate of default under section 24(2) as prima facie evidence that the default exists. Where the existence of default is disputed by the debtor, they may seek suspension of the calling-up notice or notice of default,[25] or challenge the competence of any court action raised on that basis.[26] The onus is effectively placed on the debtor to dispute the claimed default, rather than on the creditor to prove default in the first instance. This may raise the question of what a court order, where required, must cover.

---

[16] These are set out in s 24A and discussed at para 8.11.
[17] 1970 Act s 24(5).
[18] 1970 Act s 24(6)-(7). Entitled residents may also apply for a continuation or other orders under ss 24B-24C, on which see para 8.16.
[19] See paras 4.2-4.18.
[20] See paras 5.2-5.4.
[21] See paras 4.43-4.47.
[22] See paras 5.5-5.11.
[23] Higgins, *Enforcement* para 8.7; Gretton and Reid, *Conveyancing* (3rd edn, 2004) para 19-33.
[24] Higgins, *Enforcement* para 8.7.
[25] Rules of the Court of Session ch 60. See Higgins, *Enforcement* paras 2.31 and 3.13; G Jamieson, *Summary Applications and Suspensions* (2000) paras 27-08-27-10.
[26] Higgins, *Enforcement* para 10.2.

Discussion

6.11 The law in this area must reconcile two competing policy concerns. The first is to ensure that standard securities can be exercised efficiently. Where a court order is prerequisite to exercise of a remedy, the process becomes lengthier and more expensive. This may be to the disadvantage of both parties, particularly where there is no defence to the action and the expenses of the court proceedings are likely to be borne ultimately by the debtor. The competing policy concern, however, is to ensure that the debtor is adequately protected from illegitimate exercise of a remedy by the security holder. This concern may be heightened where the debtor is particularly vulnerable, or where the remedy sought has particularly deleterious effects.

6.12 Before considering options for reform in this area, it may be useful to consider the approach taken to balancing these policy concerns elsewhere in Scots law, and in our comparator jurisdictions.

Court orders in relation to other rights in security in Scots law

6.13 Reviewing the approach taken to this issue in relation to other rights in security in Scots law presents a mixed picture. For voluntary rights in security, such as caution[27] and pledge,[28] a court order is generally required to exercise a remedy, and establishing the existence of a default will form part of that process. A notable exception here is the floating charge, in respect of which a receiver can be appointed by the chargeholder on default without the need for judicial intervention.[29]

6.14 Where judicial security is created through a diligence process, the first step is necessarily to obtain decree establishing the existence of the debt, unless parties have consented to summary diligence.[30] The diligence itself will also require a court order.

Comparative law

6.15 The comparative picture is also mixed. In France, exercise of the remedies of sale or foreclosure under the *hypothèque* involves a mandatory court hearing at which the judge may sanction the remedy only if the relevant requirements, including the existence of a default, are met.[31] The position is similar in Germany, where the right to exercise remedies of sale or receivership must be demonstrated to the court,[32] and in South Africa, where exercise of a remedy is only possible with a court order.[33] In the common law jurisdictions, judicial supervision of the process is less likely. In England, powers of sale can, in principle, be

---

[27] Gloag and Irvine, *Rights in Security* 790-791.
[28] Bell, *Principles* § 207.
[29] Insolvency Act 1986 ss 51-52.
[30] Debtors (Scotland) Act 1987 s 87.
[31] French Code of Civil Enforcement Procedures art R322-15 para 1. See MacLeod, *Enforcement* paras 4.48-49.
[32] German Code of Civil Procedure §§15-16. See MacLeod, *Enforcement* para 4.50.
[33] Uniform Rules of Court 2009 (HCR) 45(1) and Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa 2010 (MCR) 36(1) and (7).

exercised without a court order[34] meaning that there is little scope for judicial verification of the existence of default.[35] The position is similar in New Zealand.[36]

Options for reform

6.16 New legislation on standard securities should provide a more coherent answer than the law currently provides to the question of when a court order is required to exercise remedies. Bearing in mind the policy concerns outlined above, our tentative proposal for reform is that it should be possible to exercise remedies under a standard security without a court order, subject to three exceptions. The first is that a court order should be required in cases to which the enhanced debtor protection measures apply, protecting vulnerable debtors in line with the policy objectives outlined in more detail in Chapters 7 and 8. The second exception is that a court order should be required, even outwith the enhanced debtor protection context, for the exercise of remedies which raise specific policy concerns. We consider when remedies may give rise to these concerns in the chapters which follow. At present, we note simply our preliminary proposals that a court order should be required for ejection, foreclosure and the grant of leases longer than a statutory minimum period.

6.17 Finally, we suggest that new legislation should require a court order for the exercise of remedies where this would be required by the Consumer Credit Act 1974. We discuss the 1974 Act in detail in Chapter 7, noting that most cases in which a court order is required by the 1974 Act will be cases to which the enhanced debtor protection measures would apply under our proposals.[37] However, some exceptions would remain, for example where the debt of a juristic person trustee is secured on a dwelling occupied by a beneficiary of the trust, or where the debt of a natural person is secured on a property not in use as a dwelling by the debtor and no other relevant exemptions apply (for example, that the debtor is a high net worth individual).[38] In our discussion in Chapter 7, we recognise that our proposals as to the application of the enhanced debtor protection measures do not align with the circumstances in which the 1974 Act requires a court order for exercise of a security. To address this misalignment, we think any new legislation should provide that a court order will be mandatory where required by the 1974 Act.

6.18 Allowing for the exercise of remedies on the basis of an expired default notice, without the need for a court order, maximises the efficiency of the enforcement process. This has benefits for both parties, and consequently for the availability of finance in general. Court supervision of the exercise of a security has benefits in terms of debtor protection, but the risk to a debtor or security property owner of illegitimate exercise of a standard security should not be overstated. There is nothing in the reported case law or commentary to suggest that the behaviour of creditors in this respect is a matter of concern. Most security holders in the Scottish market will be regulated by the Financial Conduct Authority. Our proposal to introduce a duty to conform with reasonable standards of commercial practice[39] will ensure security holders are expected to operate with an appropriate level of integrity regardless of whether they fall under FCA governance. More vulnerable debtors not covered by the enhanced debtor

---

[34] Though a court order will general be required for residential property and/or consumer debtors: see MacLeod, *Enforcement* paras 4.149-4.155.
[35] Bridge et al., *Megarry and Wade* para 24-017.
[36] Property Law Act 2007 s 119.
[37] See paras 7.42-7.48.
[38] See para 7.52.
[39] See para 2.24-2.29.

protection measures, such as microbusinesses and Small and Medium-sized Enterprises (SMEs), are protected by alternative measures, including the Business Banking Resolution Service[40] which covers businesses with a turnover up to £10 million, and the Financial Ombudsman Service's dispute resolution regime for SMEs.[41] In addition, it should be remembered that debtors and owners will retain the ability to challenge the exercise of a security in court by seeking suspension of a default notice, for example if the existence of a default is disputed. Adopting a rule that a standard security can be exercised without a court order unless exceptions apply is consistent with the position in our comparator common law jurisdictions, and with our recent proposals for enforcement of pledge.[42] We think this is the approach most in keeping with modern commercial reality.

6.19 An alternative approach which could be taken in any new legislation would be to provide that a court order is required for the exercise of remedies in all cases, but to allow parties to contract out of this requirement except in specific circumstances. Under this approach, the law defaults to the position which better protects the debtor against an unscrupulous security holder, at the cost of efficiency. The ability to contract out of the requirement provides parties with a degree of freedom to strike the balance between protection and efficiency for themselves, but also increases the overall legal complexity of standard security arrangements. It has been suggested to us that contracting out would likely be the norm in corporate security arrangements. If so, the protection to debtors that this default rule seems to provide may exist more in theory than in practice. On balance, we think our original proposal may be better suited to the needs of current practice than the alternative. However, we would be grateful for the views of consultees.

6.20 We ask:

> **25. Do consultees agree that a court order should not be required to exercise a remedy under a standard security, except where legislation specifically so provides?**

6.21 Under the current law, a security holder will sometimes choose to obtain a court order even where this is not a legislative requirement for the practical reasons outlined above. It has not been represented to us that this has caused any difficulties in practice. A concern may be raised about the expenses incurred by this process which will usually be borne by the debtor. We note, however, that expenses can only be recovered where reasonable, and we discuss options to clarify the law in this respect in Chapter 15.[43] In respect of any new legislation on standard securities, we ask:

> **26. Should a security holder be able to apply to the court for relevant orders in relation to the exercise of remedies even where such an order is not required by legislation?**

---

[40] As the BBRS website explains, "the BBRS has been established to provide an industry-funded independent service to resolve eligible historical and future disputes between SMEs and participating banks, with a view to delivering fair, reasonable and independent outcomes and without the need for litigation or external legal support.": https://thebbrs.org/faqs/#.

[41] See https://sme.financial-ombudsman.org.uk/who-we-are.

[42] Report on Moveable Transactions paras 27.46-27.54.

[43] Paras 15.10-15.13.

6.22 Under the current law, where a court order is sought in any case other than one in which the security property is used to any extent for residential purposes, proceedings are by way of ordinary cause. We are not aware of any concerns in this respect. We discuss court proceedings in cases to which the enhanced debtor protection measures apply in Chapter 8.

6.23 We ask:

27. Should court proceedings in respect of the exercise of standard securities be raised by way of ordinary cause procedure, except in cases to which the enhanced debtor protection measures apply?

Prescription

6.24 A final issue to be addressed in relation to court orders for the exercise of remedies concerns prescription. The obligation to recognise or obtemper a decree of court is subject to a negative prescriptive period of 20 years under the Prescription and Limitation (Scotland) Act 1973.[44] Therefore, where a creditor obtains decree under the 1970 Act, this decree is enforceable for 20 years.

6.25 In early consultation for this project, it was suggested to us that the 20-year prescriptive period for a decree is, in the circumstances of a standard security, too long. This was said to be the case particularly in respect of securities over property used to any extent for residential purposes. It was questioned, in short, whether it was justifiable to for the debtor to have the risk of their home being sold "hanging over their head" for such a long period. The shorter five-year prescriptive period for enforcement notices was also noted.[45]

6.26 As we discussed in relation to prescription of default notices earlier, the policy underlying the current law in this area is to maintain a certain degree of uniformity as to prescriptive periods, with most rights and obligations now falling within the short five-year or long 20-year prescriptive periods.[46] The long prescription applies to the obligation to obtemper any decree of court, arbitration award or order of a tribunal. Consistency may argue against altering that rule in this particular context. In practical terms, it has not been represented to us in the project so far that the long prescriptive period is causing difficulties, for example through security holders taking an unreasonably long time to execute decrees obtained under the 1970 Act. The need for a change in the law in practical terms therefore seems unclear to us at present. However, we would be grateful for the views of consultees.

6.27 We ask:

28. (a) Should the obligation to obtemper a decree of court obtained under legislation on standard securities continue to be subject to the long 20-year prescription?

(b) If not, why not?

[44] Prescription and Limitation Act 1973 Sch 1 para 2(a).
[45] See discussion at paras 5.60-5.64.
[46] Para 5.62.

Chapter 7 Enhanced debtor protection measures: application

Introduction

7.1 This chapter will consider the enhanced debtor protection measures introduced into the statutory scheme for exercise of standard securities by the Mortgage Rights (Scotland) Act 2001 and the Home Owner and Debtor Protection (Scotland) Act 2010. At present, these measures apply where the security property is used to any extent for residential purposes. This chapter will review the background to these measures and discuss the difficulties the current application criterion has caused. It will suggest reform to this application criterion in any new legislation. The content of the enhanced measures will be considered in more detail in Chapter 8.

Current law

7.2 Under the 1970 Act, where the security property is "land or a real right in land used to any extent for residential purposes",[1] the procedure by which the security is exercised includes additional measures designed to protect the interests of debtors and certain residents of that property. The key aspects of these protections are as follows.

- The security holder is required to give notice to the occupier of the security property and to the local authority when a calling-up notice[2] or a notice of default[3] is served, or an application to court is made under section 24(1B) for warrant to exercise remedies.[4]
- The security holder may exercise the remedies of recovery and sale only where the security property has been voluntarily surrendered in line with the requirements of section 23A or where warrant has been obtained under section 24(1B).[5]
- Prior to making an application under section 24(1B), the security holder must comply with the pre-action requirements (PARs).[6] These include an obligation to provide the debtor with clear information about the debt and sources of financial advice, a duty to make reasonable efforts to come to an agreement with the debtor about fulfilment of the secured obligation, and a duty not to apply for warrant if the debtor is taking steps likely to result in fulfilment of the secured obligation within a reasonable time.
- The court may not grant warrant unless the PARs have been fulfilled[7] and it is reasonable to do so in all the circumstances of the case,[8] having regard to certain factors listed in the legislation[9] which principally concern the debtor's

---

[1] 1970 Act ss 20(2A); 24(1A).
[2] *Ibid*, ss 19A and 19B.
[3] *Ibid*, s 21(2A).
[4] 1970 Act s 24(3)(b)-(c). Where the security holder seeks to eject the debtor under the Heritable Securities (Scotland) Act 1894 s 5, notification must also be given per ss 5A(2)(b)-(c).
[5] 1970 Act s 20(2A). An action for ejection will be founded on the 1894 Act s 5.
[6] 1970 Act s 20(2A)(a). The PARs are set out in s 24A and the Creditors (Pre-Action Requirements) (Scotland) Order 2010 (SSI 2010/317).
[7] 1970 Act s 24(1C).
[8] *Ibid*, s 24(5).
[9] *Ibid*, s 24(6)-(7).

circumstances and ability to remedy the default. Where the security property is their sole or main residence, the security property owner and certain family members of either the debtor or the owner ("entitled residents")[10] are also entitled to apply to the court to continue proceedings or make any other order the court thinks fit.[11]

7.3 The current legislation deals with these measures as a package, all of which are required where the security property is "used to any extent for residential purposes". On a strict reading, this suggests that the measures apply regardless of whether the debtor is an owner-occupier, corporate entity or buy-to-let landlord provided only that the property in question is in residential use. Arguably this goes beyond the intent behind the legislation. In the following paragraphs, we outline the development of the current law and the policy objectives underlying it, then review the case law and commentary to date, summarising the ongoing debate.

Development of the current law

7.4 Additional protections for residents of heritable property were first introduced into the legislative scheme for exercise of a standard security by the Mortgage Rights (Scotland) Act 2001. The purpose of the Act, as explained by MSP Cathie Craigie who introduced the Bill, was:[12]

> "…to allow the courts to consider the personal and financial circumstances of the borrower when deciding whether to grant the order asked for by the lender and to provide greater protection and information for the tenants of those in default...I believe that, by allowing the courts to take all the debtor's circumstances into account, we can reduce homelessness and ensure that lenders receive payment in full on the money that they have loaned on the property."

7.5 When introduced into Parliament, the Bill provided that it applied simply to any "standard security over an interest in land".[13] Where action had been initiated to exercise such a security, the debtor, the owner of the security property or certain family members[14] could make an application to suspend the exercise, provided that the security property was the applicant's "sole or main residence".[15] The court could order suspension where it considered it reasonable to do so in all the circumstances, having regard to a list of factors similar to those now contained in the 1970 Act, section 24(7).[16] The intention was that the suspension could provide a period of time in which "the applicant might be able to repay the debt or arrears…so as to keep their home."[17]

---

[10] Defined in the 1970 Act s 24C.
[11] 1970 Act s 24B.
[12] Scottish Parliament, Official Report, Social Inclusion, Housing and Voluntary Sector Committee, 20 September 2000 col 1374 available at: https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=3384&mode=pdf.
[13] Mortgage Rights (Scotland) Bill as introduced s 1(1).
[14] Under s 1 of the 2001 Act, applications for suspension of remedies could be made by the debtor, the owner of the security property, the spouse, civil partner or cohabitant of the debtor or owner, or a former cohabitant of the debtor or owner who remained living in the security property with any child of the relationship after the debtor or owner ceased living there.
[15] Mortgage Rights (Scotland) Bill as introduced, s 1(2).
[16] Mortgage Rights (Scotland) Bill as introduced, s 2.
[17] Explanatory Notes to the Mortgage Rights (Scotland) Bill (SP Bill 19) para 7 available at: https://archive2021.parliament.scot/S1_Bills/Mortgage%20Rights%20(Scotland)%20Bill/b19s1en.pdf.

7.6 The Bill made separate, more limited provision for other residents of the security property, such as tenants. These residents would not be entitled to apply for suspension of the exercise of the security. Nevertheless, it could be useful for them to know that enforcement action was underway, as Cathie Craigie explained:[18]

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

The Bill accordingly provided for notification to be made to the occupier of the security property and the local authority where certain steps towards exercise of "any standard security over an interest in land" were taken. The relevant steps were: (i) service of a calling-up notice; (ii) service of a notice of default; (iii) application to court for remedies on default under the 1970 Act, section 24; (iv) commencement of ejection proceedings under the Heritable Securities Scotland Act 1894, section 5.

7.7 During amendment at stage 2 of the legislative process, the application of both the suspension and notification provisions was restricted to any "standard security over an interest in land used to any extent for residential purposes". The inclusion of the phrase "used to any extent for residential purposes" was intended to exclude commercial property from the provisions in response to concerns expressed by stakeholders. Moving the relevant amendments in the Social Justice Committee, Cathie Craigie explained:[19]

> "This group of amendments would make it clear at the start of the bill that the provisions only apply to standard securities over properties that are used wholly or in part for residential purposes. It would also amend the bill to ensure that lenders were not required to issue to debtors notices of standard securities over purely commercial properties…The Keeper of the Registers of Scotland pointed out that it is unnecessary for new notices to be sent if the property is not a home, for example, if the security is over a shop unit in a local main street, or a factory unit. I accepted that criticism of the bill and propose that the notice should be sent only if the security is over the debtor's home."

7.8 The final sentence of this explanation, where property "used for residential purposes" is equated with "the debtor's home", contains the seeds of subsequent confusion in the law. Residential use of property may, of course, be made by someone other than the debtor. This is clearly recognised elsewhere in the Bill, for example in the notification provisions targeted at occupiers other than the debtor. In any event, the amendment was passed without discussion, and the legislation remained in the same terms when it entered into force later that year. Neither the small number of reported cases nor the published commentary on the 2001 Act disclose any concerns about identifying which securities fell within the ambit of the legislation.

---

[18] Scottish Parliament, Official Report, Social Inclusion, Housing and Voluntary Sector Committee, 20 September 2000 col 1376 available at: https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=3384&mode=pdf.

[19] Scottish Parliament, Official Report, Social Justice Committee, 21 March 2001 col 1915-1916 available at: https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=3400&mode=pdf.

7.9 Further change to the law followed the global financial crisis in 2008. In its wake, the Scottish Government established a Debt Action Forum composed of "stakeholders and academics invited by Scottish Ministers to consider measures that might create a coherent debt package to respond to the current financial crisis."[20] The DAF's terms of reference specified its focus as "personal debt issues."[21] The DAF established a subcommittee, the Repossessions Sub-Group, to consider "whether the protection offered to home owners at risk of repossession is adequate or needs strengthening."[22] The recommendations contained within the Final Report of the Repossessions Sub-Group[23] formed the foundations of the Home Owner and Debtor Protection (Scotland) Act 2010, which repealed and replaced the bulk of the Mortgage Rights (Scotland) Act 2001.

7.10 In its discussion of the need for additional protections, the Repossessions Sub-Group focused on personal debtors at risk of losing their home as a result of the exercise of a standard security. In its Final Report, it explained:[24]

> "We have considered measures to assist home owners in financial difficulty to stay in their homes, but we also recognise that, in some situations, it may be in their best interests to exit home ownership."

The context in which the Sub-Group placed its recommendations included consideration of other programmes designed to help home owners to "stay in their homes", including the Scottish Government's Mortgage to Rent and Mortgage to Shared Equity schemes and the UK Government's Homeowners Mortgage Support Scheme. Tenants of residential property were considered beyond the scope of the Sub-Group's remit, as shown by the consideration given to protection of tenants as a parallel but distinct issue,[25] and the desire expressed in its final recommendations to harmonise "the arrangements for repossession of owner occupied homes with those in relation to rented homes."[26] There was no suggestion that "home owner" might be understood to mean a person, such as a landlord, who owned a home lived in by other parties. There was no discussion of the concept of "residential property" as distinct from property in which the debtor or their family were living.

7.11 The Sub-Group also reviewed a number of non-legislative measures available to protect home owners in financial difficulty. These included the regulatory requirements placed on lenders by the Financial Services Authority (now the Financial Conduct Authority) in its Mortgages: Conduct of Business Sourcebook.[27] The MCOB sets out a pre-action protocol which lenders are required to follow prior to raising an action for repossession in respect of mortgages covered by the scheme, the main example of which is a "regulated mortgage contract". A regulated mortgage contract was defined at the time as a contract where credit was secured on land at least 40% of which was (intended to be) used as a dwelling by the borrower or certain family members.[28] The Sub-Group recommended that the Scottish

---

[20] Debt Action Forum (2009) *Final Report* para 2.1.
[21] Debt Action Forum (2009) *Final Report*, Annex A – DAF Terms of Reference.
[22] Debt Action Forum (2009) *Final Report*, para 2.1.
[23] Debt Action Forum (2009) *Final Report*, Annex B.
[24] *Ibid*, paras 1.3-1.4
[25] *Ibid*, paras 6.35-6.38.
[26] *Ibid*, para 6.13.
[27] The current version of the MCOB can be accessed at: https://www.handbook.fca.org.uk/handbook/MCOB.pdf.
[28] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 art 61. This article has been amended subsequently to expand the definition of a regulated mortgage contract: see para 7.43.

Government consider placing the pre-action protocol on a legislative footing to enhance the protection it provided to debtors.[29]

7.12 A further key concern of the Sub-Group was to address the process by which the court came to consider whether the exercise of remedies should be suspended in a particular case. Under the 2001 Act, the onus was on entitled parties to make an application to the court for suspension once initial steps towards the exercise of a remedy had been taken by the security holder. If no application was made, no consideration would be given to whether suspension was appropriate, and the security holder might be able to exercise a remedy without any recourse to court at all.[30] The Sub-Group considered that, to ensure the policy behind the 2001 Act could be realised, all enforcement cases to which the Act applied should call in court, irrespective of whether they were defended.[31] To achieve this outcome, it proposed a provision framed as follows:[32]

> "In respect of property to which the 2001 Act relates, a standard security can competently be enforced only by means of a section 24 application."

Thereafter, the court could consider whether it was reasonable to grant warrant as under the 2001 Act, though some changes were suggested in respect of the factors to which the court might have regard in making its determination.[33]

7.13 It is worth noting that both measures drawn upon by the Sub-Group were restricted in their application to security properties used as a residence by the debtor or connected persons. The MCOB pre-action protocol was applicable only in respect of a security over land used as a dwelling by a debtor who was a natural person or a member of their family. The court had discretion to suspend the exercise of a remedy under the 2001 Act only in respect of property (i) used to any extent for residential purposes and (ii) which the debtor, the security property owner or certain family members use as their sole or main residence. However, when the Home Owner and Debtor Protection (Scotland) Bill was introduced into Parliament, the provisions based on these measures did not appear to be similarly restricted.

7.14 The Policy Memorandum accompanying the Bill noted:[34]

> "The Scottish Government's response to the reports of the Debt Action Forum and Repossessions Group included the following commitments-
>
> (1) To act on the recommendations of the Repossessions Group, including bringing forward legislation to introduce pre-action requirements on creditors and to improve the 2001 Act protection, which is currently available only where borrowers and residents make an application to court, by extending it to all cases involving residential property."

---

[29] Debt Action Forum (2009) *Final Report*, Annex B paras 4.1-4.4; 6.26-6.30.
[30] Debt Action Forum (2009) *Final Report*, Annex B paras 6.11-6.13. The Sub-Group noted that, in practice, a creditor would usually seek a court order under s 24 of the 1970 Act, but this was not a requirement where enforcement had proceeded by way of calling-up notice or notice of default.
[31] *Ibid*, para 6.13.
[32] *Ibid*, para 6.15.
[33] *Ibid*, para 6.34 and following recommendations.
[34] Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum (SP Bill 32-PM, Session 3 (2009)) para 12 available at: https://archive2021.parliament.scot/S3_Bills/Home%20Owner%20and%20Debtor%20Protection%20(Scotland)%20Bill/b32s3-introd-pm.pdf.

On a plain reading, the amendments to the 1970 Act brought about by the 2010 Act seem to expand the application of the pre-action requirements and the suspension provisions quite considerably by comparison with their forerunners. Where the security property is used to any extent for residential purposes, a remedy can be exercised only where: (i) the property has been voluntarily surrendered in line with section 23A, which requires that the property be unoccupied; or (ii) following compliance with the pre-action requirements, a court application is made under section 24(1B), and the court considers it reasonable to grant warrant having considered the factors listed in section 24(7), which relate mainly to the debtor's behaviour and circumstances. On the face of it any debtor, from a natural person to a company, benefits from the protection of the pre-action requirements and potential suspension of the exercise of the security provided their obligation is secured on land "used to any extent for residential purposes", regardless of whether they use that property as their home.

7.15 Accepting this interpretation of the legislation would suggest that the government had adopted a markedly different policy position to that of the Sub-Group, and to that which had underpinned the suspension provisions in the 2001 Act, by taking the view that corporate debtors and buy-to-let landlords, for example, should benefit from the statutory protections it introduced. However, there is nothing in the materials documenting the passage of the Act[35] to acknowledge a change in policy. The government's stated intention, as noted above, was to implement the recommendations of the Sub-Group. There is also nothing in the materials to acknowledge that the drafting of the legislation might have the effect of extending the scope of the protections beyond personal debtors resident in the security property. In committee hearings and Parliamentary debates, the terms "debtor" and "homeowner" tend to be used interchangeably, with no suggestion that the "home" in question might not be the debtor's own. The Policy Memorandum explains that further solutions were being explored to protect tenants at risk of homelessness as a result of their landlord's default,[36] but does not suggest that, for example, the pre-action requirements or suspension of a remedy might support a debtor landlord to resolve financial difficulties, providing a contingent benefit to tenants. In short, it is not readily apparent that the 2010 Act as drafted, insofar as it extends the benefit of the protective measures to any debtor with an obligation secured on land used to any extent for residential purposes, reflected the intention of the Parliament in enacting it. At the very least, it seems fair to say that the implications of extending the application of these provisions did not receive any consideration.

Case law and commentary

7.16 Although the apparently expanded reach of the protective provisions did not form a focus in Parliament, the change was marked by legal commentators. Higgins, writing on the Bill in December 2009 shortly after its introduction into Parliament, notes:[37]

> "Part 1 of the bill…changes the landscape in relation to repossession procedures by separating out procedures for the enforcement of securities over, on the one hand,

[35] Scottish Parliament, Passage of the Home Owner and Debtor Protection (Scotland) Bill 2009 (SPPB 143) available at: https://archive2021.parliament.scot/S3_Bills/Home%20Owner%20and%20Debtor%20Protection%20(Scotland)%20Bill/BBV-143_final.pdf.

[36] Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum (SP Bill 32-PM, Session 3 (2009)) para 64 avaiable at: https://archive2021.parliament.scot/S3_Bills/Home%20Owner%20and%20Debtor%20Protection%20(Scotland)%20Bill/b32s3-introd-pm.pdf.

[37] M Higgins, "Homing Instinct" (2009) 54(12) JLSS 16, 16.

subjects "used to any extent for residential purposes" and, on the other, wholly commercial subjects.

Mortgages and other securities in the first category will be subject to a whole raft of new legislation to be developed over the next six months. The enforcement of commercial securities will remain largely unchanged, and none of the changes set out below apply to bargains where there is no usage on a residential basis. The very first question creditors need to ask themselves in future is therefore "what are the security subjects being used for?"; but canny borrowers might consider moving into their warehouses or factories for a few nights to avail themselves of the new protections."

7.17 On a related point, Reid and Gretton note in their overview of the 2010 Act as introduced:[38]

"Suppose that a person owns a flat as an investment and, having a "buy-to-let" mortgage, defaults on the loan. It appears that such a case would be covered by the new legislation."

7.18 The case law suggests a reluctance on the part of the court to construe the protective provisions in this way, however. The court has been asked to consider the meaning of land "used to any extent for residential purposes" in four reported decisions to date. The first two, *Accord Mortgages Ltd v Edwards*[39] and *Northern Rock Asset Management Plc v Fowlie*,[40] dealt with questions as to the categorisation of security property as "residential". The reasoning to be extracted from the decisions seems to be that, if the security property is not in use for residential purposes as a matter of fact at the time enforcement action is initiated, the protective provisions will not apply. In *Edwards*, the owner of the security property was deceased and his estate had been sequestrated. The property was unoccupied at the time of the action. Sheriff P J Braid was satisfied that this was not land "used to any extent for residential purposes". He found that:[41]

"...as a matter of plain English, the point in time at which the use is considered is that at which the creditor wishes to exercise his remedies."

This accorded with the purpose of the legislation, which he took to be, "to provide information and assistance to persons with a view to their not being evicted unreasonably from their homes."[42] Uses of land may change over time, but in order for the provisions to achieve their aim, the use at the time a remedy was sought under the security had to be the determining factor. In *Fowlie*, the security holder had lodged evidence in support of its averment that the security property, though residential in character, was unoccupied at the time of raising the action. Sheriff P Mann agreed that this excluded it from the application of the additional protective measures.

7.19 The approach taken in these two cases received some critical comment. Bain and Bury argue:[43]

---

[38] K G C Reid and G L G Gretton, *Conveyancing 2010* (2011) 154.
[39] 2013 SLT (Sh Ct) 24.
[40] 2013 SLT (Sh Ct) 25.
[41] 2013 SLT (Sh Ct) 24, para 7.
[42] *Ibid.*
[43] D Bain and C Bury "A home is a home" (2013) 1 SCOLAG 4, 5.

> "On any straightforward analysis of the words 'residential purposes', a house abandoned by its owner does not suddenly arbitrarily become a shop or other commercial premises or some undesignated 'non-residential' class simply because it is not currently being used as a dwelling house. The approach approved by the courts in [*Edwards* and *Fowlie*] might be characterised as a 'snap-shot in time' approach, in which the instant status of a property may be determinate of the proprietor's rights. For example, a house in Stonehaven may have become damaged by storms and flooding, and may have been cleared and left unoccupied pending repairs and subsequent reoccupation, with the residents meantime moving temporarily in with relatives. Can that property be said to have ceased to be residential? A home is a home."

They also query the need for the voluntary surrender provisions in section 23A of the 1970 Act, which require written confirmation from the debtor and other entitled residents that the security property is unoccupied, if the fact of ceasing to occupy is sufficient in itself to remove the property from the ambit of the protective provisions.[44]

7.20 In the third case, *Westfoot Investments Ltd v European Property Holdings Inc*,[45] Sheriff TC Welsh QC took the opportunity to consider the scope of the protective provisions more generally, notwithstanding that their application to the case was not in dispute between the parties. The defender debtor was a property development company. It had taken a loan from the pursuer, secured on two flats in Edinburgh that were let by the defender for market rent. The defender fell into arrears. The pursuer sought to exercise remedies under the securities on the understanding that the security properties were "used to any extent for residential purposes", and so the enhanced measures applied. Following expiry of the calling-up notice, the pursuer complied with the pre-action requirements before raising an action for warrant to sell in terms of section 24. The case was defended on various grounds including errors in compliance with the pre-action requirements and the averred unreasonableness of granting warrant given the history of efforts made to effect repayment.

7.21 The court made a finding that the pursuer had complied fully with the pre-action requirements, and it seemed that warrant could simply have been granted under section 24. However, the court did not consider this to be the correct reading of the legislation. Sheriff Welsh noted:[46]

> "The solicitor for the pursuer, supported by counsel in this regard, seemed resigned to the suggestion that land use alone determined whether the protective régime is engaged and applies, irrespective of the purpose for which the standard security was used and the scheme *and purpose* of the 2010 Act.
>
> I am not persuaded that this restricted reading is justified or produces a legitimate result. In fact, I am of the opinion, it produces a perverse result and is the antithesis of the intention of the legislature."

7.22 His interpretation of the legislation was that it is designed to provide protection where certain persons are at risk of losing their home should power of sale be exercised. Those persons are the debtor, the owner of the security property and entitled residents as specified at sections 24B-C, in addition to other occupiers who must be given notice of proceedings

---

[44] Bain and Bury, "A home is a home", 5.
[45] 2015 SLT (Sh Ct) 201.
[46] *Ibid,* paras 23-24. Emphasis included in original text.

under section 24(3)(b), albeit that they are not entitled to enter the process.[47] This construction was based on a purposive reading of the relevant sections, particularly the fact that the identification of entitled residents by way of their relationship to the debtor tends to suggest that the debtor was intended to be a natural person, the fact the court is directed to consider the debtor's "personal circumstances" under the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010, art 3(1)(e), and the fact the court has to take into account the ability of the debtor to secure reasonable alternative accommodation under the 1970 Act, s 24(7).[48] The sheriff also noted wording in the SPICe Briefing on the Home Owner and Debtor Protection (Scotland) Bill and the Scottish Government guidance on the pre-action requirements which suggested that the legislation was aimed at protecting people facing repossession of their homes.[49] He concluded that:[50]

> "…corporate borrowers that grant standard securities over their residential property assets and use these as collateral security, to raise capital on the financial markets, are not included within the scope of the protection created."

7.23 The reasoning of the Sheriff in *Westfoot Investments* was upheld by the Sheriff Appeal Court in *Royal Bank of Scotland Plc v Mirza*.[51] The defender was a natural person, but was admittedly not in occupation of the security property at the time of service or expiry of the calling-up notice – in fact, he was both resident and domiciled elsewhere. At first instance, the sheriff followed *Westfoot* in finding that the security property in this case was not "used to any extent for residential purposes" within the meaning of the 1970 Act, since it was not the debtor's home. Compliance with the pre-action requirements was accordingly not required. The Sheriff Appeal Court agreed with the approach taken at first instance. Delivering the opinion of the court, Sheriff P Arthurson QC suggested that, in determining whether the provisions applied, the first question that should be asked was "Were the subjects used to any extent for residential purposes?" That question, in the view of the court, must logically precede the question suggested by Sheriff Welsh in *Westfoot Investments*, namely "*Whose* home?".[52] Sheriff Arthurson clarified that factual presence in the property at a particular time need not be determinative, since temporary absence in a hospital or hospice could be accommodated within the definition.[53] The focus should be rather on the purposes to which the relevant party had put the property.

7.24 From the case law, then, it could be suggested that the protective provisions will apply only where the debtor is a natural person and only if the security property is being used "to any extent for residential purposes" at the time exercise of the security is initiated. Whether these decisions represent an appropriate construction of the statute is a matter of debate.[54] The decisions also leave some questions unanswered. For example, do the protective provisions apply if the debtor is a natural person who leases the property to tenants on a residential basis? Future legislation on standard securities must remove these ambiguities in line with the policy intent behind the current legislation.

---

[47] *Ibid,* para 24.
[48] 2015 SLT (Sh Ct) 201 paras 21-22, 25-26.
[49] *Ibid,* para 27.
[50] *Ibid,* para 26.
[51] 2017 SLT (Sh Ct) 105.
[52] *Ibid,* para 4, citing *Westfoot Investments* para 24.
[53] *Ibid.*
[54] Higgins, *Enforcement* para 6.1 fn 3 suggests the reading in *Westfoot Investments* "flies in the face of clear, express wording in primary legislation."

Debtor and residential property protection in other enforcement processes

7.25 Protections for residential debtors within the current standard securities regime fit within a framework of protections for individual debtors and the family home in the law of debt enforcement more broadly. Discussion of appropriate reform to the law of standard securities in this respect may therefore be usefully informed by an understanding of the protections that exist in other debt enforcement processes which may result in forced sale or confiscation of residential heritable property. In this section, we consider insolvency processes, diligence and confiscation under the proceeds of crime legislation.

Debt Advice and Information Package

7.26 The debt advice and information package (DAIP) is a booklet produced by the Accountant in Bankruptcy on behalf of the Scottish Government[55] which sets out the debtor's rights in relation to any legal proceedings raised against them by a creditor and contains information on local sources of support for addressing financial difficulties.[56] Where a creditor wishes to apply for sequestration or carry out most forms of diligence against a debtor who is a natural person, the creditor must first provide the debtor with a copy of the DAIP.[57]

Insolvency processes

7.27 Sequestration[58] is the insolvency process applicable to natural persons.[59] It is a judicial process, with sequestration awarded by the court in appropriate circumstances[60] following an application by a creditor or certain other qualified persons.[61] Alternatively, a debtor may apply to the Accountant in Bankruptcy to sequestrate their own estate.[62] The effect of a sequestration order is to vest the debtor's estate in a trustee in sequestration, who is empowered to realise the estate for the benefit of creditors.[63] Protection for the debtor's family home during the sequestration process was introduced by section 40 of the Bankruptcy (Scotland) Act 1985, which was amended to apply also to administration of an estate under a trust deed for creditors[64] by section 11 of the Home Owner and Debtor Protection (Scotland) Act 2010. The legislation is now consolidated in the Bankruptcy (Scotland) Act 2016. These provisions are aimed at alleviating hardship to the debtor's family, although the debtor may incidentally benefit.[65] Section 113(7) of the 2016 Act defines "family home" as a property in which, on the

---

[55] Debt Arrangement and Attachment (Scotland) Act 2002 s 10(5).
[56] The booklet is available on the Accountant in Bankruptcy's website at https://www.aib.gov.uk/debt/deal-debt/debt-advice-and-information-package.
[57] For example, Bankruptcy (Scotland) Act 2016 s 3(1) re sequestration; Bankruptcy and Diligence etc. (Scotland) Act 2007 s 174(2)(d) re money attachment and s 147 re inhibition. A summary of time limits for service of a DAIP in respect of all processes is available at https://www.aib.gov.uk/guidance/publications/information-guides-and-booklets/debt-advice-and-information-package/timescale (The authorities listed on this page have not been updated to reflect the introduction of the 2016 Act).
[58] Discussion of this process is necessarily sparse. A detailed treatment can be found in D W McKenzie Skene, *Bankruptcy*, Scottish Universities Law Institute Series (2017).
[59] Trusts, partnerships, limited partnerships, bodies corporate (other than companies and limited liability partnerships) and unincorporated bodies can also be subject to sequestration proceedings under the Bankruptcy (Scotland) Act 2016 s 6. However, the family home protections are not relevant to entity debtors since they cannot occupy a property as a residence or have spouses, civil partners or children.
[60] Bankruptcy (Scotland) Act 2016 ss 22-23.
[61] *Ibid*, s 2(1)(b).
[62] *Ibid*, s 2(1)(a).
[63] *Ibid*, ss 50 and 78.
[64] This may be understood as a type of non-judicial sequestration process, voluntarily entered into by the debtor and their creditors.
[65] *Bankruptcy* (2017) SULI, 11-32-11-38.

day immediately preceding the date of sequestration, the debtor had a right or interest and the property was occupied as a residence by:

- The debtor together with their spouse or civil partner;
- The debtor together with any child of the family;[66]
- The debtor's current or former spouse or civil partner, with or without any child of the family.

7.28 Although the family home vests in the trustee in sequestration alongside the rest of the debtor's estate, before the trustee sells or disposes of any interest in it, they must obtain either a "relevant consent" or the authority of the sheriff.[67] A relevant consent is one obtained from the debtor's current or former spouse or civil partner where they occupy the home as a residence, or the consent of the debtor where they occupy the home as a residence with any child of the family.[68] Where an application under this section is made by the trustee, the sheriff is directed to have regard to all the circumstances of the case, including:[69]

- The needs and financial resources of the debtor's current or former spouse or civil partner;
- The needs and financial resources of any child of the family;
- The interests of creditors;
- The length of the period during which the family home was used as a residence by any of the persons referred to above.

The sheriff may then grant or refuse authority, or may postpone the granting of the application for up to three years, or may grant authority subject to certain conditions.[70]

7.29 At the end of three years beginning with the date of sequestration, unless the trustee has taken steps towards selling or disposing of the family home,[71] it ceases to form part of the sequestrated estate and is reinvested in the debtor.[72] This provision, first introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007,[73] does not apply in the case of a trust deed for creditors.

7.30 Consideration was given to the definition of "family home" in sequestration proceedings by Lord Tyre in *Fortune's Trustee v Cooper Watson Ltd*.[74] The sequestrated debtor had concluded missives for sale of a property which he contended had reinvested in him under section 39A of the 1985 Act[75] since more than three years had passed since the date of sequestration. The trustee in sequestration challenged this contention on various grounds, including that the property was not a family home within the meaning of the Act.[76] Both parties

---

[66] "Child of the family" is defined in s 113(7) to include any legal or accepted child or grandchild of the debtor and/or the debtor's current or former spouse or civil partner, regardless of age.
[67] 2016 Act s 113(1).
[68] *Ibid*, s 113(7).
[69] *Ibid*, s 113(2).
[70] *Ibid*, s 113(2).
[71] Section 112(3) provides an exhaustive list of actions undertaken by the trustee which will prevent the family home reinvesting in the debtor.
[72] 2016 Act s 112(2).
[73] 2007 Act s 19, inserting s 39A into the Bankruptcy (Scotland) Act 1985.
[74] [2017] CSOH 74.
[75] Now 2016 Act s 112.
[76] 1985 Act s 40 (now 2016 Act s 113).

accepted that the onus of proving the property met the statutory definition lay on the debtor.[77] Lord Tyre considered it clear that more than one property could fall within the definition of family home if, for example, the debtor and his spouse occupied one property as a residence at the date of sequestration, while the debtor's ex-spouse and child occupied another. However, he thought it very unlikely that the same person could *simultaneously* occupy more than one property as a residence. He noted:[78]

> "The focus of the definition is upon the situation at a particular date. Clearly the benefit of falling within the definition would not be lost by a short-term absence by the occupier, for example on business or on holiday or, as in the circumstances of this case, because of detention in custody. But if the reason for absence from Property A was that the person concerned was occupying Property B as a residence, then in my opinion it is unlikely that it could be argued that he or she was nevertheless also still occupying Property A. Even if both properties could reasonably be described as residences, only one or other could at any given time, save in exceptional circumstances, be occupied as such."

7.31 The debtor gave evidence of a complex pattern of living arrangements in the years leading up to the sequestration, including some time spent at a home in France and some in custody, but the court found this to be largely incredible and unreliable.[79] Based on contemporaneous correspondence from the debtor's former partner to the trustee in sequestration, to the effect that the debtor was not living in the property in question but was attempting to present himself as living there for some unknown gain, the court found on a balance of probabilities that the debtor had not occupied the home as a residence at the relevant date.[80]

7.32 No protections for residential property are available in corporate insolvency processes.

Diligence

7.33 Adjudication is the diligence by which an unsecured creditor may enforce payment of a decree against heritable property owned by a debtor. On registering their decree of adjudication in the Land Register or Register of Sasines against the property owned by the debtor, the creditor obtains a right of security (though not a standard security) in respect of it. The adjudger may seek to eject the debtor from the property,[81] grant leases in respect of it and keep the rent paid by tenants in satisfaction of the debt.[82] If the debt has not been repaid at the end of ten years, the adjudger may seek declarator of "expiry of the legal", meaning expiry of this ten year period without repayment of the debt. Registration of the declarator transfers ownership of the property to the adjudger.[83] Like a standard security holder, an adjudger is empowered to seek ejection of the debtor under the Heritable Securities (Scotland) Act 1894,[84] meaning that the provisions applicable to property "used to any extent for residential purposes" apply equally to an adjudger seeking ejection as to a standard security holder.[85] There are no

---

[77] Para 3.
[78] Para 6.
[79] Para 20.
[80] Para 28.
[81] Heritable Securities (Scotland) Act 1894 s 5.
[82] 1894 Act ss 6-7.
[83] *Hull v Campbell* 2011 SLT 881.
[84] J G Stewart, *A treatise on the law of diligence* (1898) 624; Gretton, *Inhibition* 220.
[85] 1894 Act ss 5A-F.

reported cases on the application of these provisions in the adjudication context, which is unsurprising considering that adjudication is little used.

7.34 Provision was made in the Bankruptcy and Diligence etc. (Scotland) Act 2007 for adjudication to be abolished[86] and replaced with the new diligence of land attachment.[87] These provisions have yet to be brought into force.[88] In brief, the 2007 Act provides that the creditor must register a notice of land attachment against heritage owned by the debtor in the Land Register or Register of Sasines, and against the debtor's name in the Register of Inhibitions.[89] 28 days later, the attachment takes effect to provide the attacher with a right in security over the property.[90] After six months have passed, if at least £3,000 of debt remains outstanding, the attacher can apply to court for warrant to sell the property.[91]

7.35 Section 98 makes special provision in respect of attached land which comprises or includes a dwellinghouse, and that dwellinghouse is the sole or main residence of the debtor, the attached property owner or certain family members.[92] A dwellinghouse may be a sole or main residence irrespective of whether it is used to any extent by the debtor, the owner or one of the family members for the purposes of any profession, trade or business.[93] Where an application is made for warrant to sell a property falling within the section 98 definition, the sheriff must have regard to:[94]

- The nature of and reasons for the debt secured by the land attachment;
- The debtor's ability to pay the debt outstanding if the effect of the warrant for sale were suspended;
- Any action taken by the creditor to assist the debtor in paying that debt;
- The ability of those occupying the dwellinghouse as their sole or main residence to secure reasonable alternative accommodation.

The sheriff may refuse to grant the warrant, or suspend its application for up to one year, if to do otherwise would be "unduly harsh" to the debtor or any other person with an interest.[95]

7.36 In their commentary on these provisions, Reid and Gretton note that the question of whether residential property should be attachable at all was a matter of "sharp political controversy", and that it remains to be seen whether the compromise represented by section 98 proves lasting.[96] Under section 92, Scottish Ministers may, by regulations, provide that an application for warrant to sell may only be made in respect of attached land which does not comprise or include a dwellinghouse. The Accountant in Bankruptcy's website includes a note

---

[86] 2007 Act s 79.
[87] These provisions largely implement recommendations contained in Scottish Law Commission, Report on Diligence (Scot Law Com No 183, 2001) available at: https://www.scotlawcom.gov.uk/files/6412/7989/7339/rep183.pdf.
[88] We understand that the Accountant in Bankruptcy's Diligence Working Group is currently giving consideration to their implementation with a view to making recommendations to Scottish Ministers: Diligence Working Group Terms of Reference, available at: https://www.aib.gov.uk/about-aib/stakeholder-working-groups/diligence-working-group.
[89] 2007 Act s 83.
[90] *Ibid*, s 81.
[91] *Ibid*, s 92.
[92] The relevant class of family members is the same as provided for in the 1970 Act regime, namely the spouse, civil partner or cohabitant of the debtor or owner, or a former cohabitant of the debtor or owner who remained living in the dwellinghouse with a child of the relationship after the debtor or owner ceased living there.
[93] 2007 Act s 98(8).
[94] *Ibid*, s 98(5).
[95] *Ibid*, s 97(3).
[96] K G C Reid and G L G Gretton, *Conveyancing 2006* (2007) 134.

that the First Minister has announced that a debtor's home will not be subject to land attachment.[97]

Proceeds of crime legislation

7.37 Under the Proceeds of Crime Act 2002, where an accused is convicted of a criminal offence, and the prosecutor asks the court to do so, the court is empowered to make a confiscation order requiring an accused to pay an amount of money ("the recoverable amount") which represents the accused's financial benefit from the crime.[98] The order may relate to a benefit directly connected to a specific offence or offences, such as property stolen during a housebreaking. Alternatively, the order may result from the accused's conviction for "lifestyle offences", chief amongst which are drug trafficking and money laundering.[99] Where the accused has a criminal lifestyle, the court is entitled to assume that all assets acquired by the accused in the six years prior to the initiation of the criminal proceedings in question were the result of the accused's criminal conduct.[100] Where the accused does not make payment of the recoverable amount within a specific time, and the confiscation order is no longer subject to appeal, the court may appoint an enforcement administrator to take possession of, manage and/or realise the accused's property with a view to satisfaction of the debt.[101]

7.38 Section 98 of the 2002 Act provides protection for the family home where it is part of a benefit resulting from the accused's criminal lifestyle. Where acquisition of the home can be connected to a specific offence, the protection does not apply. The family home is defined as any property in which the accused had a right or interest, occupied as a residence by: the accused together with their spouse; the accused's spouse or former spouse alone; or the accused or their spouse or former spouse together with any child of the family.[102] The administrator can dispose of any right or interest in the family home only with the consent of the accused's current or former spouse where they occupy the family home, or with the consent of the accused if they occupy the home together with a child of the family. If consent is not given in these circumstances, the administrator must apply to the court for authority to carry out the disposal. The court may grant or refuse the application, or postpone its grant for a period of 12 months, after having regard to all the circumstances of the case including:

- The needs and financial resources of any spouse or former spouse of the person concerned;
- The needs and financial resources of any child of the family;
- The length of the period during which the family home has been used as a residence by any of above persons.[103]

Comparative material

7.39 MacLeod observes that it is difficult to discern "much in the way of a meaningful pattern"[104] in the approach taken to protection of consumer debtors and residential property in

[97] https://www.aib.gov.uk/services/future-changes/attachment-land.
[98] 2002 Act s 92.
[99] The full list is set out in the 2002 Act Sch 4.
[100] 2002 Act s 96. This assumption can be overturned by evidence of a legitimate source for the asset(s).
[101] 2002 Act s 128.
[102] Child of the family is defined to include any legal or accepted child or grandchild of the accused or his spouse or former spouse, whatever the child's age: s 98(5).
[103] 2002 Act s 98(3).
[104] MacLeod, *Enforcement* para 4.171.

our comparator jurisdictions. New Zealand has no mortgage-specific protections, though mortgage debtors will be able to make use of a general provision allowing consumer debtors to apply to court for the debt arrangement to be restructured in circumstances where they have reasonable cause for being unable to meet their obligations.[105] In Germany, where the realisation of value of the security property is by way of the general law of judicial execution, a debtor may make use of provisions in the rules of civil procedure to have the execution set aside "if the measures in question are *contra bonos mores* because of the very particular hardship to which they would give rise".[106] France has no specific protections beyond a general restriction on the availability of *expulsion* (the equivalent of an action for ejection) in relation to a *lieu habité* (dwellingplace) for two months,[107] or longer in certain circumstances concerning, for example, the time of year.[108]

7.40 In South Africa, protection for mortgage debtors flows principally from the constitutional right to have access to adequate housing,[109] with additional legislative protections for consumer debtors.[110] The absence of an equivalent constitutional right in a Scottish context makes it difficult to draw much assistance from the case law here.[111]

7.41 Finally, England has a number of protections in place, perhaps most importantly the Consumer Credit Act 1974, which also applies in Scotland, and which we discuss further below. Mortgagees are additionally obliged to comply with a pre-action protocol[112] annexed to the Civil Procedure Rules[113] prior to raising possession proceedings in respect of "residential mortgages",[114] although buy-to-let mortgages are specifically excluded.[115] Where a creditor seeks possession of a dwelling-house under a mortgage which is not covered by the Consumer Credit Act 1974,[116] the Administration of Justice Act 1970, section 36, gives the court wide discretion to delay enforcement or suspend an enforcement order where it thinks the debtor is likely to be able to remedy the default within a reasonable period.

Consumer Credit Act 1974

7.42 The final issue which it is useful to consider prior to discussion of when the enhanced debtor protection measures should apply in any new standard securities legislation is the Consumer Credit Act 1974. Exercise of a standard security must conform to the requirements of both the 1974 Act and any relevant Scottish legislation. It would accordingly be sensible to align new standard securities legislation with the requirements of the 1974 Act so far as is possible.

---

105 Credit Contracts and Consumer Finance Act 2003 ss 55-59A.
106 German Code of Civil Procedure § 756a, translated by MacLeod, *Enforcement* para 4.166.
107 French Code of Civil Enforcement Procedures art L412-1.
108 *Ibid,* art L412-2-4.
109 Constitution of the Republic of South Africa s 26(1).
110 National Credit Act 34 of 2005 ss 129-130.
111 MacLeod provides a brief discussion at para 4.169.
112 Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property available at: www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha.
113 Practice Direction – Pre-Action Conduct and Protocols (11 February 2017) available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.
114 Pre-Action Protocol para 4.1.
115 *Ibid*, para 4.3.
116 Administration of Justice Act 1970 s 38A.

7.43 The 1974 Act makes provision for protection of individual consumer debtors,[117] and, broadly speaking, has no application to entity debtors. The Act deals with two main categories of heritable security arrangement relevant to the present discussion.[118] First, a regulated mortgage contract is defined as one where credit secured by "a mortgage"[119] on land in the European Economic Area is provided to (i) an individual and at least 40% of that land is (intended to be) used as or in connection with a dwelling[120] or (ii) trustees, and at least 40% of that land is (intended to be) used as or in connection with a dwelling by an individual who is a beneficiary of that trust or a related person.[121] Certain types of mortgage contract which meet these requirements are, however, explicitly excluded from the definition, the most significant of which is buy-to-let mortgage contracts.[122] Secondly, an agreement relating to the purchase of land for non-residential purposes is defined as one in which credit is secured by a mortgage on land where less than 40% of the land is (intended to be) used as a dwelling by the borrower or a related person, or by the beneficiary of a trust where the borrowers are the trustees.[123] This covers buy-to-let mortgage contracts as well as contracts for land used for entirely commercial or industrial purposes.

7.44 The bulk of the provisions of the 1974 Act apply only to "regulated agreements" as defined in section 8(3). Both regulated mortgage contracts and agreements relating to the purchase of land for non-residential purposes are excluded from that definition, taking standard securities outside the scope of the Act for the most part.[124] However, section 126 provides that a "land mortgage"[125] securing certain types of agreement will be enforceable only on an order of the court. A regulated mortgage contract is one such agreement, meaning that a court order is always required to exercise a security against an individual debtor where the security property is used as a dwelling, unless the individual is a buy-to-let landlord.

7.45 Under section 126, a court order is also required to enforce a land mortgage securing a consumer credit agreement that would be a regulated agreement but for the fact it relates to the purchase of land for non-residential purposes. The fact that an agreement relates to the purchase of land for non-residential purposes may not be the only reason it is exempted from the definition of regulated agreements. An exemption applies where the agreement is entered into "wholly or predominantly" for business purposes and the credit advanced exceeds £25,000.[126] An exemption applies where a credit agreement secured on land is made with a "high net worth" individual.[127] Exemptions apply where credit is advanced by a local authority

---

[117] Individual is defined to include (i) a partnership consisting of two to three persons, not all of whom are bodies corporate, and; (ii) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership: Consumer Credit Act 1974 s 189.
[118] For more detailed discussion, see H G Beale, *Chitty on Contracts* (33rd edn, 2019) paras 39-038-39-040.
[119] Defined as including "a charge and (in Scotland) a heritable security": Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (known as the Regulated Activities Order or RAO) art 61(4)(a).
[120] RAO art 61(3). There is no requirement that the land be used as a dwelling by the individual debtor.
[121] *Ibid*. A related person is defined as the spouse, civil partner, cohabitant, parent, brother, sister, child, grandparent or grandchild of the borrower or the beneficiary under a trust: RAO art 61(4)(c).
[122] RAO art 61A.
[123] *Ibid*, art 60D.
[124] 1974 Act s 8(3); RAO art 60B (defining a regulated agreement as one which is not exempt under RAO ch 14A); 60C(2) (providing that a regulated mortgage contract is exempt under RAO ch 14A); 60D (providing that an agreement relating to the purchase of land for non-residential purposes is exempt under RAO ch 14A).
[125] Defined as including "any security charged on land": 1974 Act s 189.
[126] RAO art 60C(3).
[127] *Ibid*, art 60H. A high net worth individual is one with an income or assets above FCA-specified limits (currently £150,000 and £500,000 respectively), in respect of whom various procedural requirements must be fulfilled before this exemption will apply: see the FCA Consumer Credit sourcebook (CONC) Appendix 1.4, available at: https://www.handbook.fca.org.uk/handbook/CONC/App/1/4.html.

or other bodies prescribed by the FCA[128] for the purchase of land,[129] or where credit is advanced by a housing authority secured on land used as a dwelling.[130] There are other exemptions of less immediate relevance to the current discussion.[131] Where an agreement relating to the purchase of land for non-residential purposes also falls within one of these exemptions, no court order will be required to enforce it under section 126. If the only exemption which applies is that for the purchase of land for non-residential purposes, however, a court order will be required.

7.46 The combined effect of these provisions is that a court order will be required to exercise a security against:

- an individual debtor where the security property is used as a dwelling by anyone (except on a buy-to-let basis);
- trustee debtors where the security property is used as a dwelling by a beneficiary of the trust or a related person;
- an individual or trustee debtors where the security property is not in use as a dwelling by the borrower, a beneficiary under a trust, or related person, provided that the agreement was not entered into wholly or predominantly for business purposes, the debtor is not a high net worth individual, and no other exemptions apply.[132]

7.47 In circumstances where section 126 requires a court order for the exercise of a remedy under a security, the debtor can consent to the remedy being exercised without a court order under the waiver provision in section 173(3).

7.48 Section 126 provides that the judicial controls on enforcement set out in Part 9 of the 1974 Act will also apply to a limited category of regulated mortgage contracts. Where the purpose of the contract is to acquire or retain property rights in land or in an existing or projected building, the judicial controls will not apply.[133] However, where the purpose of the contract is something else – for example, to carry out renovations to a property which the debtor already owns – the judicial controls will apply. The relevant controls are the power of the court to make a time order, specifying payment of the debt by such instalments and at such times as the court considers reasonable having regard to the means of the debtor,[134] and the power of the court to suspend the effect of orders for enforcement or to impose conditions on them where it considers it just to do so.[135]

---

[128] Mainly life assurance companies and charities. The full list is found in the FCA Consumer Credit sourcebook (CONC) Appendix 1.3, available at: https://www.handbook.fca.org.uk/handbook/CONC/App/1/3.html.

[129] RAO art 60E(2).

[130] *Ibid*, art 60E(5).

[131] See generally RAO arts 60C - 60HA.

[132] The number of cases in which a non-high net worth individual borrows money to purchase land for a non-residential, non-business purpose must be small, but perhaps examples can be imagined.

[133] 1974 Act s 126(2) provides that Part 9 controls will apply to a regulated mortgage contract which would be a regulated agreement under s 8(3) but for the exemption in RAO art 60C(2). A regulated mortgage contract the purpose of which is to acquire or retain property rights in land or in an existing or projected building is excluded from the definition of a regulated agreement by both the exemption in RAO art 60C(2) and the definition in art 3(1)(b) of the Mortgage Credit Directive.

[134] 1974 Act s 129.

[135] *Ibid*, s 135.

Discussion

7.49 In the past 20 years, Parliament has introduced two significant pieces of legislation aimed at enhancing the protection of vulnerable debtors where a standard security is exercised. In summary, these enhanced debtor protection measures require warrant of the court for the exercise of remedies, with warrant granted only where the PARs have been fulfilled and the court considers it reasonable in all the circumstances of the case.[136] We noted at the start of this Discussion Paper that we intend to respect the recent policy choices of the Parliament on these issues.[137] Accordingly, we consider it necessary for any new legislation on standard securities to continue to provide enhanced protection to vulnerable debtors through measures of a similar kind. However, the opportunity should be taken to resolve the difficulties outlined above relating to the applicability of the current measures, whilst adhering to the underlying policy.

7.50 Under the current law, the enhanced measures apply where a security property is used to any extent for residential purposes. This applicability criterion arguably fails to capture the intent behind the legislation, and has given rise to a number of ambiguities. In the paragraphs which follow, we seek views on preliminary proposals that the enhanced debtor protection measures should apply in future where two criteria are fulfilled. First, the debtor or owner of the security property must be a natural person ("the person criterion"). Second, the security property must comprise or include a dwelling house ("the property criterion"). Separately, we make provisional proposals as regards notification to the occupier of a security property and the local authority that a default notice has been served.

Person criterion

7.51 We provisionally propose that the enhanced debtor protection measures should apply only where the debtor or owner of the security property is a natural person. This is the understanding of the current legislation set out by Sheriff Welsh in *Westfoot*, as approved by the Sheriff Appeal Court in *Mirza*. It accords with our understanding of the policy intention behind the introduction of the measures, and is consistent with the approach taken in other debt enforcement processes as regards both provision of the DAIP and protection of the family home. There is no obvious support within the policy discussions, by comparison with the other debt enforcement processes in Scotland, or in our comparator jurisdictions for extending the application of these measures to juristic person debtors.

7.52 In formulating this proposal, we have given careful consideration to the requirements of the Consumer Credit Act 1974. Section 126 of this Act requires a court order for the exercise of a security in certain circumstances where the debtor is an "individual", a term which includes both natural persons and certain partnerships. Section 126 also requires a court order in certain circumstances where the debtors are trustees, which includes juristic persons acting as trustees. There would be obvious advantages in terms of legal clarity to aligning the applicability criteria for the enhanced debtor protection measures with the criteria for section 126. For that reason, we considered whether the person criterion should be expanded to cover all the persons in respect of whom a court order may be required by the 1974 Act. However, this approach creates other difficulties. The 1974 Act does not require compliance with the pre-action requirements or an equivalent, and the powers of the court where an order is sought

---

[136] The content of each of these measures is considered in Chapter 8.
[137] Para 1.12.

in terms of the 1974 Act provisions are more restricted than under the Scottish legislation. It is not clear that the desire for consistency with section 126 can justify the expansion of the enhanced debtor protection regime beyond the policy intent behind the measures, nor the attendant costs which the expansion would entail. Incorporating the complexity of the 1974 Act into new standard securities legislation may also be considered undesirable from a legal accessibility perspective. Although the retention of two overlapping regimes here is certainly an imperfect solution, our provisional view is that it may nevertheless be preferable to aligning the person criterion for the enhanced debtor protection measures with section 126.

7.53 A complexity arises in relation to the person criterion where the debtor and the owner of the security property are different persons, one a natural person and the other a juristic person. This is not an uncommon situation in practice, as for example where one spouse grants security over the family home for the debts of the other spouse's business, or a company grants security over one of its assets for a loan taken by one of its directors. Here, it is worth considering what each of the enhanced debtor protection measures is designed to achieve. The pre-action requirements are primarily designed to support the debtor to resolve the default, though of course the owner will receive a contingent benefit if this avoids the need for the security to be exercised. The requirement for warrant of the court provides an opportunity to check that there has been adherence to the PARs, again of primary benefit to the debtor. The discretion of the court as to the reasonableness of granting warrant primarily protects the security property owner (at least where the owner is resident in the security property) and any entitled residents.

7.54 An argument could be made for disapplying some of the enhanced debtor protection measures where either the debtor or the owner is not a natural person. Specifically, the PARs could be disapplied where the debtor is a juristic person, and the court's discretion to consider the reasonableness of granting warrant could be removed where the owner of the security property is a juristic person. Fine-tuning the application of the enhanced debtor protection measures in this way may align the scheme more closely with the policy intent behind the legislation, but at a cost to its simplicity and accessibility. In discussions with our advisory group, little concern was expressed about requiring compliance with the PARs where the debtor is a juristic person. More resistance was expressed to the requirement for court warrant where the security property owner is a juristic person, though it was noted that some mechanism is required by which adherence to the PARs can be ascertained in these circumstances, and the likelihood of a court refusing to grant warrant in such cases (assuming compliance with the PARs) seems low. We would be grateful for the views of consultees.

7.55 We ask:

29. Should the person criterion for application of the enhanced debtor protection measures be satisfied where both the debtor and the owner of the security property are natural persons (including where the debtor and owner are the same person)? If not, what difficulties do you identify with this proposal?

30. Where the debtor is a natural person and the owner of the security property is a juristic person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

31. Where the debtor is a juristic person and the owner of the security property is a natural person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

Property criterion

7.56 Where the person criterion is satisfied, the property criterion will also require to be satisfied in order for the enhanced debtor protection measures to apply. Our proposal is that the property criterion will be satisfied where the security property comprises or includes a dwelling house.

7.57 Under the current law, the enhanced debtor protection measures apply where the security property is used "to any extent for residential purposes". We think this formulation goes beyond the policy intent behind the legislation, which was not to protect residential property as a use class, but rather to protect natural person debtors with obligations secured on property used by them or their family as a sole or main residence. This was the focus of the 2001 legislation, and of the MCOB pre-action protocol at the time the 2010 Act was introduced.

7.58 If our proposals were to align fully with the policy intent behind the legislation, the enhanced debtor protection measures would apply only where the security property was occupied by the debtor, owner or entitled residents as their sole or main residence. We considered a property criterion along these lines. The difficulty is that the security holder has no easy way to ascertain who occupies the property. The protections conferred by the enhanced regime are reliant on the security holder making an accurate assessment of when the measures apply. If the security holder fails to do so, the protection is lost, since the debtor may well be otherwise unaware of their rights. The security holder also faces the risk of wasted resources and reputational damage, amongst other things, if it cannot identify with confidence the cases to which the enhanced measures apply. Adopting a criterion based on actual occupation of the property would therefore seem to require a high standard of diligence from security holders. This increases the complexity of the procedure and the related costs, which will ultimately fall to be paid by the debtor.

7.59 A criterion based on the nature of the property, without regard to who currently occupies it, removes much of this uncertainty. We are told that it will usually be fairly straightforward for a security holder to identify the nature of the property. The disadvantage of this approach is that it may bring some cases within the ambit of the enhanced protections which arguably were not intended to be included. The most obvious example is buy-to-let properties. Again, we understand that these properties can be identified relatively straightforwardly by security holders, and consult below on whether they should be specifically excluded from the enhanced regime. Even with this exception in place, however, there will still be cases caught by our proposed property criterion which do not align fully with the policy intent behind the legislation. On balance, and having discussed the matter with our advisory group, we nevertheless consider that the relative certainty and ease of use of this criterion is preferable to the high degree of diligence required and associated risk of error that would result from a criterion based on actual occupation.

7.60 In determining how to formulate a property criterion based on the nature of the security property, we were reluctant to employ the phrase "residential property" standing the difficulties

it has caused under the current legislation. Members of our advisory group suggested that it may be appropriate to adopt an approach in line with the legislation governing recovery of possession from residential tenants[138] and the protections available in other debt enforcement processes.[139] Here the property in question is generally described as a house or dwellinghouse. The group were content that this description would be sufficient for most lenders to accurately identify when the enhanced debtor protection measures apply. It was also suggested that if further clarification of the meaning of the term "dwellinghouse" is required, the definition of "house" in the Leasehold Reform Act 1967, s 2(1)[140] might be of assistance.[141]

7.61 Under the current law, properties which combine residential and other forms of use (such as a shop with a flat above it, or an agricultural property including a farm house) receive the protection of the enhanced measures. This seems in line with the policy intent behind the legislation, and we consider that it should be replicated in any new legislation. For that reason, the criterion is formulated to cover property "which comprises or includes" a dwellinghouse.

7.62 We would be grateful for the views of consultees in relation to our preliminary proposals on the property criterion. We ask:

32. (a) Should the property criterion for application of the enhanced debtor protection measures be satisfied where the security property comprises or includes a dwellinghouse?

(b) If not, what difficulties do you identify with this proposal, and what would you propose as an alternative?

33. Should the term "dwellinghouse" be defined in new legislation, if the property criterion is that the security property "comprises or includes a dwellinghouse" as suggested above?

34. (a) Should buy-to-let properties be excluded from the application of the enhanced debtor protection measures?

(b) Should the legislation provide for any other exceptions, and if so, what?

Notification of occupiers

7.63 Separately from the proposals on the application of the enhanced debtor protection measures outlined above, we think it is uncontroversial to suggest that, as under the current law, any new legislation on standard securities should provide for occupiers of a security property and the local authority in which the property is located to be notified that the process of exercising the security is underway. We propose that, where a default notice is served in relation to a security property which meets the property criterion for application of the

[138] Rent (Scotland) Act 1984 s 1; Housing (Scotland) Act 1988 s 12; Housing (Scotland) Act 2001 s 11.
[139] Bankruptcy (Scotland) Act 2016 s 113(7); Bankruptcy and Diligence etc. (Scotland) Act 2007 s 79.
[140] "…any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats...".
[141] We are grateful to Adrian Stalker for drawing this provision to our attention.

enhanced debtor protection measures, the security holder must give notification of the same to the occupier(s) of the security property and the local authority.

7.64 The provisions on notification of occupiers and the local authority[142] introduced by the Mortgage Rights (Scotland) Act 2001 were intended to protect tenants of the debtor, and other non-entitled residents, who might not otherwise be aware that steps had been taken towards exercising a security until an advanced stage. It was hoped that early provision of information as to their rights and sources of advice might assist non-entitled residential occupiers to find alternative accommodation more easily. However, there was no intention that the existence of such a resident should suspend or prevent a remedy being exercised.

7.65 It was explicitly recognised in the Parliamentary discussion that a security holder is unlikely to know when there are non-entitled residents in a security property. Their occupation may well be in breach of the standard conditions. This notification is therefore sent as a safety net. At present, occupiers' notification must be sent where the security property is used "to any extent for residential purposes". In line with our proposals above, we suggest that the notification requirement should now apply where the property criterion for application of the enhanced debtor protection measures is satisfied. If consultees support our approach to the property criterion, this will mean the notification requirement will apply where the security property "comprises or includes a dwellinghouse". We would emphasise that notification would be required where the property criterion is met even where the case is excluded from the enhanced debtor protection regime for other reasons, for example that the debtor and owner are juristic persons, or the security property is a buy-to-let property.

7.66 Under the current legislation, notice to the occupier must be in a prescribed form and sent by recorded delivery letter addressed to "The Occupier" at the security property.[143] Notice to the local authority must be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.[144] We are not aware of any difficulties with these provisions in practice and suggest that equivalent provision be made in any new legislation.

7.67 We provisionally propose:

35. Where a default notice is served in relation to a security property which meets the property criterion for application of the enhanced debtor protection measures, the security holder must give notification of the same to the occupier(s) of that property and to the local authority in which the property is located.

Do consultees agree?

[142] 1970 Act ss 19A-B, 21(2A) and 24(3)(b)-(c).
[143] 1970 Act s 19A. The form is set out in Sch 6 to the Act (Form BB).
[144] 1970 Act s 19B.

Chapter 8 Enhanced debtor protection measures: content

Introduction

8.1 In Chapter 7, we set out the background to the introduction of the enhanced debtor protection measures and made preliminary proposals in respect of the circumstances in which these measures should apply in any new legislation. In this chapter, we focus on the content of the measures.

8.2 It may be useful here to recap the revised procedure for the exercise of a standard security provisionally proposed earlier in this Discussion Paper[1] to clarify where and how the enhanced debtor protection measures fit. Under our provisional proposals, the availability of remedies under a security is triggered by default, defined as non-performance of the secured obligation. In the standard case, following default, a security holder who wishes to enforce the secured obligation must serve a default notice, and may proceed to exercise remedies on expiry of that notice, subject to the requirement to obtain a court order in certain situations (for example, to eject occupants from the security property). In cases to which the enhanced debtor protection measures apply, this revised procedure contains additional steps. Following default, a security holder who wishes to enforce the secured obligation must first comply with the pre-action requirements (PARs). If no resolution to the default is found, the security holder must then serve a default notice in the usual way. On expiry of the default notice, the security holder will be required to seek warrant of the court for the exercise of any remedy, unless the debtor and other relevant parties waive this requirement. The court will have discretion to delay or refuse warrant having regard to the circumstances of the case, including the position of any entitled resident who enters the process. We consider each of these additional measures in turn below.

Pre-action requirements

8.3 In Chapter 7, we explained the origin of the PARs in the FCA pre-action protocol.[2] The PARs are currently set out in the 1970 Act, section 24A with further detail provided in secondary legislation[3] and guidance.[4] The requirements in summary are as follows:

- To provide the debtor with clear information about the terms of the security, the amount due including arrears and charges, and any other default;
- To make reasonable efforts to agree proposals in respect of future payments and the resolution of any other default;
- Not to make an application to court for warrant to exercise remedies if the debtor is taking steps likely to result in resolution of any default;

---

[1] See paras 2.17-2.20.
[2] See para 7.11.
[3] Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010 (SSI 2010/317).
[4] Scottish Government, *Home Owner and Debtor Protection (Scotland) Act 2010: Guidance on Pre-Action Requirements for Creditors* (2010) available at: https://www.gov.scot/publications/home-owner-debtor-protection-scotland-act-2010-guidance-pre-action-requirements-creditors/.

- To provide information about local sources of advice and assistance on debt management; and
- To encourage the debtor to contact the local authority.

8.4 Earlier in the Discussion Paper,[5] we noted that the contested meaning of "default" within the scheme of the 1970 Act has given rise to difficulties in ascertaining when the PARs should be fulfilled. We made provisional proposals in respect of the definition of default which, if supported, will resolve these ambiguities by clarifying that compliance with the PARs should follow on non-performance of the secured obligation and precede service of a default notice. This is in line with the intentions of Parliament as outlined in Chapter 7, and with the views of stakeholders who work in this area who have told us that they prefer this "earlier intervention" approach.

8.5 The content of the PARs has attracted little criticism. This is perhaps unsurprising given their genesis in the pre-action protocol, which has been in place for some time. Where the PARs include standards of behaviour, disputes have arisen as to whether that standard has been met in particular cases, for example whether attempts on the part of the security holder to contact the debtor[6] or to agree repayment proposals[7] have been "reasonable", or whether information provided has been "clear".[8] Notwithstanding the case law, we do not think that any change to the standards as currently expressed is necessary or desirable. Continuity in the provisions may, in fact, be beneficial in the sense that the existing case law would continue to provide guidance on how the standards are applied. However, we would be grateful for the views of consultees.

8.6 We ask:

36. Are any amendments, additions or deletions to the PARs required? If so, what?

8.7 The current approach to providing for the PARs, whereby the "headline" requirements are contained in primary legislation, with the detail contained in more easily amended secondary legislation augmented by guidance, seems to work well in practice. We are not aware of any criticisms of the current law in this respect. We ask:

37. Should the "headline" requirements of the PARs continue to be provided for in primary legislation, with further detail in secondary legislation and guidance, as at present?

Warrant of the court

Application for warrant

8.8 Under the current law, a security holder seeking to exercise remedies in a case to which the enhanced debtor protection measures apply must seek warrant of the court to do so.[9] The 1970 Act, section 24(1D) provides that where an application is made in this respect,

[5] Paras 4.24-4.28.
[6] *Northern Rock (Asset Management) Plc v Savage* Unreported, Glasgow Sheriff Court, 29 April 2015.
[7] *Northern Rock (Asset Management) Plc v Doyle* 2012 Hous LR 94 (a combined report on five separate cases).
[8] *Outlook Finance Ltd v Lindsay's Executor Nominate* 2016 Hous LR 75; *Skye Loans Ltd v McEwan* 2020 Hous LR 39.
[9] Para 7.49.

proceedings are by way of summary application, a provision intended to make the process more easily accessible for debtors and other entitled residents. The summary application rules[10] were amended at the time of the introduction of the Home Owner and Debtor Protection (Scotland) Act 2010 to make provision for applications under section 24(1B).[11] Issues have arisen with several of the procedural requirements. In particular:

- Where the debtor or owner of the security property is a company which has been dissolved, it is not clear if the company must be restored to the Register in order for service of the writ to be effected.[12] The ordinary cause rules allow for service on the Lord Advocate in this situation, but no equivalent provision is found in the summary application rules.
- Service of the court proceedings on debtors, owners and potentially entitled residents involves a considerable number of forms. For example, the debtor will receive: a copy of the initial writ, Form 11C[13] and any productions; Form E;[14] and if ejection is sought, Form 1 under the Mortgage Rights (Scotland) Act 2001.[15] A potentially entitled resident will receive: a copy of the initial writ, Form 11C and any productions; Form 11D;[16] and Form 11E.[17] The same information is to a certain extent duplicated in some of these forms and there seems to be scope for streamlining the process, to the benefit of all parties.
- The methods of service competent for Forms E and F,[18] as set out in section 24(4), are more limited than the methods available for the remainder of the documentation. There seems no clear reason for this difference of approach.
- The timing of service of Forms E and F is also problematic. Section 24(3) provides that these should be served "when the creditor applies to the court" rather than at the point when the proceedings are served on the defender. Again, there seems to be no clear reason for this.

8.9 While there appears to be scope to streamline these procedural requirements, we are conscious that court rules are primarily a matter for the Scottish Civil Justice Council. We understand the SCJC are currently looking towards the bringing into force of the Courts Reform (Scotland) Act 2014, section 72(3)(e), under which actions relating to the recovery of heritable property will proceed by way of simple procedure rather than summary application. Work on implementation of this and other "Special Claims" rules is due to progress once the SCJC's current evaluation of the core simple procedure rules is complete.[19] This work forms

---

[10] Set out in the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 (SI 1999/929).

[11] The amendments were effected by the Act of Sederunt (Sheriff Court Rules) (Enforcement of Securities over Heritable Property) 2010 (SSI 2010/324).

[12] Under our proposals on the application of the enhanced debtor protection measures, this situation should arise infrequently since entity debtors will not be subject to the enhanced regime except potentially in the case where a natural person grants security over their dwellinghouse for an entity's debt.

[13] This is a checklist submitted by the security holder to the court when raising the application to confirm compliance with the pre-action requirements.

[14] This explains the nature of the default, recommends that the debtor seek legal advice and notes that the PARs should have been complied with. The form is set out in the 1970 Act Sch 6.

[15] This explains the default and the nature of the ejection proceedings.

[16] This gives notice to the entitled resident that an application has been made for enforcement of the security.

[17] This is the form the resident must complete to make an application to the court.

[18] Notification to the occupier that enforcement proceedings have been raised. The form is set out in the 1970 Act Sch 6.

[19] See Scottish Civil Justice Council, *Annual Report 2018/19* p 7 available at: https://scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/20190808-scjc-annual-report-2018-2019-and-annual-programme-2019-2020.pdf?sfvrsn=87d905d2_2.

one of the SCJC's key priorities for 2021/2022.[20] We aim to liaise with relevant officials as they move forward on implementation of those rules to the extent that they intersect with application for warrant under the enhanced debtor protection regime. To that end, it would be useful to have further information on any difficulties with the current rules that have not been captured in the discussion above.

8.10 We ask:

38. Other than those outlined in this Discussion Paper, what difficulties exist with the procedure for application for warrant under the 1970 Act, section 24(1B)?

Determination by the court

8.11 Under the current legislation, the court may not grant warrant to exercise a remedy unless the PARs have been fulfilled, and it is reasonable to do so in all the circumstances of the case.[21] In determining an application where the debtor appears or is represented, the court must have regard to the factors set out in section 24(7), namely:

- The nature of and reasons for the default;
- The ability of the debtor to fulfil within a reasonable time the obligations under the security in respect of which the debtor is in default;
- Any action taken by the creditor to assist the debtor to fulfil those obligations;
- Where appropriate, participation by the debtor in a debt payment programme approved under Part I of the Debt Arrangement and Attachment (Scotland) Act 2002; and
- The ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.

This list is not exhaustive, and the court may take other factors into account in its assessment.[22]

8.12 As with the PARs, difficulties have arisen in relation to the meaning of default in these provisions, which should be resolved by our proposals in relation to the definition of default in any new legislation.

8.13 In terms of the content of the factors, as with the PARs, case law has begun to develop in relation to the reasonableness standard as applicable under section 24(7).[23] Again, we have not been made aware of any concerns in this respect and consider that continuity in the legislation may have benefits here, but we seek the views of consultees below. A specific issue arises with the final listed factor, namely "the ability of the debtor and any other person residing at the security subjects to secure alternative accommodation." This appears to go beyond the policy intention behind the legislation, as discussed in Chapter 7,[24] which was to

---

[20] See Scottish Civil Justice Council, *Annual Report 2020/2021* p 14 available at: https://scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/scjc-annual-report-2020-21-and-programme-2021-22.pdf?sfvrsn=36bf9513_2

[21] 1970 Act s 24(5).

[22] *Accord Mortgages Ltd v Cameron* 2013 Hous LR 22.

[23] *Accord Mortgages Ltd v Cameron* 2013 Hous LR 22; *Swift Advances Plc v Martin* 2015 Hous LR 50; *HSBC Bank Plc v Collinge* 2014 Hous LR 78.

[24] Paras 7.5-6.

allow for suspension of enforcement to protect the debtor, owner or entitled residents and their children, but not tenants or other occupiers. We think it may be appropriate for future legislation to contain an amended version of this factor which better reflects the policy intent by restricting the court's consideration to the ability of the debtor, owner or any entitled resident to secure reasonable alternative accommodation. We seek views.

8.14 We ask:

39. (a) Should new legislation continue to provide a non-exhaustive list of factors to be taken into account by the court when determining an application for warrant to exercise remedies where the debtor appears or is represented, modelled on the current section 24(7)?

(b) Should the final factor listed in section 24(7) be amended in new legislation to restrict the court's consideration to the ability of the debtor, the owner, any entitled resident and any child of the foregoing parties residing with them to find reasonable alternative accommodation?

(c) Are any other amendments, additions or deletions to the section 24(7) factors required? If so, what?

8.15 Higgins raises a final difficulty, pointing out that there is no guidance in the statute or elsewhere as to how a court should deal with a scenario where the interests of the debtor and entitled residents differ, as where an ex-spouse and child reside in a security property owned by a debtor who is no longer able to meet the mortgage repayments.[25] We are not aware of any reported case law in which this issue has arisen as yet, and there is no mention of the point in the policy discussion. Our tentative view is that the duty of the court to determine the reasonableness of the application provides sufficient discretion for it to balance the competing interests of all parties (including the security holder) in cases of this type, not least because we have struggled to identify what form more structured guidance in this respect might take. However, we seek views.

40. Should new legislation provide the court with guidance on how to balance the interests of the debtor, owner and entitled residents in considering factors equivalent to those currently listed at section 24(7)? If so, what guidance should be given?

Entitled residents

8.16 Under the current legislation, where an application for warrant is made under section 24(1B), an entitled resident may apply to the court to continue proceedings or make any other order that the court thinks fit. In determining an application by an entitled resident, the court is to have regard to the section 24(7) factors, reading the reference to the ability of the debtor to resolve the default as a reference to the ability of the entitled resident to resolve the default. "Entitled resident" is defined in section 24C as a person whose sole or main residence is the security property and who is:

- The owner of the security property;

[25] Higgins, *Enforcement* para 7.13.

- The non-entitled spouse[26] or civil partner[27] of the debtor or owner where the security property is a matrimonial[28] or family[29] home;
- A cohabitant of the debtor or owner;
- A former cohabitant of the debtor or owner who lived with the debtor or owner in the security property for at least 6 months prior to the end of the relationship, and who continues to live there with a child of the relationship aged under 16.[30]

8.17 We have not been made aware of any concerns with the current definition of entitled resident. The persons protected by the current definition are roughly in line with the family members protected under similar provisions in other Scottish debt enforcement legislation, as discussed in Chapter 7.[31] In DP1, we suggested that there is an argument for including tenants within the definition of entitled resident.[32] Having now had the opportunity to review in detail the policy material underlying the enhanced debtor protection measures, which makes clear that tenants were never intended to benefit from these protections, we do not think that argument can be supported. In short, we do not think any amendment of the entitled resident provisions are required in any new legislation on standard securities. However, we seek views.

8.18 We ask:

41. Are any amendments, additions or deletions required to the definition of entitled resident set out in section 24C? If so, what?

Waiver of the requirement for warrant

8.19 Under the current law, following expiry of a calling-up notice, a security holder may exercise remedies in respect of a property used to any extent for residential purposes without warrant of the court where the property has been voluntarily surrendered in line with the 1970 Act, section 23A.[33] The requirements for voluntary surrender are that the property is unoccupied, and the debtor, the owner and any party with occupancy rights in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Civil Partnership Act 2004 have confirmed in writing that: (i) the property is unoccupied; (ii) they consent to the exercise of remedies; (iii) the consent has been given freely and without coercion of any kind.

8.20 We think it is uncontroversial to suggest that similar provision should be made in any new legislation. We understand that the provision is useful in practice where a debtor wishes to cooperate with the security holder in respect of the sale of the security property, reducing cost and complexity. It also aligns with the waiver provision in the Consumer Credit Act 1974, section 173(3).

8.21 We are not aware of any reported cases or critical commentary in respect of section 23A. A question may be raised, however, as to why the debtor and other parties are required

---

[26] As defined in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 1.
[27] As defined in the Civil Partnership Act 2004 s 101(1).
[28] As defined in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 22.
[29] As defined in the Civil Partnership Act 2004 s 135(1).
[30] Child is defined to include step-children and accepted children.
[31] See paras 7.27-7.30 (on sequestration) and para 7.37-38 (on proceeds of crime legislation).
[32] DP1 para 8.54.
[33] 1970 Act s 20(2A)(a). The security holder may also proceed to sell security subjects used to any extent for residential purposes on the basis of an expired default notice without court warrant where voluntary surrender has occurred: s 23(4)(a)(i).

to confirm that the property is unoccupied. In policy terms, as discussed earlier, the requirement for a court warrant in a case to which the enhanced measures apply is intended to protect the debtor, the owner and certain family members from losing their home. It would seem to follow that surrender of the property by these parties, followed by their consent to exercise the security, should be sufficient to waive the requirement. Other persons, such as tenants, may continue to occupy the property and as we discuss elsewhere,[34] court decree may be required to dispossess such persons if they will not flit voluntarily. It is not clear why that should prevent the requirement for court warrant in terms of the enhanced debtor protection regime to be waived. Accordingly, we think there may be a case for adjusting the waiver provisions in any new legislation so that the debtor and relevant parties are no longer required to confirm that the security property is unoccupied. Our advisory group had mixed views on this question, with some members pointing out that it may unwise to alter a procedure which currently works well. We would be grateful for the views of consultees.

8.22 We ask:

42. (a) Following expiry of a default notice, should the requirement for warrant of the court under the enhanced debtor protection regime be waived where the debtor, the owner and any entitled residents confirm in writing that:

(i) they are not in occupation of the security property;

(ii) they consent to the exercise of remedies under the security;

(iii) their consent was given freely and without coercion of any kind?

(b) Should the debtor, the owner and any entitled resident also be required to confirm that the security property is unoccupied?

---

[34] See para 10.14-10.21.

Chapter 9 Remedies: General Principles

Introduction

9.1 The preceding chapters of this Discussion Paper have outlined the procedural steps required to exercise a standard security. We turn now to consider the remedies available under the security once these procedural steps have been completed. In this Chapter we deal with some overarching issues, including which remedies should be available, who may exercise those remedies and how the proceeds resulting from any remedy should be applied. Subsequent chapters will deal with the detail of specific remedies.

Which remedies are available?

Current law

9.2 Any new legislation on standard securities must continue to make provision for the choice of remedies available under a standard security.[1] Under the current law, provisions on the available remedies are split between different pieces of legislation[2] and, in the case of the 1970 Act, between the statute itself and the standard conditions.[3] In our first Discussion Paper, we proposed that rules in relation to enforcement should be dealt with in the substantive provisions of new legislation rather than in standard conditions.[4] This proposal was supported by every consultee who expressed a view. In line with the project's ambition to streamline the law in this area, we consider that any future legislation should make comprehensive provision in this respect. The question we address here is which remedies that legislation should provide for.

9.3 The law currently allows the security holder to exercise the following remedies under the security:

- ejection of the debtor and other occupants of the security property;[5]
- entry into possession of the security property;[6]
- grant and administration of leases of the security property and collection of rents;[7]
- sale of the security property;[8]
- foreclosure (meaning direct acquisition of the security property by the security holder).[9]

---

[1] As noted at para 2.18, a creditor in a secured obligation may choose to enforce the obligation using a remedy that does not stem from the security, for example by raising an action for payment followed by diligence. Those remedies will remain available. The discussion in this and subsequent chapters relates only to remedies available under a standard security.
[2] Particularly the Heritable Securities (Scotland) Act 1894 and the Conveyancing and Feudal Reform (Scotland) Act 1970.
[3] Particularly Standard Conditions 7-10 and 12.
[4] DP1 para 7.39.
[5] Heritable Securities (Scotland) Act 1894 ss 5-7. We discuss the complications in relation to private residential tenants at paras 10.14-10.21.
[6] 1970 Act s 20(5) and Sch 3 SC 10(3).
[7] 1970 Act s 20(3)-(5) and Sch 3 SC 10(4)-(5).
[8] 1970 Act s 20(2)-(2A) and Sch 3 SC 10(2).
[9] 1970 Act Sch 3 SC 10(7).

The security holder is also entitled to recover the expenses of the enforcement process.[10] For completeness, we note that the common law remedy of maills and duties is no longer available to a security holder since explicit statutory provision is now made for entry into possession and collection of rents.[11] The common law remedy of adjudication on a *debitum fundi* (a special form of the diligence of adjudication available only to a heritable creditor) is now obsolete[12] and will be abolished when section 79 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 is brought into force.

9.4 There are various difficulties with the exercise of these remedies under the current law, which we discuss in detail in the chapters which follow. However, there is no suggestion in the case law or commentary that any of the remedies should cease to be available entirely. The selection of remedies is broadly consistent with those available in our comparator jurisdictions,[13] and our advisory group supported their retention in any new legislation. In terms of remedies not currently provided for, we consider the question of receivership below. No other additions have suggested themselves to us during our research to date, or been proposed to us by stakeholders, but we seek views.

9.5 We ask:

43. (a) Should new legislation on standard securities make available the same remedies as current legislation?

(b) Should new legislation include any remedy not currently provided for, and if so, which remedy?

Receivership

9.6 The law in Scotland currently makes no provision for receivership as a remedy under a standard security. This contrasts sharply with the position in England and Wales, where the appointment of a receiver under the Law of Property Act 1925 is a remedy commonly exercised by mortgagees. Consultees have suggested to us that consideration should be given to the introduction of equivalent provision in Scotland.

9.7 The remedy of receivership in English mortgage law has its roots in the duties placed on a mortgagee who enters into possession of the mortgaged property:[14]

> "The mortgagee is liable to account strictly [to the mortgagor], 'on the footing of wilful default'. This means that the mortgagee must account not only for all that is actually received but also for all that ought to have been received, had the property been managed with due diligence. Indeed, the mortgagee 'must take reasonable care to maximise his return from the property'."

---

[10] 1970 Act Sch 3 SC 12. This is not a remedy, but rather an entitlement of the security holder, but we mention it here for completeness since it will be discussed later in the Discussion Paper.
[11] *Dunbar v Gill* 1908 SC 1054 at 1058 per Lord McLaren and 1060 per Lord Kinnear.
[12] *Stair Memorial Encyclopaedia* Vol 8 para 372. Adjudication on a *debitum fundi* was commenced by way of poinding of the ground, which was abolished by the Debt Arrangement and Attachment (Scotland) Act 2002 s 58(1).
[13] MacLeod, *Enforcement* paras 4.07-4.20, though see the discussion of possession and management of the security property in the context of receivership below at paras 9.6-9.10.
[14] Bridge et al., *Megarry and Wade* para 24-026, citations omitted.

Seeking to avoid these onerous duties, it became common for mortgagees to include a term in the mortgage allowing for the appointment of a receiver with powers of management in respect of the mortgaged property. The mortgagee would reserve this power of appointment to itself, but stipulate that it exercised the power as an agent for the debtor. The receiver would accordingly also be an agent of the debtor, and so could take possession without becoming subject to the duties which would be imposed on a mortgagee.[15] This common term was eventually put on a statutory footing, currently embodied in the Law of Property Act 1925, section 101(1)(iii) with more detailed provision on the powers and duties of the receiver in section 109.

9.8 Under the statute, the receiver has the power to collect income from the mortgaged property[16] and to take out insurance against fire in respect of it.[17] The terms of the mortgage can, and commonly will, grant the receiver wider powers including to sell the property and to develop the property in order to enhance its value. In the commercial context, we understand that mortgage terms may allow for a receiver to be appointed to manage a portfolio of properties mortgaged by the same debtor which are underperforming.

9.9 In New Zealand, mortgagees in possession are subject to duties similarly onerous to those imposed under English law,[18] and statute also provides for the appointment of a receiver who is deemed the agent of the mortgagor.[19] The position is different in our other comparator jurisdictions. In Germany, judicial execution may take the form of receivership (*Zwangsverwalterung*) rather than sale of the security property. In this case, the *Zwangsverwalter* takes possession of the property[20] and uses it to generate revenue in satisfaction of the debt[21] under the supervision of the court. There is no option for the security holder to enter into possession or manage the property in its own right. In France, rents may be seized as part of the process of selling the security property, but no remedy involving ongoing management of the security property is available to the security holder, whether in its own right or by way of receivership.[22] South Africa similarly makes no provision for ongoing management of the security property in statute, though parties are free to make express provision to this effect.[23]

9.10 Under the current law in Scotland, a security holder may enter into possession of the security property, but this does not result in imposition of the onerous liabilities that are placed on an English mortgagee in possession.[24] Insofar as receivership might be considered the "solution" to these obligations for an English mortgagee, the case for receivership is accordingly less clear in Scotland. The current law in Scotland also allows for an agent to exercise the powers of the security holder on its behalf,[25] which could include taking possession of the security property, administering leases and/or carrying out repairs and renovations as required. We recommend below that this should continue to be the case in any

---

[15] Bridge et al., *Megarry and Wade* para 24-036.
[16] 1925 Act s 101(1)(iii).
[17] 1925 Act s 109(7).
[18] Property Law Act 2007 ss 137-173.
[19] Receiverships Act 1993 s 6(3).
[20] German Code of Civil Procedure § 151 I.
[21] *Ibid*, §§ 152 I and 155 II.
[22] French Code of Civil Enforcement Procedures art L321-1 para 3.
[23] *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E).
[24] We address the question of when a security holder enters into possession for the purposes of liability under statutes such as the Environmental Protection Act 1990 at paras 11.20-11.29.
[25] 1970 Act s 30(1).

new legislation.[26] To that extent, it is not clear what provision for an equivalent to a receiver under the Law of Property Act 1925 would achieve.

9.11 In our Report on Moveable Transactions, we recommended that receivership should not be available as a remedy under a pledge, noting that receivership is "to some extent a concept of insolvency law".[27] Its introduction for pledge was not supported by consultees in that project, citing amongst other concerns the potential for knock-on consequences for other creditors.[28] We think the same considerations apply in relation to a broad remedy of receivership in the standard security context. At present, we are not persuaded that provision for this remedy in any new legislation would be appropriate. However, we seek views.

9.12 We ask:

> **44. Should receivership be available as a remedy under any new legislation on standard securities? If so, what powers should be available to the receiver?**

Choice between remedies

9.13 A separate question relates to choice between the different remedies. At common law, where more than one right in security is held by the same person in respect of the same debt, the holder's choice of which security to exercise is restricted to a certain extent by the interests of any postponed security holders.[29] The 1970 Act, however, places no restriction on the security holder's choice between remedies in the interests of the debtor or other creditors. The key choice here is between selling the security property, or entering into possession of it to collect rents or otherwise manage it.[30] Sale of the property will usually better protect the interests of the debtor, the owner or registered tenant of the security property and other creditors, since it allows the full value of the security property to be realised and distributed. In practice, sale is also the remedy overwhelmingly favoured by security holders,[31] who may generally have little desire to remain in ongoing possession of the security property. However, an argument can be made that allowing this choice to be made freely by the security holder offers insufficient protection to the debtor and other interested parties. MacLeod notes that it is not uncommon for a significant portion of the debtor's capital to be tied up in the security property.[32] A security holder who takes long-term possession in preference to sale may deny the debtor and other interested parties access to any value the property has which exceeds the sum outstanding under the secured obligation. Is express statutory provision to regulate the security holder's choice of remedy therefore required?

9.14 Although the 1970 Act is silent on this issue, there is some suggestion in the case law that the security holder's choice between remedies may nevertheless be restricted at common law. In *Armstrong v G Dunlop & Son's Judicial Factor*, Lord Jauncey suggested that the

---

[26] See para 9.24.
[27] Report on Moveable Transactions para 27.10.
[28] *Ibid*, para 27.11.
[29] For a detailed explanation of the equitable principles applicable to catholic and secondary securities, see Gordon and Wortley, *Land Law* paras 19-44-19-50.
[30] Decree of foreclosure may not be sought until an attempt has been made at sale by public auction: 1970 Act s 28(1), discussed at paras 14.3-14.4.
[31] Cusine and Rennie, *Standard Securities* para 8.34.
[32] MacLeod, *Enforcement* para 4.27.

petitioner, a heritable creditor, must exercise his rights *civiliter* (meaning in a reasonable manner) and with regard to the interests of the debtors:[33]

> "A creditor's primary interest will normally be the recovery of the debt due to him and I do not consider that he has unlimited discretion as to which one or more of the powers [in standard condition 10] he exercises. If the value of the heritage is likely to exceed the sum of the debt, his interest is to have the heritage sold and thereafter to account for the surplus to the debtor. If in such a situation he elected to exercise the powers in condition 10 in a manner which did not result in money being available for the debtor he might very well be restrained from so acting. A heritable creditor cannot use his powers for the primary purpose of advancing his own interests at the expense of the debtor when he has the alternative of proceeding in a more equitable manner."

Lord Penrose agreed with these comments in *G Dunlop & Son's Judicial Factor v Armstrong (No 2)*.[34] Views amongst commentators have, however, been mixed,[35] with Cusine noting an apparent contradiction in requiring a creditor to consider the debtor's best interests.[36]

9.15 Looking to the comparative position, this issue does not arise in Germany, France or South Africa since there is no general provision for a security holder to manage the security property in these jurisdictions, as discussed above. In England, the security holder has a choice of remedies with no statutory provision as to which should be preferred. In New Zealand, the security holder also has a choice, but the debtor has the option to apply to court for an order directing the sale of the property,[37] which the court has a wide discretion to grant.[38]

9.16 In terms of future law in Scotland, in principle we see force in the argument that the interests of the debtor and others may be prejudiced where the security holder has a free choice between sale and longer-term possession of the security property. However, it does not appear that this risk has materialised under the current law, and we are reluctant to create additional statutory obstacles to the exercise of securities where there may be no real harm to neutralise. If consultees support the introduction of a general duty on security holders to conform with reasonable standards of commercial practice, as discussed in Chapter 2, that may be considered to provide debtors and other interested parties with sufficient protection against whatever risk may be posed by allowing the security holder a free choice. It may alternatively be considered desirable to create a fallback provision by which a debtor or owner can apply to the court to order a sale in a case where long-term possession is thought to be inappropriate, as in New Zealand. We seek views.

9.17 We ask:

45. Should any restriction be placed on the security holder's choice between the remedies of sale and management of the security property? If so, what form of restriction is appropriate?

---

[33] *Armstrong v G Dunlop & Son's Judicial Factor* 1987 SC 279 at 283.
[34] 1995 SLT 645 at 648.
[35] T Guthrie, "Controlling creditors' rights under standard securities" 1994 SLT (News) 93; J Urquhart, "Enforcing standard securities" (1995) 40(10) JLSS 400; G Junor, "The heritable creditor's right to sell – the arising obligations?" (1997) SLG 159.
[36] D J Cusine, *Standard Securities* (1991) para 8-25.
[37] Property Law Act 2007 s 107.
[38] *Ibid*, s 108.

Variation of remedies

9.18 Under the current law, scope for contractual variation of the statutory remedies is limited. A distinction can be drawn between sale and foreclosure, and other remedies which do not result in transfer of the security property.

9.19 In relation to sale and foreclosure, variation of the relevant standard conditions is prohibited by section 11(3) of the 1970 Act. The invariability of the standard condition on foreclosure followed from a recommendation of the Halliday Committee, who considered it desirable that all creditors should be subject to court procedure before they could become owners of the property.[39] This recommendation was extended to cover sale during the preparatory work for the introduction of the Bill which became the 1970 Act. The reason for the extension, according to the Notes on Clauses, was the desire to safeguard the debtor's interests from the potentially "disastrous" effects of sale, especially in the case where the security subjects are the debtor's home.[40]

9.20 The invariability of these provisions restricted the flexibility which had been available to creditors under the law relating to older forms of security prior to 1970. However, the Notes recount that the proposals were supported by lending institutions, in part because they reflected the general practice of lenders in relation to enforcement which was "not…to be over-anxious to enforce their security too quickly". In addition:[41]

> "To some extent they welcome the prescribing in the Bill of clear rules they can follow, knowing that if they follow them their actions will be, generally speaking, unchallengeable in the courts. Similarly on a sale the title of a purchaser of the security subjects will be better protected from challenge."

9.21 In relation to the other remedies, although variation of relevant standard conditions is not expressly prohibited, the freedom to vary is limited by specific statutory provision. For example, the power to grant leases under standard condition 10(5) is restricted by subsections 20(3) and (4), which allow for the grant of leases longer than seven years only by warrant of the court. The power of ejection is, of course, wholly regulated by the Heritable Securities (Scotland) Act 1894. Halliday suggested that contractual variation in relation to entry into possession might be possible, so that for example the debtor may agree to warrant of summary ejection being taken against him on default, or may concede possession by agreement.[42] It is not clear whether Halliday thought such agreements could extend to contracting out of the statutory provisions on, for example, the length of leases which can be granted without court intervention.

9.22 Future legislation should, we submit, adopt a clearer position on contractual variation to the remedies set out in statute. Our preliminary view is that the appropriate solution would be to prohibit contracting out of the statutory provisions. The justifications for statutory regulation of the sale and foreclosure processes set out in the Notes on Clauses appear to us just as relevant in the present day as in the 1960s. The need to protect the debtor and the benefits of a clear process for both parties also apply in relation to ejection and the extent of

---

[39] Halliday Report, Appendix F, Part II, para 8 (on p 113); Notes on Clauses (clause 10, para 8).
[40] Notes on Clauses (clause 10, para 8).
[41] Notes on Clauses (clause 10, para 9).
[42] Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-51; see also Gordon and Wortley, *Land Law* para 20-50.

the security holder's powers while in possession. Where some flexibility is desirable in relation to the exercise of particular remedies – for example, where the owner of the security property may wish to concede possession to the security holder without the need for a court process – this can and should be provided for within the statutory scheme, and examples of this are discussed in the chapters on specific remedies which follow. This approach should allow for parties to operate largely as desired in practice without the risks to the enforcement regime as a whole that a broader power to contract out would entail. We note in this respect the recommendation in our Report on Moveable Transactions that a pledge should be enforceable only by way of the remedies set out in statute, to provide certainty in addition to protecting the provider of the pledge.[43]

9.23 We ask:

> **46. Do consultees agree that it should not be possible to vary the statutory provisions on exercise of remedies under a standard security?**

Who may exercise remedies?

9.24 Under the current law, remedies under the 1970 Act may be exercised by the creditor, with "creditor" defined to include any successor in title, assignee or representative.[44] In practice, remedies are routinely exercised *on behalf of* the security holder by an agent such as a solicitor or property marketing company, and there seems no reason why this should not continue to be possible under new legislation. We ask:

> **47. Do consultees agree that remedies under a standard security should continue to be exercisable by or on behalf of the security holder?**

9.25 Where more than one security is held in the same property, each security holder is entitled to exercise remedies. A question has arisen as to whether one security holder may insist on its exercise of remedies in preference to others. The current law here is somewhat unclear. *Skipton Building Society v Wain*[45] confirms that only one security holder may enter into possession at a time. In the case, a prior security holder in possession interdicted a postponed holder from disturbing its possession or otherwise exercising remedies under the postponed security. There is disagreement in the commentary as to whether this case provides authority for the broader principle that a prior holder may interdict any action by a postponed holder:[46] Cusine and Rennie submit that this should be the rule even if the case does not so provide.[47] The position in relation to *pari passu* holders is also unclear. Section 11 of the Heritable Securities (Scotland) Act 1894 sets out a procedure by which a security holder who has not been successful in obtaining consent from *pari passu* holders to sale may seek warrant from the court to sell the security property. The majority view in the commentary is that this provision is permissive rather than imposing a requirement for consent to sale from *pari passu* holders,[48] but there is scope for argument here also.

---

[43] Report on Moveable Transactions para 27.27 and Draft Bill s 68(1).
[44] 1970 Act ss 20, 23 and 30.
[45] 1986 SLT 96.
[46] Gordon and Wortley, *Land Law* para 20-152 suggest that it does; Higgins, *Enforcement* para 13.5 is more equivocal.
[47] Cusine and Rennie, *Standard Securities* para 8.35.
[48] Halliday, *Conveyancing Law and Practice* Vol 2 para 54-41(2); Higgins, *Enforcement* para 14.15; Gordon and Wortley, *Land Law* para 20-141.

9.26 Under the current law, the significance of which security holder exercises a remedy diminishes to some extent when the consequences are taken into account. Sale by a postponed holder does not have the effect of disburdening the property of a prior security.[49] Perhaps more significantly, proceeds of any sale must be held in trust by the selling security holder and applied to the whole sum due under any prior security, then proportionately to sums due under *pari passu* securities, which must be paid off in full before anything can be applied to postponed securities.[50] Below, we suggest similar provision be made in any new legislation.

9.27 Since these consequences are the same regardless of which security holder exercises remedies, it might be argued that any holder should be free to take action. However, there may be strategic reasons why a holder would rather exercise remedies itself, and if so, it would seem consistent with general property law principle for the rights of an earlier holder to trump those of a postponed holder. Requiring consent to be sought from prior and *pari passu* holders before a remedy can be exercised may be administratively unwieldy, however. A middle ground may be to provide prior and *pari passu* holders with the right to seek interdict against a *pari passu* or postponed holder who seeks to exercise remedies where it would be unreasonable to do so. We seek views.

9.28 We ask:

48. What comments do consultees have as to the powers of postponed (or *pari passu*) security holders to exercise remedies without the consent of prior (or *pari passu*) security holders?

Application of the proceeds of remedies

9.29 As mentioned above, section 27 of the 1970 Act provides that the proceeds of sale by any security holder are held in trust and must be applied as follows:

(a) Payment of all expenses properly incurred by the security holder in connection with the sale or any attempted sale;[51]

(b) Payment of the whole amount due under any prior security to which the sale is not made subject;[52]

(c) Payment of the whole amount due under the standard security, and payment, in proportion, of the whole amount due under a *pari passu* security;

(d) Payment of any amounts due under any postponed securities, according to their ranking;[53] and

---

[49] 1970 Act s 26. A postponed security holder is entitled to redeem a prior security on sale: 1970 Act s 26(2). See DP1 para 11.32.
[50] 1970 Act s 27.
[51] Expenses are discussed in Chapter 15.
[52] Real burdens in favour of a local authority that are created by statute and state that they have preference over heritable securities must be considered at this point: Higgins, *Enforcement* para 14.18 fn 102.
[53] The issue of ranking is discussed in Chapter 3.

(e) Any residue following these payments is paid to “the person entitled to the security subjects at the time of sale, or to any person authorised to give receipts for the proceeds of the sale thereof.”

Where another creditor dies or cannot be found, the selling security holder may consign the amount due to that creditor in the sheriff court.[54]

9.30 Leaving to one side the question of which expenses are relevant here, which we discuss further in Chapter 15, this provision appears to work well in practice and we propose that equivalent provision should be made in any new legislation, subject to one caveat. Section 27 does not apply to proceeds from the exercise of remedies other than sale, such as the collection of rents where a security property is leased. There may be a case for providing consistent provision for the application of the proceeds of remedies regardless of which remedy has been exercised. We seek views.

9.31 We ask:

49. (a) Should provision equivalent to section 27 of the 1970 Act on application of the proceeds of sale be made in any new legislation?

(b) Should this provision be extended to cover the proceeds of any remedy exercised under a security?

[54] 1970 Act s 27(2).

Chapter 10 Ejection

Introduction

10.1 The 1970 Act provides the security holder with the right to enter into possession of the security property.[1] Exercise of this right is, however, subject to the common law principle that a person in natural occupation of land or buildings cannot be dispossessed lawfully without consent or a court order.[2] Where an occupant has had no legal right to occupy, the appropriate order is usually decree of ejection.[3] Section 5 of the Heritable Securities (Scotland) Act 1894 provides that the security holder may seek decree of ejection against the owner or registered tenant where they remain in natural occupation of the land or buildings in which the security is held. Decree of ejection may be sought at common law against other natural occupants with no legal right to occupation. Where a natural occupant has had a legal right to occupy, for example as a tenant, ejection is not the appropriate remedy. The security holder may, however, have grounds to terminate the lease.[4]

10.2 Decree of ejection confirms that the person(s) against whom it is directed have no right to continue in occupation of specified land or buildings. The decree can be executed against the occupants if necessary by way of removing (eviction) as regulated by the Bankruptcy and Diligence etc. (Scotland) Act 2007.[5] Removing is competent against the person in respect of whom decree of ejection has been obtained,[6] and any person who derives their right or has permission from the defender to occupy the land or buildings.[7] Under the 2007 Act, removing requires service of a charge on the occupants,[8] followed no earlier than 14 days afterwards[9] by service of a further notice specifying the date of removal.[10] On that date, sheriff officers may remove the occupants and their effects, seeking the assistance of the police if required.[11] The removing process, as a matter of the general law of civil procedure, is beyond the scope of the project and we do not consider reform of that process here.

---

[1] SC 10(3).

[2] Erskine II.1.23; Stair I.9.26. The Rent (Scotland) Act 1984 s 23 provides that it shall not be lawful to evict a residential occupier otherwise than by court proceedings.

[3] The terminology in this area is confused. For discussion, see *Campbell's Trustees v O'Neill* 1911 SC 188, Lord Johnston at 191-195; Scottish Law Commission, Report on Recovery of Possession of Heritable Property (Scot Law Com No 118, 1989) paras 7.5-7.14 available at: https://www.scotlawcom.gov.uk/files/5712/8015/1761/26-07-2010_1442_969.pdf; Reid, *Property* para 153; Explanatory Notes to the Bankruptcy and Diligence etc. (Scotland) Act 2007 paras 808-812 avaiable at: https://www.legislation.gov.uk/asp/2007/3/notes/contents.

[4] This has caused confusion in relation to private residential tenants, as we discuss at para 10.14-10.21. We discuss the security holder's right to administer leases of the security property more generally at para 12.16-12.18.

[5] Bankruptcy and Diligence etc. (Scotland) Act 2007 ss 214-219. This process is sometimes referred to as eviction, recovery of possession or (confusingly) ejection, albeit that it is a distinct procedure from the action of ejection referred to above.

[6] Bankruptcy and Diligence etc. (Scotland) Act 2007 s 216(1).

[7] *Ibid*, s 216(2). S 216(2A)-(2B) provide that removing is not competent against assured or private residential tenants on the basis of decree of ejection obtained under the 1894 Act s 5A or the 1970 Act s 24(1B).

[8] Bankruptcy and Diligence etc. (Scotland) Act 2007 s 216(1). Provision is made for how service may be executed in Act of Sederunt (Actions for removing from heritable property) 2012 (SSI 2012/136) art 3. The content of the charge is set out in the Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SS1 2011/158) as amended.

[9] Bankruptcy and Diligence etc. (Scotland) Act 2007 ss 214(2)(d) and 216(1)-(1A).

[10] Act of Sederunt (Actions for removing from heritable property) 2012 (SSI 2012/136) art 4.

[11] *Ferro Finance UK Plc v Akintola* 2010 Hous LR 28; Higgins, *Enforcement* para 12.36.

10.3 In this Chapter, we outline the basis for decree of ejection under a standard security in the current law, describe some difficulties with the current provision and consider options for reform in any future legislation. Separately, we consider the position in relation to eviction of private residential tenants by a security holder. Finally, we consider the security holder's liability for moveables found in the security property during the removing process.

Current law

10.4 Although ejection is routinely sought by standard security holders as part of the enforcement process, provision for it is not made within the 1970 Act itself.[12] Instead, the remedy continues to be pursued primarily on the basis of the Heritable Securities (Scotland) Act 1894,[13] section 5(1) which provides:

> "Where a creditor desires to enter into possession of the land disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such an occupant: Provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition."

Where decree of ejection is sought in respect of land used to any extent for residential purposes, the enhanced debtor protection measures discussed in Chapters 7 and 8 will also apply.[14] Most significantly, this means that the court may not grant decree of ejection against the owner or entitled residents unless it is reasonable in the circumstances of the case to do so.[15]

10.5 Section 5 of the 1894 Act provides for decree of ejection against the owner or registered tenant in personal occupation of the land or buildings in which the security is held. Where the property is occupied by someone else, and that person has no legal right to occupy, the security holder may instead rely on the common law remedy of ejection.[16] Case law has confirmed that it is competent for a security holder to pursue this common law remedy where necessary in the course of an action seeking remedies under the 1970 Act.[17] Ejection at common law may be sought against a person who has never had a legal right to occupy the land, such as a squatter.[18] It may also be sought against a person whose personal right to occupy (for example, as an employee) came to an end through termination of the owner's civil possession by the security holder.[19]

---

[12] *Hill Samuel & Co Ltd v Haas* 1989 SLT (Sh Ct) 68, 70. This results from the fact that the statute was not intended to be a complete codification of the law of heritable securities: See discussion in A J M Steven, "Mortgage Law Reform in Scotland" in S Farran, et al., *Modern Studies in Property Law Volume 11* (2021) ch 10.

[13] 1970 Act s 32 provides that the provisions of any enactment relating to any form of heritable security shall also apply to a standard security unless inconsistent with the 1970 Act.

[14] Heritable Securities (Scotland) Act 1894 ss 5(2)-(3), 5A-5F. See para 7.2 for an overview.

[15] Heritable Securities (Scotland) Act 1894 s 5A(5)(b).

[16] Reid, *Property* paras 141, 152-154.

[17] *Cedar Holdings Ltd v Iyyaz* 1989 SLT (Sh Ct) 71; *Persimmon Homes v BJR Realisations Ltd* 2013 GWD 33-649.

[18] For a discussion of the general position of squatters, see J Voyias, "Unlocking doors: demystifying squatting" (2016) 61(9) JLSS 24.

[19] We discuss the exercise of the security holder's right of possession at para 11.3.

Problems with the current law

10.6 Interpretation of section 5 has caused some difficulty in practice. First, ejection can be sought against the "proprietor of the land disponed in security." However, there is no disposition of land in the grant of a standard security. Additionally, the reference to the "proprietor" of the security property sits uneasily with the situation where the security is held in the tenant's interest in a registered lease.[20] Higgins notes that the court is likely to read references in section 5 to the "proprietor" as references to the "debtor", which would address this issue provided that the debtor and the registered tenant are the same person.[21] The position could be clearer on the face of the statute, however.

10.7 Difficulties are also caused by the relationship between the statutory and common law remedies of ejection. There is scope for doubt as to which remedy is appropriate in certain circumstances, as illustrated by *Westfoot Investments Ltd v European Property Holdings Inc*.[22] The pursuer in *Westfoot* held standard securities over two flats owned by the defender, and sought decree of ejection against it under the 1894 Act. The defender argued that ejection under the 1894 Act is competent only against a natural person in occupation of the property, and that a juristic person cannot be in personal occupation of the subjects. The court did not agree.[23] Sheriff T Welsh QC noted that the human rights of security holders under Article 1 of the First Protocol to the ECHR were engaged by the court's interpretation of section 5. This opened it to the court to read the legislation in a Convention-compliant manner under the Human Rights Act 1998, section 3. Reading section 5 of the 1894 Act literally, so that the remedy of ejection would be available against a debtor in natural possession but not a debtor in civil possession, seemed to the court to represent an arbitrary interference with the security holder's rights, and also to be contrary to the intention of Parliament in enacting the legislation. Accordingly, it read the phrase "in personal occupation" down to "in occupation", to include both natural and civil occupation.[24] The sheriff did not consider decree of ejection to be required in the case, however. This was because it was "neither averred nor proved that the subjects are actually occupied by the [owner]. It was accepted by [the security holder] that the premises are tenanted."[25]

10.8 The threads of this case are somewhat difficult to untangle. On one reading, the court seems to suggest that decree of ejection under the 1894 Act can be sought against a juristic person whether in natural or civil possession, since otherwise vacant possession of the security property could not be obtained. However, this seems inconsistent with the understanding that ejection of natural persons whose personal right to occupy has come to an end through termination of the owner's civil possession can be sought at common law. Overall, the position is unsatisfactory.

Discussion

10.9 In Chapter 9, we provisionally proposed that a security holder should continue to have the remedy of entry into possession of the security property under any new legislation. Where

---

[20] 1970 Act s 30(2) provides that "proprietor" is held to mean "lessee" for the purposes of construing Part II of that Act in relation to security over a registered lease, but it is not clear that this provision can be read across to the 1894 Act.
[21] Higgins, *Enforcement* para 5.6.
[22] 2015 SLT (Sh Ct) 201.
[23] Para [30].
[24] Para [33].
[25] Para [34].

a person is in natural possession of the land or buildings in which the security is held, they cannot be lawfully dispossessed without consent or a court order. If their possession has no legal basis, the appropriate order is decree of ejection.[26] New legislation on standard securities must therefore ensure a standard security holder can continue to seek decree of ejection in appropriate circumstances.

10.10 Ejection is currently provided for through a combination of the Heritable Securities (Scotland) Act 1894 and the common law. In line with our intention to streamline the law in this area, we think every statutory remedy available to a security holder should be provided for within one piece of legislation. Accordingly, we would suggest that the 1894 Act be disapplied to standard securities, and provision for ejection made in any new legislation. We think there would also be a considerable benefit in expanding the statutory remedy in new legislation to cover all circumstances in which decree of ejection may be required. The position at present, where ejection may be sought either under the statute or under the common law depending on who is in possession, seems a source of unnecessary confusion. Finally, we think the statutory language should more clearly denote the persons against whom decree of ejection can be sought. We would be grateful for the view of consultees.

10.11 We ask:

50. Should new legislation on standard securities provide that a security holder may seek decree of ejection against any person in natural possession of the land or buildings in which the security is held where that person has no legal basis to occupy?

10.12 *Royal Bank of Scotland v Wilson* clarified that the basis for the remedy of ejection against the proprietor under the current law is the 1894 Act.[27] Prior to *Wilson*, there had been litigation on alternate bases for the remedy. One argument was that the remedy flowed from contractual consent on the part of the debtor.[28] Another was that the remedy was a necessary incident of the security holder's right to take possession provided for by the 1970 Act.[29] Following reform of the law, we think it is desirable that ejection should be possible only on the basis of express statutory provision. In part, this is a matter of legal clarity, of particular importance here given that the general law of ejection and removing is somewhat confused. More substantively, restricting the basis of the remedy to statute ensures that its availability can be made conditional on compliance with policy-motivated protective measures, such as those described in Chapters 7 and 8. If ejection were possible on other bases, potential would exist for statutory protections to be circumvented.[30]

10.13 We therefore ask:

51. Do consultees agree that the only basis for ejection under a standard security should be the relevant statutory provision?

---

[26] Where the person in natural possession has had a legal right to be there, for example as a tenant, ejection is not competent.
[27] 2010 UKSC 50; 2011 SC (UKSC) 66 at para [29].
[28] *Clydesdale Bank Plc v Hyland* 2004 Hous LR 116.
[29] *National & Provincial Building Society v Riddell* 1986 SLT (Sh Ct) 6.
[30] *Clydesdale Bank Plc v Hyland* 2004 Hous LR 116 at [43]; Higgins, *Enforcement* para 5.9.

Private residential tenants

10.14 The relationship between the security holder's remedy of ejection and eviction of private residential tenants has been the subject of some debate under the current law. Our first Discussion Paper looked at the interaction between standard securities and leases granted by the owner of the security property more broadly,[31] and included consideration of the rights of private residential tenants in this respect.[32] We set out the provisions within the private residential tenancy legislation under which exercise of a standard security may provide grounds for eviction of a tenant.[33] We asked consultation questions in relation to potential reform of these grounds, considering particularly whether their application may vary depending on whether the lease was granted before or after the security.[34] Our recommendations in relation to these questions will be contained in our Report and draft Bill in due course. In our first Discussion Paper, we deferred consideration of reform of the law on *how* a private residential tenant may be evicted by a security holder to the current Discussion Paper, on the basis that the issue would be more appropriately dealt with alongside other enforcement matters. We turn now to that question.

10.15 Private residential tenants in Scotland may hold an assured tenancy under the Housing (Scotland) Act 1988 or a private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016. Both pieces of legislation make detailed provision as to how an order for possession against a tenant may be obtained,[35] which in both cases requires an application to be made to the First-tier Tribunal following service of prescribed notices and the expiry of a statutory notice period. Where an order for possession is not complied with voluntarily by the tenant, it may be executed by way of the removing process outlined above.[36] The question which has arisen in the standard security context is whether a security holder seeking to remove a tenant must first obtain an order for possession in line with the requirements of the 1988 or 2016 Acts, or whether a tenant can be removed on the basis of a decree of ejection granted against the landlord under the standard security.

10.16 This issue was addressed in *Tamroui v Clydesdale Bank Plc,*[37] where a security holder sought to remove a short assured tenant under the 1988 Act. The security holder had obtained decree of ejection against the owner of the property and sought to remove the tenant on the basis of that decree, since her right to occupy derived from the owner. The tenant argued that the security holder was required to proceed against her separately under the 1988 Act. Sheriff Richard Davidson agreed, noting that the 1988 Act post-dated the 1970 Act and therefore must have taken account of it.[38] Subsequent amendment to the 1970 Act appeared to put this decision on a statutory footing, with section 24(10) of the 1970 Act[39] now providing: "[f]or the avoidance of doubt, a decree granted [entitling the creditor to eject the debtor] is not an order

[31] See generally DP1 paras 8.1-8.58.
[32] DP1 paras 8.45-8.57.
[33] Housing (Scotland) Act 1988 Sch 5 rule 2; Private Housing Tenancies (Scotland) Act 2016 Sch 3 para 2.
[34] DP1 paras 8.52 and 8.57.
[35] Housing (Scotland) Act 1988 ss 18-19 and Sch 5; Private Housing Tenancies (Scotland) Act 2016 ss 51-56 and Sch 3.
[36] Bankruptcy and Diligence etc. (Scotland) Act 2007 ss 214(2)(g) and (k) and 215-217. See para 10.2.
[37] 1997 SLT (Sh Ct) 20.
[38] *Ibid* at 22.
[39] Introduced by the Housing (Scotland) Act 2010 s 152, which also inserted a similar provision, s 5A(9), into the 1894 Act.

for possession of a house let on an assured tenancy (within the meaning of Part II of the Housing (Scotland) Act 1988)."

10.17 No equivalent amendment to the 1970 Act was made on the introduction of private residential tenancies by the 2016 Act. However, the reasoning in *Tamroui* would seem to apply to the 2016 legislation just as it did to the 1988 legislation. In any event, amendments to the Bankruptcy and Diligence etc. (Scotland) Act 2007 make clear that a decree of ejection granted under the 1894 or 1970 Acts does not provide a basis on which to carry out the process of removing against either an assured or a private residential tenant.[40]

10.18 In our first Discussion Paper, we noted that debtors and some other occupiers of property used "to any extent for residential purposes" benefitted from enhanced protection measures under the 1970 Act, and suggested there may be an argument for including tenants within those provisions.[41] In Chapter 7 of this Discussion Paper, we reviewed the policy background to the enhanced debtor protection measures.[42] We concluded that bringing tenants within the scope of the regime would significantly exceed the policy intention behind the measures. We did not think that such a change could be justified.[43]

10.19 In our first Discussion Paper, we also asked: what comments do consultees have on the situation where a heritable creditor is enforcing its security and there is a residential tenant whose lease was granted after the security?[44] Of the nine respondents who gave a substantive answer to this question, seven discussed the grounds on which a security holder should be entitled to remove a tenant, but did not mention the process. One respondent suggested that the protections that apply to homeowners (ie the enhanced debtor protection regime) should apply with appropriate modifications to tenants. The final respondent noted simply that, in their experience, the process under the 1988 Act worked. We do not think these responses set out a strong steer in favour of any particular reform here.

10.20 The question to be addressed in this part of the project is whether a security holder seeking to remove a private residential tenant should be required, as at present, to seek a possession order under the relevant tenancy legislation, or whether it should be sufficient to obtain decree against the landlord. Requiring a possession order adds to the complexity and expense of the enforcement process. However, it provides an important protection to residential tenants by ensuring that the same eviction procedure must be followed regardless of the reason for that eviction. Legislation to this effect was enacted as recently as 2016, following extensive policy discussion in relation to the nature and extent of the protection that should be afforded to residential tenants.[45] It has not been represented to us that current provision on the process (as opposed to the grounds) of eviction of residential tenants is causing particular difficulties in practice. In short, we are not persuaded there is a case for altering the status quo here. New legislation should, however, clarify any ambiguity that may

---

[40] 2007 Act s 216(2A)-(2B), originally inserted by the Housing (Scotland) Act 2010 s 152(3) to cover assured tenancies and amended by the Private Housing (Tenancies) (Scotland) Act 2016 s 79(2) and Sch 4 para 10(3) to include private residential tenancies.
[41] DP1 para 8.54.
[42] See paras 7.4-7.15.
[43] Para 8.17.
[44] DP1 para 8.55.
[45] See SPICe, *Briefing on the Private Housing (Tenancies) (Scotland) Bill* (2015) for an overview. Available at: https://external.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-68_Private_Housing_Tenancies_Scotland_Bill.pdf.

exist at present as to the basis on which a security holder may seek to remove a private residential tenant.

10.21 We would be grateful for the views of consultees. We ask:

52. When seeking to remove an assured or private residential tenant from the security property, should a security holder be required to obtain an order for possession under the relevant tenancy legislation?

Liability for moveables

10.22 A final issue which has been raised with us in relation to ejection by a security holder concerns the extent of the security holder's liability for moveables left behind by the former occupants. Under the current law, decree of ejection allows for "the defender and any effects of the defender" to be removed from the property.[46] In principle, any such effects may be disposed of during the removing process.[47] In practice, reputational concerns make it unlikely that a security holder who discovers moveables left behind will simply throw them out.[48] Once the security holder exercises control over the moveable property, however, a duty to take reasonable care of the property arises,[49] owed to the owner of the moveables whether that owner is the debtor or a third party.[50] The security holder is under an obligation to contact the owner (or their agents) to find out what should be done with the moveables.[51] An owner may seek damages against the security holder for breach of its duty of care in this respect, though any award made may be subject to a finding of contributory negligence, for example if the owner has been careless in leaving possessions behind or tardy in responding to the security holder's enquiries.[52]

10.23 Since a standard security is held only in heritable property, a security holder has no right to sell moveables left behind,[53] unless contractual provision has been made to that effect. Such provision would apply only to moveables owned by the debtor or other parties to the contract, and the security holder would sell as the agent of the owner.[54]

10.24 The position of a security holder in Scotland in this respect is similar to that of a mortgagee in England. An English mortgagee may immediately dispose of chattels on entering into possession of a mortgaged property,[55] but will become involuntary bailee if instead they assume control over them.[56] While the involuntary bailee has no duty of care to protect chattels left on repossessed property against loss or damage,[57] they do have a duty not to deliberately

---

[46] Bankruptcy and Diligence etc. (Scotland) Act 2007 s 216(1).
[47] *Harris v Abbey National Plc* 1997 SCLR 359 at 360; *Gemmell v Bank of Scotland* 1998 SCLR 144 at 146. It is open to the court to make an order for preservation of property left in the premises under the 2007 Act s 218.
[48] Higgins, *Enforcement* para 13.3 fn 21. An example is the "breathing space" policy of the defenders in *Harris*.
[49] There is dispute as to whether the basis of this duty is the delict of spuilzie or an implied contract of gratuitous deposit, with the case law preferring the latter explanation: see *Harris* at 361-362; *Gemmell* at 147.
[50] *Harris* at 361.
[51] *Ibid,* 362.
[52] *Ibid,* 361.
[53] Gretton and Reid, *Conveyancing* para 23.35.
[54] D J Cusine, "Expenses under a standard security" (1994) Jur Rev 18, 28.
[55] F Chalmers and P Morgan, *Fisher and Lightwood's Law of Mortgage* (15th edn, 2019) para 29.52, citing *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264.
[56] *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch) at para 2.
[57] N Palmer, "Bailment" in A Burrows (ed) *English Private Law* (3rd edn, 2013) para 16.87, citing *Lethbridge v Phillips* (1819) 171 ER 731*; Howard v Harris* (1884) Cab & Ellis 258; *Neuwith v Over Darwen Co-operative Society Ltd* (1894) 63 LJQB 290.

or recklessly damage chattels and may be liable for gross negligence where this occurs.[58] The involuntary bailee also has a duty to do "what is right and reasonable" in respect of the chattels,[59] such as giving mortgagors access to collect the chattels on multiple occasions and posting notices at the property informing mortgagors that chattels will be disposed of if they are not cleared within a specified period.[60] They have no obligation to store chattels following expiry of any notice period given for collection.[61] The English position was cited with approval in the New Zealand Court of Appeal in *Cribb v FM Custodians Ltd*.[62]

10.25 It has been suggested to us that the law in this area is in need of reform. The willingness of security holders to retain moveables left in the security property – a practice which, in policy terms, appears to us to be worthy of encouragement – is undercut at present by the ambiguity as to what is required to discharge their duty of care to the owner of the moveables once responsibility for them has been assumed. Members of our advisory group suggested that the problem could be ameliorated by guidance on how long moveables should be retained and to what extent attempts must be made to contact their owner in order for the duty of care to be discharged. A difficulty here is that the current law on liability for moveables following a removing process extends beyond the law of heritable securities.[63] Reform to the law as a whole is accordingly beyond the scope of the project. However, standing the desirability of reform here in policy terms, it may be appropriate for new legislation on standard securities to clarify the content of the duty of care in relation to moveables as it applies to a security holder exercising the remedy of ejection under the security.

10.26 We ask:

53. (a) Should new legislation on standard securities provide guidance on how the security holder's duty of care in relation to moveables left in the security property may be discharged?

(b) If so, what guidance would be appropriate?

---

58 *Taylor v Diamond* [2012] EWHC 3008 (Ch) at [103].
59 *Elvin & Powell Ltd v Plumber Roddis Ltd* [1933] Solicitors Journal 48 per Hawke J.
60 *Ibid* at para 54.
61 *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454.
62 [2018] NZCA 183 at [27].
63 For discussion in the context of eviction by a landlord, see A Stalker, *Evictions in Scotland* (2nd edn, 2021) 519.

Chapter 11 Possession

Introduction

11.1 Entry by the security holder into possession of the land or buildings in which the security is held plays a central role in the current standard security regime. Standard Condition 10(3) provides that, on default, the security holder may enter into possession of the security property and receive or recover rents.[1] The security holder's right to exercise this remedy emerges without the need for a court order where a calling-up notice has expired[2] and either the security property is not used to any extent for residential purposes[3] or the voluntary surrender procedure has been followed.[4] Otherwise, warrant of the court is required.

11.2 Where a security holder is "in lawful possession" of the security property, significant consequences follow under both the 1970 Act and other pieces of legislation. Under the 1970 Act, a creditor in lawful possession has the right to grant and administer leases, and to carry out further acts of management and maintenance in relation to the property.[5] Additional rights are conferred and liabilities imposed on heritable creditors in lawful possession by the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004, amongst other pieces of legislation passed by the Scottish Parliament. Finally, certain liabilities are imposed on the person entitled to receive rents of land by the Environmental Protection Act 1990 and other legislation passed by the UK Parliament. Despite these important consequences, there is some debate as to whether "lawful possession" in the meaning of the statute occurs immediately on taking natural possession, or whether some longer-term interest in the management of property is required. This Chapter will consider these two approaches and consult on how possession should be understood in any new legislation. It will also consider which rights and obligations of the owner or registered tenant become available to a security holder who enters into possession under the 1970 Act and asks whether reform is required.

Entering into possession

11.3 The right to enter into possession of the security property is conferred on a security holder by Standard Condition 10(3). Where the security property is not used to any extent for residential purposes, the right becomes exercisable following expiry of a calling-up notice,[6] or on the basis of court warrant.[7] Where the security property is used to any extent for residential purposes, warrant of the court is required,[8] unless the debtor has complied with the voluntary surrender procedure.[9]

---

[1] 1970 Act s 20(5)(a) and SC 10(3).

[2] 1970 Act s 20(1) and SC 10(3). In these circumstances, a security holder who wishes to enter into natural possession of the land or buildings in which the security is held will usually nevertheless require an order for ejection or removing to dispossess the current occupants: see Ch 10 for discussion.

[3] 1970 Act s 24(1B) requires warrant of the court for entry into possession of security property used to any extent for residential purposes.

[4] 1970 Act s 23A.

[5] *Ibid*, s 20(3)-(5) and SC 10(4)-(5).

[6] *Ibid*, s 20(1) and SC 10(3).

[7] *Ibid*, s 24(1).

[8] 1970 Act s 24(1)-(1B).

[9] *Ibid*, s 23A, discussed at para 8.19.

11.4 A security holder may exercise this right by taking civil possession of the security property through a third party such as a tenant, or by taking natural possession of the land and buildings in which the security is held. It may enter into civil possession of the property by intimating its expired calling-up notice or court decree[10] to the owner of the property and the tenant from whom it intends to collect rent.[11] Alternatively, it may enter into natural possession of the security property generally by changing the locks or otherwise securing the boundaries of the property, though it would usually first be necessary to eject any occupants.[12] Whether this latter course of action is sufficient to amount to "entry into lawful possession" in the meaning of the Act is a matter of dispute. We turn now to that issue.

Lawful possession: two approaches

11.5 What actions on the part of the security holder will result in it having "entered into lawful possession" of the security property? Two different answers can be suggested. On one view, it is sufficient for the security holder to take control of the physical occupation of the land or buildings, usually by ejecting occupants and changing the locks.[13] On another, a security holder is only in lawful possession where it demonstrates a longer-term interest in management of the security property, paradigmatically by granting and administering leases in respect of it.[14]

11.6 This ambiguity dates back to the pre-1970 law of heritable securities. A bond and disposition in security would typically contain a clause of assignation of rents, which conferred on the creditor a right to enter into possession of the security subjects and receive rents.[15] The right could be exercised either by the consent of the debtor or by raising an action of maills and duties.[16] The relationship between the two aspects of the right is open to question.

11.7 *Mackenzie v Imlay's Trustees*[17] provides an illustration. The pursuer in this case challenged the validity of a lease granted by the defenders, who were heritable creditors in respect of the lease subjects, on various grounds including that a lease could be granted only by heritable creditors in possession. Prior to the disputed grant, the defenders had indicated to their debtor, the company which owned the lease subjects, an intention to enter into possession of the subjects and take rents. The debtor company passed a resolution consenting to this arrangement and intimated to its tenants that rent should now be paid to the creditors. The pursuer argued that this was insufficient to put the defenders in possession since no decree of maills and duties had been obtained. Lord Dundas accepted the proposition that the creditors required to be in possession in order to grant a valid lease. He did not accept,

---

[10] *GE Money Home Lending Ltd v Bianchet* Unreported, Dumbarton Sheriff Court, 17 July 2014, Sheriff Principal Kerr found that a security holder could not take lawful possession under the 1970 Act through intimation of a court order to a sitting tenant. This decision is thought to be incorrect: see Higgins, *Enforcement* para 12.36 fn 184.

[11] Higgins, *Enforcement* para 13.7; Cusine and Rennie, *Standard Securities* para 8.66. Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-53 suggests that tenants may, as under the older forms of heritable security, be entitled to require a decision of court to authorise payment of rents to a person other than the proprietor, but it is not clear that this was even the case under the old law: see *Neils v Lyle* (1863) 2 M 168; Gloag and Irvine, *Rights in Security* 97; J G Stewart, *A Treatise on the Law of Diligence* (1898) 515.

[12] We discuss ejection in Chapter 10.

[13] Higgins, *Enforcement* para 13.4.

[14] *Ibid*; Cuisine and Rennie, *Standard Securities* para 8.71; D J Cusine, "The Creditor's Remedies Under a Standard Security" (1998) 3(2) SLPQ 79 at 82; P Braid, "Remedies on Default" in *Standard Securities and their Enforcement* (1999) Post Qualifying Legal Education 14.

[15] *Mackenzie v Imlay's Trustees* 1912 SC 685 at 692; Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-51; Cuisine and Rennie, *Standard Securities* para 8.68

[16] *Ibid.*

[17] 1912 SC 685.

however, that possession could be taken only by decree, considering that it had been taken by the defenders upon the company intimating to its tenants to pay rent to them. In this connection, he noted:[18]

> "[The defenders] were in a position to enforce entry by any competent process, and I do not know that they could in fact have taken possession of [the security property] in any more effective manner than by letting it."

11.8 This dictum sums up the confusion. On the one hand, the court accepts that taking possession is a precondition of the power to grant a lease. On the other, the court suggests that it is through granting a lease that possession has, in fact, been taken. It is not clear whether the grant of the lease must be preceded by possession or is constitutive of it.

Current law

11.9 Current legislation and case law does not provide a straightforward answer as to when a creditor will be considered in lawful possession. The clearest support for the minimalist approach, whereby the creditor is in lawful possession on ejecting occupants and changing the locks without demonstrating any longer-term management interest in the property, can arguably be found in the wording of the legislation itself. The remedies connected to possession are set out in standard condition 10.[19] Standard condition 10(3) provides that a creditor:

> "may enter into possession of the security subjects and may receive or recover the rents of those subjects or any part thereof."

Standard condition 10(4) provides that:

> "where he has entered into possession as aforesaid, he may let the security subjects or any part thereof."

Exercise of this remedy is further regulated by section 20(3), which begins:

> "A creditor in a standard security who is in lawful possession of the security subjects may let the security subjects…"

Standard condition 10(5) provides that:

> "Where he has entered into possession as aforesaid there shall be transferred to him all the rights of the debtor in relation to the granting of leases or rights of occupancy over the security subjects and to the management and maintenance of those subjects."

Exercise of this remedy is further regulated by section 20(5), which begins:

> "There shall be deemed to be assigned to a creditor who is in lawful possession of the security subjects all rights and obligations of the proprietor relating to [leases and management and maintenance of the subjects]."

---

[18] *Mackenzie v Imlay's Trustees* 1912 SC 685 at 692.

[19] SC 10 is further regulated by section 20(3)-(5), as discussed below in relation to the right to grant leases and the right to carry out other acts of management in relation to the security property.

A security holder is in "lawful possession" for the purposes of section 20 where it has entered into possession by virtue of standard condition 10(3), or through the consent of the owner.[20]

11.10 It could be argued that standard condition 10(3) should be read to suggest that entry into possession is possible only where there are rents to be received or recovered, meaning that the lawful possession required by standard condition 10(4) and (5) can be taken only through entry into civil possession of the security property. However, this would result in a security holder being unable to grant leases or carry out other acts of management or maintenance in relation to the security property unless a lease had been granted in respect of it by the owner. There seems no reason to construe the statute such as to restrict the security holder's remedies in this way.

11.11 Understanding the security holder to have entered into possession on ejecting occupants and changing the locks also seems to accord with the way that expression is generally used in relation to security holders in practice. In *Ferro Finance UK Plc v Akintola,*[21] the defenders sought to repone[22] a decree of ejection granted against them. Reponing is competent only if the decree in question has not been implemented in full. The court found the decree in this case to contain three parts:[23]

> "First, it grants warrant to the pursuers to enter into possession of the house. Secondly, it ordains the defenders to remove themselves from the house. Thirdly, it grants warrant to the pursuers to exercise the remedies open to a creditor in lawful possession of the house."

The court took the view that there was "no doubt" the first part of the decree had been implemented, since the defenders had been forcibly evicted from the security property by sheriff officers and the locks had been changed.[24] As regards the third part, the court noted that the pursuers had not yet exercised the remedies available to them in that the house had not yet been sold. However, it found:[25]

> "…their right to sell the house flows from the fact that they are in lawful possession of it, and as it is too late to reverse that possession by recalling the eviction, it seems to me that it is also too late to recall the rights which they are entitled to exercise as a result of being in possession."

11.12 In *Bank of Scotland v Community Charges Registration Officer for Central Region,*[26] the house in which the security was held was unoccupied, and the security holder had changed the locks and begun marketing the property for sale. The sheriff found that a heritable creditor in this position should not be equated with an owner for the purposes of liability to pay the

---

[20] Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 10-64; *GE Money Home Lending Ltd v Bianchet* Unreported, Dumbarton Sheriff Court, 17 July 2014; Cusine and Rennie, *Standard Securities* para 8.69; Higgins, *Enforcement* para 13.4.

[21] 2010 Hous LR 28.

[22] Reponing is the sheriff court procedure by which an unimplemented decree granted against a party in their absence can be recalled. Where reponing is successful the party is essentially restored to the pre-decree position whereby they are required to state a formal defence to the action. Reponing is provided for in chapter 8 of the Ordinary Cause Rules 1993. An equivalent procedure for recall of a decree granted in absence in a summary cause can be found in chapter 24 of the Summary Cause Rules 2002.

[23] *Ferro Finance UK Plc v Akintola* 2010 Hous LR 28 at [14].

[24] *Ibid* at [15].

[25] *Ibid* at [17].

[26] 1991 SCLR 394. This case concerned whether a heritable creditor in possession of security subjects was "the owner" of the subjects in terms of the Abolition of Domestic Rates etc. (Scotland) Act 1987 s 10(4)(a).

community charge. In reaching this conclusion, he considered *obiter* whether the pursuer had taken possession of the security property, noting:[27]

> "Clearly [the creditors did not enter possession] in the physical sense, but equally, in the conveyancing sense, they obtained the equivalent of entry, albeit by traditio longu manu."

11.13 Support for the position that a security holder is in lawful possession only where it has demonstrated a longer-term interest in the management of the property, or perhaps only where it has entered into civil possession of the property, can be found amongst commentators who consider possession to have been understood in this way in the pre-1970 law of heritable securities. They note that the 1970 Act was not intended to innovate on the general law of securities unless explicitly provided for,[28] and suggest that the drafting of the 1970 Act does not demonstrate a clear intention to deviate from the equation of "lawful possession" with a longer-term interest in the property, meaning that this interpretation should continue to apply.[29]

11.14 Again, some reflection of this interpretation of "lawful possession" can be found in the case law. *Northern Rock Building Society v Wood*[30] addressed the council tax liability of a security holder where it had changed the locks of an unoccupied security property and begun marketing it for sale. Although not determinative of the issue in the case, Sheriff McEwan observed that he did not consider security holders in this position to be in possession of the property:[31]

> "…although they had a right to enter into possession and sell, the building society were never physically in possession of the subjects. The mere fact that they employed agents to advertise and ultimately to sell them to a third party is not in my view indicative of possession."

11.15 *Skipton Building Society v Wain*[32] is also cited by Higgins as supportive of the interpretation that lawful possession requires a longer-term interest in the property.[33] The security property in this case was a hotel. The pursuer had changed the locks and was progressing towards sale. It had allowed the owner to remain in occupation during this period to continue running the business and to minimise the likelihood of the alcohol licence being lost, thereby enhancing the property's marketability. Lord Stewart said:[34]

> "What [the security holders] have done amounts, in my view, to a taking of possession of the hotel property. They have changed the locks and the owners presently run the hotel only by their leave. Instructions have been given by [them] for the property to be put on the market."

---

[27] 1991 SCLR 394 at 399-400.
[28] See, for example, Higgins, *Enforcement* para 13.4 fn 32; Cusine and Rennie, *Standard Securities* para 8.68.
[29] *Ibid.*
[30] 1990 SLT (Sh Ct) 109. Like *Bank of Scotland v Community Charges Registration Officer for Central Region* 1991 SCLR 394 discussed at para 11.12, this case concerned whether a heritable creditor in possession of security subjects was "the owner" of the subjects in terms of the Abolition of Domestic Rates etc. (Scotland) Act 1987 s 10(4)(a).
[31] 1990 SLT (Sh Ct) 109 at 111.
[32] 1986 SLT 96.
[33] Higgins, *Enforcement* para 13.4.
[34] 1986 SLT 96 at 97.

Discussion

11.16 New legislation should clarify when a heritable creditor is "in lawful possession", and the consequences that flow from that. Before considering options for reform of the law, we discuss the general principles of Scots law in relation to possession and review how the concept of a "heritable creditor in possession" is approached in other relevant legislation. We also consider the comparative position.

Possession in Scots law

11.17 The rules of possession in Scots law are drawn from Roman law.[35] Possession requires *corpus* (an act of the body) and *animus* (an act of the mind).[36] The act of the body can be expressed as requiring exclusive physical control of the thing possessed.[37] The act of the mind is the intention to exercise that exclusive physical control for the benefit of oneself.[38] This intention is often inferred from the physical act.[39] Physical control may be taken directly by the possessor themselves, referred to as natural possession. Alternatively, control may be taken by a third party acting on the possessor's behalf, referred to as civil possession.[40] An example of the latter is a landlord holding civil possession through their tenant, with the tenant in natural possession of the property.

11.18 Determining whether a person has obtained exclusive physical control of a piece of heritable property is less straightforward than in the case of moveables.[41] In the Outer House decision in *Hamilton v McIntosh Donald Ltd*,[42] a case in which the pursuer sought to establish sufficient possession of a plot of land over ten years to have acquired ownership of it by way of prescription,[43] Lord Prosser noted:[44]

> "The acts from which proprietory possession can be inferred are so multifarious, and the patterns which they may form, with one another, are so infinite in their variations…one cannot lay down rules. The matter in my view is one of circumstantial proof."

What is required in order to establish possession of heritage may also vary depending on the context in which possession must be proved. In *Kaur v Singh (No 1)*[45] Lord Rodger warned against relying on case law construing the meaning of possession in one statute when construing its meaning in another:[46]

> "It is well known that terms such as 'possession' have a wide range of meanings and that one must always have regard to the particular context in which they are used. For

---

[35] Reid, *Property* para 114.
[36] *Ibid*, para 117.
[37] *Ibid*, para 119; Stair II.I.13.
[38] Reid, *Property* para 123.
[39] *Ibid*, para 119; Stair II.I.13.
[40] Reid, *Property* para 121.
[41] *Ibid*, para 123; Stair II.1.11. Cf Professor Rennie, in his commentary on *Hamilton v McIntosh Donald* (discussed below), commenting: "It is easy to understand the concept of possession in relation to a semi-detached dwellinghouse. It is not so easy to understand the concept of possession in relation to subjects on which no buildings are erected." See R Rennie, "Possession: Nine Tenths of the Law" 1994 SLT (News) 261-265 at 261.
[42] 1994 SC 304. The decision at first instance was affirmed in the Inner House.
[43] Prescription and Limitation (Scotland) Act 1973 s 1.
[44] 1994 SC 304 at 316H-1.
[45] 1999 SC 180.
[46] 1999 SC 180 at 193.

that reason alone we would treat with caution any argument which sought to construe the term 'possession' in the [Land Registration (Scotland) Act 1979] by reference to its use in the [Prescription and Limitation (Scotland) Act 1973]."

11.19 The approach to possession adopted in standard security legislation need not, therefore, necessarily align with the use of that term in other statutes. An argument could also be made that a determination of whether possession has been taken by a security holder in any particular case should always turn on its facts. Bearing in mind the routine nature of the exercise of remedies under standard securities, however, we think this approach would be impractical.

Statutory rights and liabilities of heritable creditors in possession

11.20 A number of statutory provisions confer rights or impose liabilities on heritable creditors where they are in (lawful) possession of the land or buildings in which the security is held, or where they are entitled to receipt of rents from the land or buildings, which follows from entry into lawful possession under the 1970 Act. The main provisions are set out in the table below. These statutory provisions, and the policies which underpin them, may also help to illustrate how "lawful possession" under the 1970 Act has been understood.

Provision	**Person on whom rights conferred or liabilities imposed**
Title Conditions (Scotland) Act 2003, s 123(2)	Heritable creditor in lawful possession of the security subjects
Tenements (Scotland) Act 2004, s 28(3)	Heritable creditor in (lawful) possession of the flat
Planning (Scotland) Act 2006, s 23(1) [inserting s 75(11) into the Town and Country Planning (Scotland) Act 1997] and s 39(11)	Heritable creditor in lawful possession of the security subjects
Environmental Protection Act 1990, s 78A(9)	A person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive, the rents of the land

11.21 The understanding that "lawful possession" has been taken on ejecting occupants and changing the locks seems clearly to underpin the relevant provisions in the three Acts of the Scottish Parliament in the table above. Both the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 define "owner" to include a heritable creditor in lawful possession.[47] In the case of the 2003 Act, the effect of the relevant provision is largely to enable creditors in possession to exercise rights of enforcement, waiver and discharge in

[47] Tenements (Scotland) Act 2004 s 28(3); Title Conditions (Scotland) Act 2003 s 123(2).

relation to burdens which are pertinents of the security property.[48] For the 2004 Act, the effect is that heritable creditors in possession may exercise the rights conferred on flat owners in relation to the Tenement Management Scheme, and are subject to the provisions which place liability on owners of tenement flats to share costs for work carried out on the building.[49]

11.22 In the Scottish Law Commission projects preceding these pieces of legislation, we suggested that a heritable creditor in possession is generally regarded as standing in for the owner of the property.[50] This was based on the view expressed in Gloag and Irvine's *Law of Rights in Security*,[51] published in 1897. We did not address what was understood by "possession" at the time of that text, or whether the meaning may have been altered by the 1970 Act. However, the policy arguments we made in support of treating the creditor in possession as the owner suggest that a minimal approach to possession was what we had in mind.

11.23 In our Report on the Law of the Tenement, we suggested the likelihood of prompt and efficient maintenance of tenements increases in line with the likelihood that all flat owners will pay their share of the costs. Where an owner sells their flat, the other owners may struggle to locate them in order to recover such costs. Accordingly, we recommended that the purchaser should take on this liability subject to the right to relief from the seller, who the purchaser should easily be able to locate.[52] Similarly, when an owner is ejected by a security holder, we recommended that liability for costs should fall to it, since the security holder is in a better position to recover than the other flat owners would be.[53] This policy concern is engaged at the point of ejection of the owner by the security holder, rather than anticipating any longer term management interest in the security property.

11.24 In our Discussion Paper on Real Burdens, we suggested a security holder in possession, "usually as a prelude to sale", has an interest in preserving burdens from which the security property benefits.[54] An owner who has lost their house, we suggested, "should not be able to grant minutes of waiver in exchange for ready cash."[55] Again, entry into lawful possession through ejection and changing the locks seems to be envisaged here.

11.25 The provisions introduced by the Planning (Scotland) Act 2006 oblige a heritable creditor in possession to abide by the terms of any planning obligation[56] registered against the security property,[57] and confer on a heritable creditor in possession the right to vote in a ballot

---

[48] For example, ss 8-9, 33-37, 106-107. See also the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009/729 art 18(2) conferring similar rights and liabilities on a heritable creditor in possession of property covered by the Development Management Scheme.
[49] For example, ss 4, 10, 21, 24 and Sch 1 r 4.
[50] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1997) para 8.26 available at: https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf; Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No 106, 1998) para 3.59 available at: https://www.scotlawcom.gov.uk/files/3312/7892/5856/dp106_real_burdens.pdf.
[51] At 100-101.
[52] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1997) paras 8.9-8.14.
[53] *Ibid,* at 8.26. It might be noted here that security holders generally do not recover all their costs, however. In effect this may be a transfer of loss from other flat owners to the security holder.
[54] Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No 106, 1998) para 3.59.
[55] *Ibid*.
[56] Obligations undertaken by owners of land, usually in agreement with the relevant planning authority in connection with the grant of planning permission, to regulate the use or development of land: Town and Country Planning (Scotland) Act 1997 s 75 (as amended).
[57] Planning (Scotland) Act 2006 s 23(1) amending the Town and Country Planning (Scotland) Act 1997 s 75.

on any proposed Business Improvement District arrangement[58] which would include a security property in respect of which the creditor was liable for non-domestic rates.[59] Although we have been unable to find any explicit discussion of the reasons for including heritable creditors in possession within these provisions, it seems reasonable to suggest the policy underlying the comparable provisions in the 2003 Act may also be relevant here, again suggesting that changing the locks was all that was required for a heritable creditor to be in lawful possession.

11.26 The Environmental Protection Act 1990, and subsequent legislation which has borrowed from its provisions, imposes a liability on a security holder entitled to receipt of rents. The assumption underlying this provision, as expressed in the Parliamentary debates preceding its introduction, appears to have been that entitlement to rents arises on taking physical control of the property, again supporting the idea that "lawful possession" in the 1970 Act will result from ejecting occupants and changing the locks. Under the 1990 Act, if the person responsible for contaminating land cannot be found, responsibility for its remediation falls to "the owner or occupier for the time being of the contaminated land".[60] "Owner" is defined as:[61]

> "in relation to any land in Scotland…a person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive, the rents of the land in connection with which the word is used..."

This definition was intended to mirror the equivalent provision in English law, which refers to:[62]

> "a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let."

11.27 The Parliamentary debates leading to the introduction of the 1990 Act recognised that the costs imposed by the Act could be substantial and explored a number of policy arguments for and against their imposition on mortgagees and heritable creditors.[63] It was noted that lenders should not be treated as "deep pockets" for payment of remediation costs purely by virtue of their lending,[64] not least because this might limit the availability of finance to businesses dealing with potentially contaminating substances,[65] which could include small businesses such as dry cleaners and petrol stations.[66] Against this background, an amendment was proposed to exclude from liability a heritable creditor who was "not in physical possession or who exercises its rights as security holder only for the purpose of preserving, protecting, repairing, securing or selling [the land]…and otherwise performs no operational function in respect of it."[67] This amendment was, however, rejected on the basis that it could prevent suitably prompt action to deal with contamination of the site,[68] and that it would not be

---

[58] An agreement among local businesses to support regeneration within a particular area: see https://www.gov.scot/policies/regeneration/business-improvement-districts-bids/.
[59] Planning (Scotland) Act 2006 ss 39(4)-(6) and (9)-(11).
[60] Environmental Protection Act 1990 s 78F(4).
[61] *Ibid*, s 78A(9).
[62] *Ibid*.
[63] Parliamentary Debates, House of Lords, Official Report Vol 560, 31 January 1995 cols 1444-1451; Vol 562, 7 March 1995 cols 163-166; Vol 562, 20th March 1995 cols 1039-1044.
[64] Parliamentary Debates, House of Lords, Official Report Vol 560, 31 January 1995 col 1448.
[65] *Ibid*, col 1446.
[66] Parliamentary Debates, House of Lords, Official Report Vol 562, 20th March 1995 col 1042.
[67] Parliamentary Debates, House of Lords, Official Report Vol 560, 31 January 1995 cols 1444-1445.
[68] Parliamentary Debates, House of Lords, Official Report Vol 562, 7 March 1995 col 165.

right to allow mortgagees in possession an exemption from liability for what could be a long period before they sell the land when other owners could be liable.[69] Although a heritable creditor in Scotland is not an "owner" as a mortgagee may be in English law, the intention that the legislation should impose liability on a creditor who has taken physical possession of land as a prelude to sale seems clear.

11.28 The language used in the 1990 Act has been replicated in subsequent legislation to confer rights or impose liabilities on persons entitled to receipt of rents. In terms of rights, one example is the British Waterways Act 1995, by which heritable creditors who are or would be entitled to rents may claim compensation for damage or loss to land caused by the British Waterways Board entering land to carry out inspections, repairs and maintenance.[70] Another is the Regulatory Reform (Scotland) Act 2014, under which a heritable creditor entitled to receipt of rents may be entitled to compensation paid by a convicted person in relation to loss or damage caused to land in the commission of an offence.[71] In terms of liabilities, the Roads (Scotland) Act 1984 imposes liability on frontagers for repair and maintenance of a private road to a reasonable standard.[72] "Frontager" is defined as the owner of the land fronting or abutting the road and the definition of "owner" includes the person who is or would be entitled to rents.[73] The Environmental Authorisations (Scotland) Regulations 2018 provide that where nuclear waste present on land ought to be disposed of and the land is unoccupied, a heritable creditor entitled to receipt of rents may be required to make arrangements for this, or to reimburse the Scottish Environment Protection Agency for doing so.[74]

11.29 For completeness, we note further discussion in the literature as to whether statutory provisions which place a liability on the "owner" of heritable property, without defining this term to include a heritable creditor, may nevertheless be interpreted to include a liability on a security holder who has taken possession, is in receipt of rents or exercises control over the heritable property in some other way.[75] The discussion in the preceding paragraphs may be of relevance in relation to those arguments, but we do not consider interpretation of such provisions to fall within the scope of this project.

Comparative law

11.30 The assistance to be gained from our comparator jurisdictions in relation to possession is limited. In France, where enforcement is by way of judicial execution, a creditor in a *hypothèque* has no right to possession of the security property, and sale normally occurs without prior ejection of the debtor.[76] In South Africa, the right to possess does not arise automatically, and although it may be agreed between parties, the limited available case law on the subject does not shed light on how possession may be constituted.[77]

---

69 Parliamentary Debates, House of Lords, Official Report Vol 562, 20 March 1995 col 1043.
70 British Waterways Act 1995 ss 3(1), 4-5 and 10.
71 Regulatory Reform (Scotland) Act 2014 s 34.
72 Roads (Scotland) Act 1984 s 13(1).
73 Higgins, *Enforcement* para 13.19, citing *Halliday's Conveyancing Law and Practice* Vol II, para 49-21; Roads (Scotland) Act 1984 s 151(1).
74 Environmental Authorisations (Scotland) Regulations 2018 reg 2 and Sch 8 para 36.
75 For example, Cusine and Rennie, *Standard Securities* para 8.69; Higgins, *Enforcement* para 13.19; D J Cusine (ed) *The Conveyancing Opinions of JM Halliday* (1992) 337.
76 French Code of Civil Enforcement Procedures art L321-1 para 3; see also MacLeod, *Enforcement* para 4.16.
77 *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 4 SA 174 (E).

11.31 In Germany, judicial execution against land may take the form of *Zwangsversteigerung* (judicial auction) or *Zwangsverwaltung* (similar to receivership).[78] In the case of the latter, the *Zwangsverwalter* takes possession of the property[79] and uses it to generate revenue in satisfaction of the debt.[80] The creditor has no right to personal possession in either process.

11.32 In English law, since a mortgage is a form of possessory interest,[81] the mortgagee has an inherent right to take possession of the security property.[82] In practice, however, a receiver will almost invariably be appointed, as discussed in Chapter 9.[83] The question of which actions on the part of a mortgagee will constitute entry into possession is the subject of debate, and the case law does not provide a clear answer.[84] We note the concern expressed in the Parliamentary debates preceding the Environmental Protection Act 1990, discussed above, as to the lack of clarity on this issue.[85]

11.33 The position in New Zealand is similar, although the mortgagee's right to take possession is now set out in statute. The Property Law Act 2007 provides that a creditor may physically enter into the land,[86] may "assert management or control over the land"[87] by requiring the occupier of the land to pay any rents or other profits to the mortgagee rather than the mortgagor,[88] or obtain a court order for possession of the land,[89] under which it is treated as taking possession at the time and date of its application to the court.[90] As in England, a creditor in New Zealand may alternatively appoint a receiver to carry out these actions on its behalf,[91] and with the "institutionalised mantra" that receivership is the better remedy, this approach is usually preferred.[92]

Possession: future law

11.34 New legislation should clarify which actions on the part of a security holder will constitute entry into possession and the consequences which flow from that. Reform here should take into account the way this phrase is currently understood in practice, and recognise the intentions of Parliament when conferring rights and imposing liabilities on heritable creditors in the legislation discussed above. We think the most straightforward way to address these concerns may be simply to provide that a heritable creditor is in possession when exerting control over the boundaries of the property.

---

[78] German Foreclosure Law (ZVG) § 866 I.
[79] *Ibid*, § 151 I.
[80] *Ibid*, §§ 152 I and 155 II.
[81] Law of Property Act 1925 ss 85-86.
[82] Bridge et al., *Megarry & Wade* para 24-024.
[83] See paras 9.6-9.8.
[84] E Cousins, I Clarke and S Hornett, *Cousins on the Law of Mortgages* (4th edn, 2017) para 25-12.
[85] Parliamentary Debates, House of Lords, Official Report Vol 560, 31 January 1995 cols 1445-1446; Vol 562, 7 March 1995 cols 163-164; Vol 562, 20 March 1995 col 1041.
[86] Property Law Act 2007 s 137(1)(a).
[87] *Ibid*, s 137(1)(b).
[88] *Ibid*.
[89] *Ibid*, s 137(1)(c).
[90] *Ibid*, s 139(1)(c).
[91] Property Law Act 2007 s 137; Receiverships Act 1993 s 6(3); B Allan, *The Law of Secured Credit* (2016) para 14.2.05.
[92] D Armstrong, "The mortgagee remedies of entry into possession and receivership: ancient equity meets modern statute" (2000) 31 VUWLR 667-702, 667.

11.35 To define a security holder as "in possession" at the point at which it ejects occupants and changes the locks, or otherwise exerts control over the boundaries of the property, seems to us consistent with the broader understanding of the concept of possession in Scots law. It aligns with our anecdotal understanding of the way the term is commonly used in practice in this area, and with the policy intent behind the inclusion of "heritable creditors in possession" in the Acts of the Scottish Parliament referred to above. In the interests of clarity, we think it may be beneficial for new legislation to provide a non-exhaustive list of actions on the security holder's part which may constitute entry into possession on the basis of this understanding. Changing the locks to a building would be one obvious example. For larger or undeveloped plots of land, putting in place boundary markers or engaging a security service may be relevant. We seek views on these issues below. For the avoidance of doubt, we consider that where a security holder enters into civil possession of a security property, thereby exerting control through a third party such as a tenant, this will also amount to taking possession. The point is that, although this longer-term form of interest in the property will certainly be sufficient to meet the definition of possession, it is not necessary: something more minimal will suffice.

11.36 In relation to reform of the law on taking possession, we therefore ask:

54. (a) In future legislation, should "taking possession" be defined to mean taking action to physically secure the land or buildings in which the security is held, including taking possession through a third party such as a tenant? If not, why not?

(b) Should the legislation include a non-exhaustive list of actions which meet the definition of possession? If so, which actions should be included?

Rights and liabilities following on entry into possession

11.37 A security holder who enters into (lawful) possession is entitled to collect rents and grant and administer leases in relation to the security property, and we consider these remedies in more detail in Chapter 12. Other rights and obligations also follow automatically from possession in order to make the remedy effective for the security holder and to protect the owner of the security property. This is dealt with at present under section 20(5) of the 1970 Act, which provides:

> "There shall be deemed to be assigned to a creditor who is in lawful possession of the security subjects all rights and obligations[93] of the proprietor relating to—
>
> (a) leases, or any permission or right of occupancy, granted in respect of those subjects or any part thereof, and
>
> (b) the management and maintenance of the subjects and the effecting of any reconstruction, alteration or improvement reasonably required for the purpose of maintaining the market value of the subjects."

[93] The conceptual issues with assigning obligations are discussed in Anderson, *Assignation* para 8-23.

11.38 We will consider section 20(5)(a) together with connected rights and obligations in relation to leases in the next Chapter.[94] In this section, we focus on rights and obligations relating to the management and maintenance of the security property.

Rights of a security holder in possession

11.39 The current law in relation to the rights of a creditor in possession under section 20(5) was explored in the House of Lords decision in *David Watson Property Management Ltd v Woolwich Equitable Building Society*.[95] Lord Hope noted that, as under a bond and disposition in security, a creditor entering into possession was placed in the position of the owner of the security property for certain purposes. On this point, he quoted with approval[96] the view of Gloag and Irvine as to the position of a creditor in possession under the older law:[97]

> "The proper criterion as to the limits of his rights would seem to be found in the consideration of the legitimate interest of a creditor in entering into possession. These are solely to obtain payment of his debt, principal and interest, out of the proceeds of the subjects. Whatever powers may be necessary for that purpose he would seem entitled to exercise; but he is not, it is submitted, entitled to use the subjects for his own convenience or enjoyment in any manner which has no effect in reducing his debt."

11.40 This dictum sheds some light on the extent of the powers which section 20(5) makes available. Whilst the position in relation to repair and alteration of the security property seems reasonably plain from the wording of subsection (b), there is little guidance on what other powers of "management and maintenance" may be covered. This ambiguity may be of particular concern where the security holder remains in possession for a longer period, most obviously as a landlord. We are not aware of difficulties resulting from this issue in practice, and are wary of adding complication where none presently exists. We do not think an attempt to list the specific actions authorised by this power would be either necessary or possible. However, we think it may be useful to embody the broad principle set out by Gloag and Irvine in future legislation to guide parties to the security and the court, should any dispute arise.

11.41 We ask:

55. On entry into possession, should a security holder be able to exercise the rights of the owner or registered tenant in relation to the management and maintenance of the security property where:

(a) Management of the security property includes exercise of any rights required in connection with the aim of enforcing performance of the secured obligation;

(b) Maintenance of the security property includes any reconstruction, alteration or improvement reasonably required for the purpose of maintaining its market value?

---

[94] Paras 12.6, 12.16-12.18.

[95] 1992 SC (HL) 21.

[96] *Ibid* at 27.

[97] Gloag and Irvine, *Rights in Security* 100.

Liabilities of a security holder in possession

11.42 Section 20(5)(b) provides that liabilities incurred in the day-to-day management and maintenance of the security property become the responsibility of the security holder on entry into possession. The security holder may seek recovery of these costs from the debtor in turn.[98] This provision seems both practical and fair, and we are not aware of any appetite for reform in this respect.

11.43 An issue remains, however, with identifying the relevant liabilities. In *David Watson Property Management*, the question was whether debts accrued by the owner in connection with the maintenance of the property prior to the creditor's entry into possession thereafter became the creditor's responsibility under section 20(5)(b). The action was raised by a property factor who pursued the creditor for outstanding charges in relation to common repairs to the tenement. The repairs had been undertaken prior to the creditor entering into possession. Responsibility for maintenance was shared amongst the flats by virtue of real burdens in the titles. The pursuer's argument was that the outstanding costs were obligations of the owner in relation to the maintenance of the property, and therefore transferred to the creditor under the terms of the statute. Reversing the approach taken in the lower courts,[99] the House of Lords disagreed. Lord Hope noted that, under the older law, a creditor in possession would not take on liability for the debtor's personal debts. Nothing in the wording of the statute suggested a change to this position. Although an obligation contained in a real burden is an obligation on the owner, costs accrued in fulfilment of that obligation become personal to the debtor. Accordingly that debt does not transmit.[100]

11.44 We were critical of this decision in our *Report on the Law of the Tenement*.[101] We noted that difficulty in recovering shared repair costs from insolvent or absent flat owners was one reason for tenement disrepair, a problem exacerbated by the decision in the case.[102] We also noted that the decision turned on the fact the real burden was expressed as an obligation to maintain the tenement, rather than an obligation to pay for maintenance. Since the maintenance work had been carried out, the obligation under the burden had been fulfilled, and liability for costs was personal to the debtor. Had the real burden contained an obligation to pay for maintenance, however, it would not have been fulfilled, and may have transmitted to the creditor as an obligation on the owner.[103] An outcome which turns on these vagaries of drafting might be considered inconsistent.

11.45 We think future legislation should clarify the position in relation to costs incurred by the owner in relation to the management and maintenance of the security property which remain outstanding on the security holder's entry into possession. Where these costs are shared amongst groups of properties, as in a tenement or community burden situation, transferring liability for the owner's share of costs to the security holder makes prompt and efficient maintenance more likely. This concern has been addressed in these situations to some extent by the redefinition of "owner" to include heritable creditors in possession in the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. Outwith the context of shared

---

[98] 1970 Act SC 12. Recovery of enforcement expenses by the security holder is discussed in Chapter 15.
[99] 1989 SLT (Sh Ct) 4 (Sheriff Court); 1989 SLT (Sh Ct) 74 (Sheriff Principal).
[100] 1992 SC (HL) 21 at 26-28.
[101] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1997) available at: https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf.
[102] *Ibid*, para 2.18.
[103] Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1997) para 8.11.

repairs, it is not clear to us that a policy justification exists for attributing liability for arrears to a security holder in possession. We note here for completeness that a mirror ambiguity remains as to the security holder's entitlement, if any, to unpaid rents due to the owner at the point when the security holder enters into possession, discussed in the next Chapter.[104] We would be grateful for the views of consultees.

11.46 We ask:

56. On entry into possession:

(a) Should a security holder assume the obligations of the owner or registered tenant in relation to the management and maintenance of the security property?

(b) Should this include responsibility for outstanding costs previously incurred by the owner or registered tenant in relation to the management and maintenance of the security property?

[104] See the discussion below of *UCB Bank Ltd v Hire Foulis (In Liquidation)* 1999 SC 250 at para 12.5.

Chapter 12 Rents and Leases

12.1 One way in which the security holder can use the security property to generate revenue with which to satisfy the secured obligation is by collecting rental income. In this Chapter, we consider the security holder's connected remedies of collecting rents, and granting and administering leases of the security property. The Chapter begins by considering how the entitlement to exercise this remedy emerges. We then consider which rents the security holder should be entitled to collect. Finally, we discuss the current law in relation to the grant and administration of leases and consider options for reform.

Current law

12.2 Under the 1970 Act, the remedies of collecting rents, and granting and administering leases of the security property, become available at the point where a security holder is in lawful possession of the security property.[1] In Chapter 11, we provisionally proposed that any new legislation on standard securities should provide that a security holder is in possession where it controls the boundaries of the property by itself or through a third party such as a tenant. We think new legislation should continue to provide, as at present, that the security holder's entitlement to rents and leases follows from entry into possession.

12.3 We ask:

> **57. Do consultees agree that the security holder's right to collect rents and grant and administer leases under any new legislation should follow from entry into possession of the security property?**

Collecting rents

12.4 Collecting rents is the most obvious mechanism by which a security holder can generate income from a security property without transferring it. Rents may be collected from a tenant where the security is held in ownership of land and buildings, or from a sub-tenant where the security is held in a registered lease. This remedy is available to security holders in all our comparator jurisdictions by right,[2] other than South Africa where the power does not arise under statute but can be agreed by the parties.[3] Under the 1970 Act, this power is set out in Standard Condition 10(3) as further regulated by section 20. It has been accepted by the Inner House, absent argument to the contrary in the case in question, that the pre-existing law on heritable securities in this respect has not been wholly replaced by the 1970 Act and continues to have some application.[4]

12.5 The provision in Standard Condition 10(3) is that the security holder "may receive or recover rents". A question has arisen over the extent of the rent payments which the security

---

[1] 1970 Act s 20(5)(a) and SC 10(3)-(4) discussed at paras 11.9-11.10.
[2] The position is discussed in detail in MacLeod, *Enforcement* paras 4.07 (England), 4.14 (New Zealand), 4.16 (France) and 4.19 (Germany).
[3] *Ibid,* para 4.20.
[4] *UCB Bank Ltd v Hire Foulis (In Liquidation)* 1999 SC 250 at 252.

holder may recover. In *UCB Bank Ltd v Hire Foulis (In Liquidation)*,[5] the pursuers and appellants argued that a right to satisfaction of the underlying obligation from the security subjects, including from their fruits, arises from the date of the security's creation. An Extra Division of the Inner House accepted that this was the case, but noted that the extent of the security subjects was not immutable, finding:[6]

> "…once rents have been paid to the person contractually entitled to receive them, the sums so paid no longer form part of the subjects which constitute the security…"

The court also found that, under section 20(5) of the 1970 Act, a security holder had no entitlement to rents until it entered into civil possession[7] of the security subjects.[8] Accordingly, rents paid to the contractually entitled party (usually the owner of the security property acting as the landlord in the lease) prior to that time ceased to form part of the security property and could not be recovered by the security holder. The position in relation to rents paid prior to entry into possession by the security holder therefore appears clear.

12.6 The position in relation to rents which have fallen due prior to entry into possession, but have not yet been paid, is muddier. Section 20(5)(a) assigns to the security holder "all rights…of the proprietor…relating to leases", which could be read to include claims to rent arrears. Under a bond and disposition in security, a bond holder who entered into possession was deemed to have received an assignation of rents from the debtor, which would allow for the pursuit of arrears unpaid at that date. Although the 1970 Act does not provide for an assignation of rents, Halliday suggests that "the creditor has under the standard conditions the material powers conferred by a clause of assignation of rents."[9] On this basis, Cusine and Rennie have argued that a security holder under the 1970 Act should also be entitled to pursue unpaid arrears.[10] Higgins makes a counter-argument[11] with reference to the decision in *David Watson Property Management Ltd v Woolwich Equitable Building Society*,[12] which we discussed in Chapter 11.[13] In brief, *David Watson* determined that liabilities of the debtor which fell due prior to the security holder's entry into possession were personal to the debtor, and did not transfer to the security holder under section 20(5) of the 1970 Act. If the accrued liabilities of the debtor arising from management of the security property do not transfer, it seems to us equitable to suggest that the same rule should apply to accrued claims. We would be grateful for the views of consultees.

12.7 We ask:

58. Should the security holder's remedy of collection of rents cover:

(a) Rents which fall due on or after the security holder's entitlement to rents arises?

---

[5] 1999 SC 250.
[6] *Ibid,* at 253.
[7] Entry into civil possession is discussed at para 11.4.
[8] 1999 SC 250 at 254. We note that this suggests section 3 of the 1894 Act, by which a heritable creditor, on raising an action of maills and duties, may interpel tenants from making payments to the contractually entitled party, is inconsistent with the provisions of the 1970 Act and would therefore be disapplied by the 1970 Act s 32.
[9] Halliday, *The Conveyancing and Feudal Reform (Scotland) Act 1970* para 6-22.
[10] Cusine and Rennie, *Standard Securities* para 8.68. The authors concede that the arguments are finely balanced.
[11] Higgins, *Enforcement* para 13.7.
[12] 1992 SLT 430.
[13] Paras 11.40-11.41 and 11.42-11.46.

(b) Rents which fell due prior to the security holder's entitlement arising, but have yet to be paid?

Granting and administering leases

12.8 In this section, we deal first with the power to grant a lease, and thereafter with the security holder's rights and obligations in relation to administration of (sub-)leases of the security property, whether granted by the security holder itself, or by the owner or registered tenant of the security property prior to the security holder's entry into possession.[14] The remedy of granting and administering leases of the security property is available in three of our comparator jurisdictions (England, New Zealand and Germany), though only through a receiver in the German case.[15]

Granting a lease

12.9 Under the 1970 Act, Standard Condition 10(4) provides that where a security holder enters into possession, it may let the security subjects or any part thereof. As currently framed, this remedy appears to apply even where the security property is a registered lease, to allow a security holder in possession of the tenant's interest to grant sub-leases. However, when Standard Condition 10(4) is read together with section 20(5)(a), which we discuss further below,[16] it seems tolerably clear that the security holder can have no greater right to grant sub-leases than the registered tenant. We think, in future legislation, it may be more straightforward to restrict this remedy to cases where the security property is ownership of land or buildings. Where the security property is a registered lease, the extent of any power to grant sub-leases will be determined by the terms of the lease itself, as discussed further below.[17] We accordingly ask:

59. In any new legislation, should the power to grant a lease be available under a standard security only where the security property is ownership of land or buildings?

12.10 The power to grant leases or sub-leases is regulated by section 20, which specifies that a lease may be granted for any period not exceeding seven years. Should a security holder wish to grant a longer lease, it must seek warrant of the court, specifying the proposed tenant, duration and conditions of the proposed lease. An application of this sort must be served on the owner and any other heritable creditor in respect of the land or buildings in which the security is held. Section 20(4) empowers the court to grant the application, as submitted or subject to such variation as it considers reasonable in all the circumstances of the case, or to refuse it. Halliday gave an opinion that the security holder may also competently grant a lease in excess of seven years with the agreement of the debtor.[18]

12.11 We understand that, in current practice, security holders do not exercise the power to grant a lease in respect of residential properties. This remedy is generally employed only in relation to commercial investment properties, most commonly in cases where the security

---

[14] Termination of leases granted by the owner or registered tenant of the security property was discussed in DP1 paras 8.2-8.40.
[15] Law of Property Act 1925 s 99(2) (England); Law of Property Act 2007, s 142 (New Zealand); and German Code of Civil Procedure § 152.
[16] Para 12.16-12.18.
[17] Para 12.17.
[18] D J Cusine (ed) *The Conveyancing Opinions of JM Halliday* (1992) 383.

property owner had operated as a landlord prior to enforcement action being taken by the security holder. Against this background, it has been suggested to us that the seven-year limit on the duration of leases which can be granted without the authority of the court is unduly restrictive, with a figure of fifteen years put forward as more appropriate in the modern commercial property market. The seven-year limit was carried over to the 1970 Act from the Heritable Securities (Scotland) Act 1894, section 6. The principle underlying the time limit was discussed during scrutiny of the Bill which became the 1970 Act by the First Scottish Standing Committee. Norman Buchan, the Minister who introduced the Bill, explained:[19]

> "Where a lengthy lease is contemplated, the proprietor of the subjects – who will usually be the debtor – should have the protection of the court to ensure that an unnecessarily long lease is not granted which would deprive him unreasonably of the use of his property. On the other hand, when it came to a lease of under seven years, we felt that the creditor should be entitled to let – in other words to regain moneys due – without going through the formalities of going to court."

Seven years was seemingly considered to strike the right balance at the time, though there is no discussion as to why.

12.12 In our comparator jurisdictions, various limits are imposed on lease lengths. In England, a mortgagee in possession may grant a lease for 50 years for agricultural or occupation purposes, or 999 years for buildings,[20] though it should be recalled that any lease granted by the mortgagee is generally subject to the mortgagor's equity of redemption.[21] In New Zealand, a residential lease is limited to two years,[22] with a lease of any other type limited to 15 years,[23] though it should be recalled that these powers are subject to fairly stringent regulation.[24] There appears to be no time limit in respect of the receiver's power to grant a lease in Germany.

12.13 We have discovered no reported case law or critical commentary in respect of this remedy, and we do not consider the comparative material to provide a clear steer for or against extension of the seven-year limit. We are keen to hear from consultees on how this remedy is used in practice and whether there is an appetite for reform. We are also interested in the views of consultees on whether an extension of the seven-year limit might give rise to debtor protection concerns, and if so, how these might be alleviated. One suggestion is that an extended maximum lease duration might be counterbalanced by providing the owner with a right to challenge the grant of the lease where it is unreasonable in all the circumstances of the case. Such a right of challenge may help to address any concerns in relation to the rights of security property owners under A1P1 which might result from reform proposals in this area. We seek the view of consultees below.

12.14 We noted above that security holders do not generally grant residential leases in practice. However, the introduction of the Private Housing (Tenancies) (Scotland) Act 2016 raises a difficulty in relation to the length of lease a security holder may grant which new

---

[19] Parliamentary Debates, House of Commons, Official Report, First Scottish Standing Committee, 9 April 1970 col 329.
[20] Law of Property Act 1925 s 99(3). This section sets out different time limits where the mortgage was granted prior to 1926.
[21] *Franklinski v Ball* (1864) 33 Beav 560; *Chapman v Smith* [1907] 2 Ch 97.
[22] Property Law Act 2007 s 143(2)(a)(i).
[23] *Ibid*, s 143(2)(a)(ii).
[24] *Ibid*, ss 142-145.

legislation should address in case this practice changes. A tenancy under the 2016 Act is the only form of private residential tenancy which can now be granted. Tenancies under this Act cannot be for a fixed duration. Instead, they can be terminated only in accordance with Part 5 of the Act,[25] which in summary provides for a tenant to terminate the lease on giving 28 days' notice to the landlord,[26] or for a landlord to terminate the lease either through a consensual arrangement with the tenant[27] or by obtaining an eviction order from the First-Tier Tribunal[28] on the basis of one of the eviction grounds enumerated in Schedule 3 to the Act. The tenancy may therefore continue indefinitely if the tenant does not consent to leave and no ground of eviction exists. The grant of a lease of this kind by a security holder may raise similar concerns in relation to the position of the debtor as the grant of a lease longer than the duration allowed by statute. Since residential tenancies are seldom granted in practice, and a security holder who wished to do so would often require warrant of the court in terms of our proposals in relation to the enhanced debtor protection measures, it may be appropriate for future legislation to allow for the grant of a residential tenancy only where warrant of the court has been obtained. Again, we seek views.

12.15 We ask:

60. In relation to the grant of (sub-)leases by the security holder:

(a) What comments do consultees have on the current use of this remedy in practice?

(b) What duration of lease should the security holder be entitled to grant without warrant of the court?

(c) Would the extension of the seven-year limit in relation to leases give rise to any debtor protection concerns? If so, what measures should be taken to address these concerns?

(d) What limits, if any, should be placed on the power of a security holder to grant a private residential tenancy?

Administering a lease

12.16 A security holder who grants a lease, who takes possession of property already subject to a lease as the landlord, or who takes possession of the registered tenant's interest where the security property is a registered lease, acquires certain rights and is subject to certain obligations under the 1970 Act. Standard condition 10(5) provides that where the security holder has entered into possession:

> "there shall be transferred to him all the rights of the debtor in relation to the granting of leases or rights of occupancy over the security subjects and to the management and maintenance of those subjects."

[25] 2016 Act s 44.
[26] 2016 Act ss 48-49.
[27] 2016 Act s 50.
[28] 2016 Act ss 51-53.

Section 20(5)(a) further provides:

> "…there shall be deemed to be assigned to a creditor who is in lawful possession of the security subjects all rights and obligations[29] of the proprietor relating to leases, or any permission or right of occupancy, granted in respect of those subjects or any part thereof."

12.17 Where the security is held in ownership of land or buildings, these provisions enable a security holder to administer a lease which was granted by the owner prior to the exercise of the security, or a lease subsequently granted by the security holder itself. Where the security is held in the tenant's interest in a registered lease, they enable a security holder who has taken possession of that interest to exercise rights and remedies against the landlord, including the right to grant sub-leases,[30] so far as consistent with the terms of the lease. The security holder acquires these rights and obligations *tantum et tale* (meaning that it holds the rights subject to the same restrictions as were placed on the owner or registered tenant),[31] and does not become responsible for liabilities incurred by the owner or registered tenant prior to the security holder taking possession.[32]

12.18 We are not aware of any reported cases or critical commentary on this aspect of the current law. We consider that equivalent provision in any new legislation will be an essential aspect of the remedies of rents and leases, and seek the views of consultees in that respect.

61. We provisionally propose that, on entering into possession of the security property:

(a) A security holder should be entitled to exercise the rights of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property; and

(b) A security holder should assume the obligations of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property.

Do consultees agree?

---

[29] The conceptual issues with assigning obligations are discussed in Anderson, *Assignation* para 8-23.
[30] 1970 Act s 20(4) will also apply to the grant of subleases, so that where a security holder seeks to grant a sub-lease for a period which exceeds seven years, it will require warrant of the court.
[31] *David Watson Property Management v Woolwich Equitable Building Society* 1992 SLT 430 (Inner House, not revised on appeal).
[32] *Holt Leisure Parks Ltd v Scottish & Newcastle Breweries Plc* 1996 GWD 22-1284.

Chapter 13 Sale

Introduction

13.1 The power to sell the security property is perhaps the most important remedy available to the holder of a standard security. In this Chapter, we review how this power becomes available to a security holder under the current law, look at the duties placed on the security holder during the sale process and consider the position of the debtor and the purchaser if the process is not carried out correctly. We conclude with discussion of options for reform.

Current law

13.2 Under the 1970 Act, the power of sale is conferred on a security holder by Standard Condition 10(2), which allows the security holder to sell the security property or any part thereof. The power of sale acquired by the security holder derives from the owner or registered tenant of the land and buildings in which the security is held. The extent of the tenant's power in that respect may be limited by the terms of the lease, so that, for example, the landlord's consent to sale may be required.[1] In practice, it is unlikely that a security holder will have taken security over a lease without an absolute power of assignation, however.[2] Where the security property is not used to any extent for residential purposes, the power of sale becomes exercisable following expiry of a calling-up notice,[3] expiry of a notice of default,[4] or on the basis of court warrant.[5] Where the security property is used to any extent for residential purposes, warrant of the court is required,[6] unless the debtor has complied with the voluntary surrender procedure.[7]

13.3 Exercise of the power of sale is regulated by section 25 of the 1970 Act, which provides:

> "A creditor in a standard security having right to sell the security subjects may…exercise that right either by private bargain or by exposure to sale, and in either event it shall be the duty of the creditor to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained."

The term "exposure to sale" in this context means sale by public roup (auction).[8] The security holder accordingly has a free choice between sale by private bargain or public auction, subject to the duties set out in the remainder of the provision.[9] In *Bisset v Standard Property Investment Plc*,[10] Lord Hamilton noted that "there may be circumstances in which a particular choice of mode of sale is so bizarre as to be outwith the power of selection conferred on the

---

[1] D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992) 288.
[2] Higgins, *Enforcement* para 13.8.
[3] 1970 Act s 20(2).
[4] *Ibid*, s 23(2).
[5] *Ibid*, s 24(1).
[6] *Ibid*, ss 24(1)-(1B).
[7] *Ibid*, s 23A, discussed at para 8.19.
[8] Higgins, *Enforcement* para 14.2 fn 6.
[9] *Ibid*, para 14.7; Gordon and Wortley, *Scottish Land Law* para 20-143.
[10] 1999 GWD 26-1253 at 525.

creditor." In practice, sale by auction generally occurs only where it has proved impossible to find a private buyer on the open market.[11]

Duties on the security holder

13.4 The security holder is under a duty to take all reasonable steps to ensure that the price obtained in the sale is the best price reasonably obtainable (generally referred to as the "best price" duty.) It is worth noting that the security holder is not bound to obtain the best *possible* price. A property's "hope value" – its theoretical value if some potential future event, such as the grant of planning permission, occurs – is not relevant for such a determination.[12] What matters, per Lord Hope in *Dick v Clydesdale Bank plc*, is:[13]

> "…the reality of the market place in which the subjects are exposed at the time when [the security holder] decided to sell. So long as he takes all reasonable steps to attract competition in that market it can be expected to find its own level and establish what the property is worth."

A debtor or other security holder seeking to challenge the security holder's compliance with this duty would accordingly need to demonstrate that a better price could have been obtained at the time of sale had all reasonable steps been taken. Expert evidence on the property's market value at that time will be relevant to the court's determination of such a challenge.[14]

13.5 In practice, most of the steps available to a security holder in order to ensure the best price is obtained concern how the property is marketed. Some doubt exists as to whether "the duty of the seller to advertise the sale" in section 25 is independent of the best price duty,[15] but Gretton and Reid note that the two "often come to much the same thing",[16] and courts generally treat them together.[17] Case law confirms that advertising carried out purely to meet the statutory duty to advertise, rather than with a view to attracting competition and achieving the best price, will not satisfy the obligations on the security holder under section 25.[18] Overall, the better view seems to be that the requirement to advertise is an aspect of the best price duty, rather than an independent requirement.

13.6 Under the older law, stringent advertising requirements were imposed in relation to sale under a bond and disposition in security, including stipulations on when and for what period of time advertising should occur, and in what publications.[19] While Reid has suggested that a prudent security holder should adhere to the requirements in the previous legislation,[20]

---

[11] Gretton and Reid, *Conveyancing* para 23-35.
[12] *Dick v Clydesdale Bank Plc* 1991 SC 365 at 371. In *Dick*, the court rejected the argument advanced by the pursuer that the potential for part of the land to be developed if planning permission was granted (which had previously been refused) was relevant for determining the best price that could reasonably be obtained.
[13] *Dick v Clydesdale Bank Plc* 1991 SC 365 at 371.
[14] *Bisset v Standard Property Investment Plc* 1999 GWD 26-1253. The court in this case rejected an argument by the defenders that such a value was theoretical in the same way as the 'hope value' in *Dick* was.
[15] *Peters v Belhaven Finance Ltd* 2016 SLT (Sh Ct) 156 at para 50 provides an example of the duties treated separately.
[16] Gretton and Reid, *Conveyancing* para 23-35.
[17] *Davidson v Clydesdale Bank Plc* 2002 SLT 1088 at para 21; *Wilson v Dunbar Bank Plc* [2006] CSOH 105; 2006 SLT 775 at para 171; *Dick v Clydesdale Bank Plc* 1991 SC 365 at 371.
[18] *Dick v Clydesdale Bank Plc* 1991 SC 365; *Wilson v Dunbar Bank Plc* [2006] CSOH 105; 2006 SLT 775. (This decision was reversed on appeal to the Inner House but the findings in respect of section 25 were undisturbed: [2008] CSIH 27, 2008 SC 457).
[19] 1924 Act s 38 (repealed).
[20] Reid, *Property* para 202.

and in practice security holders may do so to protect themselves from challenge,[21] it is generally accepted that less is required under the 1970 Act.[22] In *Peters v Belhaven Finance Ltd*, Sheriff Mohan considered that compliance with the duty requires only "something more than the bare minimum".[23] Cusine argues that "virtually anything" would suffice.[24]

13.7 More detailed guidance may be gleaned from commentary and case law. There is no rule on the number of times, for how long, or when a property must be advertised for compliance with section 25.[25] In relation to where advertising should be placed, Swinton suggests as a guiding principle an element of "public notice".[26] It is generally accepted that advertising in the window of an estate agents' office or in a solicitors' property guide is sufficient.[27] It may also be the case in the present market that advertising on the internet is adequate, at least for residential properties.[28] However, advertisement in a publication which carried little to no other advertising would be insufficient[29] as would circulating particulars of a sale solely to a closed client base.[30]

13.8 Any advertisement must be sufficiently precise: it is not permissible to advertise an unidentified property within an identified locality.[31] Furthermore, any advertisement should contain any distinguishing features of the security property likely to attract a higher price, such as the fact it is a licensed premises, contains minerals or has planning permission for further development.[32]

13.9 There is no obligation on a security holder to appoint professional agents to market the property or take professional marketing advice. In *Dick*, Lord President Hope suggested that "in the ordinary case the creditor may be regarded as having fulfilled the duties imposed upon him in regard to marketing of the subjects if he takes and acts upon appropriate professional advice".[33] Subsequent decisions departed from this approach, however. In *Bisset*, the court held that the security holder remains liable to comply with the section 25 duty even where professional agents have been employed. Lord Hamilton was of the opinion that the positioning of the security holder as quasi-trustee for the debtor, as had been relied upon by the Lord President in *Dick*, "should not be taken too far".[34] This view was followed in *Wilson v*

---

[21] Gretton and Reid, *Conveyancing* para 23-35.
[22] Cusine and Rennie, *Standard Securities* para 8.37; G Junor, "The heritable creditor's right to sell – the arising obligations?" (1997) SLG 159, 159; A J McDonald, "Advertisement requirements on a sale by a heritable creditor" (1994) 7 Prop LB 5, 5.
[23] *Peters v Belhaven Finance Ltd* 2016 SLT (Sh Ct) 156 at para 50.
[24] D J Cusine. "The power of sale under a standard security" 1991 JR 69, 183.
[25] While the Halliday Report recommended a period of three consecutive weeks as an appropriate period of advertisement, this was not adopted by the 1970 Act: Halliday Report para 110.
[26] K Swinton, "A selling creditor's duty of care: *Wilson v Dunbar Bank*" (2006) SLG 76, 77.
[27] Higgins, *Enforcement* para 14.6; Cusine and Rennie, *Standard Securities* para 8.38; Gordon and Wortley, *Land Law* para 20-143; Cusine, "The power of sale", 182-183; Junor, "The heritable creditor's right to sell", 159; McDonald, "Advertisement requirements", 5; *Bank of Credit v Thompson* 1987 GWD 10-341.
[28] Higgins, *Enforcement* para 14.6 fn 22.
[29] *Davidson v Clydesdale Bank Plc* 2002 SLT 1088 at para 21.
[30] Swinton, "A selling creditor's duty of care", 77.
[31] D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992) 314.
[32] *Bank of Credit v Thompson* 1987 GWD 10-341; *Davidson v Clydesdale Bank Plc* 2002 SLT 1088.
[33] *Dick v Clydesdale Bank Plc* 1991 SC 365 at 370 per Lord President (Hope).
[34] *Bisset v Standard Property Investment Plc* 1999 GWD 26-1253, 524-525. In the Outer House, particular reliance was placed on the decision of the High Court of Australia in *Commercial and General Acceptance Ltd* v *Nixon* [1983] 152 CLR 491.

Dunbar Bank plc.[35] It is now generally settled that the security holder remains liable for any deficiencies in advertising, regardless of whether an agent was employed.

13.10 Looking beyond the marketing to other considerations relevant to the best price duty, timing may be important. A security holder may generally choose freely when it exercises the power to sell, and the duty relates to the best price reasonably obtainable at that time. The security holder is not required to delay sale in anticipation of a possible future event that may enhance the value of the security property,[36] and a delay in sale will not necessarily be a breach of duty.[37]

13.11 We note for completeness that a security holder also has a duty at common law to give due regard to the debtor's interests when selling the security property,[38] which requires taking reasonable steps to obtain a full and fair market price. Less diligence is required on the part of the security holder to discharge this duty than is necessary under section 25.[39]

Breach of duties: remedies available to debtor

13.12 Where a security holder fails to discharge the best price duty, the primary remedy available to the debtor or other security holder is damages. Where damages are sought, it must be established that there has been a breach of the duty, and that the breach has caused loss to the pursuer. The onus of proving a breach lies with the pursuer, unless the sale is to a party related to the security holder or there is evidence of collusion between the security holder and the purchaser.[40] While the standard of proof is on a balance of probabilities, Gretton and Reid argue that, following the decision in *Dick*, in practice the burden of proof is "fairly high".[41] In seeking to show that the security holder did not take all reasonable steps to obtain the best price, it is sufficient to show a market which, if approached, would likely have yielded a better price for the property than the one obtained.[42] This does not generally require identification of specific individuals who would have been willing to pay a higher price than that obtained.[43] The quantum of damages is determined by reference to the difference between the price realised for the security property and the price that should have been obtained had the security holder fulfilled their duty under section 25,[44] with interest payable on any award.[45]

13.13 Alternatively, interdict or interim interdict may be available to prevent the security holder concluding missives in breach of the best price duty. Older case law and commentary had treated the remedy as incompetent,[46] in part because it was not accepted that the debtor had a right to call upon the security holder to demonstrate that it had fulfilled its duty under

---

[35] *Wilson v Dunbar Bank Plc* [2006] CSOH 105, 2006 SLT 775.
[36] *Dick v Clydesdale Bank Plc* 1991 SC 365 at 371.
[37] P Hood, "The duties of a standard security holder" (1994) 39(7) JLSS 257, 258.
[38] *Rimmer v Thomas Usher & Son Ltd* 1967 SLT 7; *Aberdeen Trades Council v Shipconstructors and Shipwrights Association* 1949 SC (HL) 45; *Dick v Clydesdale Bank Plc* 1991 SC 365 at 369.
[39] *Davidson v Clydesdale Bank Plc* 2002 SLT 1088 at para 22; *Dick v Clydesdale Bank Plc* 1991 SC 365 at 368.
[40] *Wilson v Dunbar Bank Plc* [2006] CSOH 105; 2006 SLT 775 at para 174; *Bisset v Standard Property Investment Plc* 1999 GWD 26-1253.
[41] Gretton and Reid, *Conveyancing* para 23-35.
[42] *Wilson v Dunbar Bank Plc* [2006] CSOH 105; 2006 SLT 775 at para 176.
[43] *Wilson v Dunbar Bank Plc* [2008] CSOH 27; 2008 SC 457 at para 6; cf *Dick v Clydesdale Bank Plc* 1991 SC 365.
[44] *Royal Bank of Scotland Plc v A & M Johnson* 1987 GWD 1-5; *Rimmer v Thomas Usher & Son Ltd* 1967 SLT 7.
[45] *Wilson v Dunbar Bank Plc* [2008] CSIH 27; 2008 SC 457.
[46] Gretton and Reid, *Conveyancing* para 23-35, on the basis of *Associated Displays (In Liquidation) Ltd v Turnbeam Ltd* 1988 SCLR 220 and *Gordaviran Ltd v Clydesdale Bank Plc* 1994 SCLR 248. Gretton and Reid posit that "the soundness of the decisions is not beyond dispute."

section 25 before a sale could be agreed.[47] The effect of an interdict in these circumstances would arguably be that a security holder could not sell the security property without the consent of the debtor or the court, which was not the intention of the legislation.[48] However, it was confirmed by Lord Hodge in *Taylor v Hadrian SARL* that interdict is available, albeit that it may only be granted in exceptional circumstances.[49] Lord Hodge did not regard earlier decisions to decline interdict as incorrect, considering rather that the pursuers in those cases had not presented a sufficient case:[50]

> "In my view the only question of incompetence in those cases was the wording of the interdicts sought. For good reasons the court may be slow to grant an interim interdict against a creditor from realising the security subjects without clear evidence of a breach of section 25 of the 1970 Act or some other legal wrong and may prefer to leave the debtor to claim damages. But that is not an issue of competency."

The result of *Taylor* is that although interdict is competent, the court will be slow to grant it and will require clear evidence of a breach of section 25, both in relation to the price to be obtained and the acts or omissions on the security holder's part that would lead to that outcome.

13.14 Interdict cannot be granted following the conclusion of missives,[51] and at that point, damages are likely to be the appropriate remedy for any breach.[52]

Protection for purchasers

13.15 A person purchasing the security property from the security holder benefits from statutory protection of their title under section 41 of the Conveyancing (Scotland) Act 1924, which applies to standard securities by virtue of section 32 of the 1970 Act. Section 41(1) provides that sale proceedings will be valid and effectual notwithstanding a lack of legal capacity on the part of the debtor or any other person entitled to notice as part of the calling-up or notice of default procedures. In such circumstances, the transfer "shall be as valid to the purchaser as if made by the proprietor of the land not being under disability." The disposition effecting the transfer imports an assignation of the warrandice in the standard security to the purchaser, and also an obligation by the owner of the security property to "ratify, approve and confirm" the sale and disposition.

13.16 Section 41(2) provides:

> "Where a disposition of land is duly recorded in the appropriate Register of Sasines[53] and that disposition bears to be granted in the exercise of a power of sale contained in a deed granting a bond and disposition in security, and the exercise of that power was *ex facie* regular, the title of a *bona fide* purchaser of the land for value shall not be challengeable on the ground that the debt had ceased to exist, unless that fact appeared in the said Register, or was known to the purchaser prior to the payment of

---

[47] *Associated Displays Ltd (In Liquidation) v Turnbeam Ltd* 1988 SCLR 220 at 222.
[48] *Ibid*; *Thomson v Yorkshire Building Society* 1994 SCLR 1014 at 1019.
[49] *Taylor v Hadrian SARL* [2012] CSOH 59 at para 19. See also T Guthrie, "Controlling creditor's rights under standard securities" (1994) SLT (News) 93.
[50] *Taylor v Hadrian SARL* [2012] CSOH 59 at para 19.
[51] *Associated Displays Ltd (In Liquidation) v Turnbeam Ltd* 1988 SCLR 220 at 222.
[52] *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries Ltd* 1978 SC 86.
[53] This provision should be read to also cover registration of a disposition in the Land Register: Land Registration (Scotland) Act 1979 s 29(2).

the price, or on the ground of any irregularity relating to the sale or in any preliminary procedure thereto;"

13.17 The meaning of this provision is a matter of debate.[54] The essence of the provision is that, following registration of the disposition, the purchaser's title is protected from any challenge made on the grounds that the secured obligation ceased to exist before or during the sale process (unless the purchaser had actual or constructive knowledge of this fact), or that there was irregularity in the sale process or the preliminary procedure by which the security holder's right to exercise the power of sale was established. This protection will, however, be available only where the exercise of the power of sale was *ex facie* regular and the purchaser was in good faith and took for value. A question arises as to why a purchaser's title would need protection from irregularity in the sale *process*, and we return to that issue below.[55] The broader difficulty with this provision is in establishing what is required for *ex facie* regularity, and how this relates to the purchaser's duty of good faith.

13.18 These conditions on the protection of purchaser's title were amended into section 41(2) by section 38 of the 1970 Act following a recommendation by the Halliday Committee, who were principally concerned about the length of time which had to pass before the purchaser's title was protected under section 41(2) as originally enacted. The Committee noted:[56]

> "It is a disadvantage…that the title which the purchaser obtains is not protected from challenge on the ground that the debt had ceased to exist or on the ground of irregularity in the calling-up and sale procedure until the expiry of five years from the date of recording of the disposition in his favour. In our experience successful challenges on these grounds are rarely made…and we consider that section 41(2)…might be amended to give immediate protection to the purchaser."

The Committee continued:[57]

> "We would suggest, however, that such protection should be given only when the procedure for calling-up and sale is *ex facie* regular. In the normal case this qualification would ensure that the regularity of the procedure was examined by the purchaser's solicitor, so that the debtor would not be prejudiced by procedure which was plainly irregular."

13.19 The Notes on Clauses indicate that the intention behind section 38 was to implement the Committee's recommendation, and quote the extracts from the Halliday Report set out above.[58] Section 38 in fact innovates on the Committee's recommendation by including the requirement that the purchaser is bona fide, but the Notes neither recognise that this condition is novel, nor explain why it was added subsequently. The clause was not debated during the Parliamentary passage of the Bill.

13.20 The background to the introduction of section 38 makes tolerably clear that the requirement of *ex facie* regularity was intended to cover the process by which power of sale was established (usually calling-up of the debt). However, that intention may not have been

---

[54] See Cusine and Rennie, *Standard Securities* para 8.65; Gretton and Reid, *Conveyancing* para 23-36; Cusine, "The power of sale under a standard security" 1991 JR 69, 185.
[55] Para 13.44.
[56] Halliday Report, para 113.
[57] *Ibid.*
[58] Notes on Clauses (clause 37).

captured by the wording of the legislation, which seems to make the protection conditional only on the *ex facie* regularity of the *exercise* of the power of sale. Cusine and Rennie note this scope for ambiguity in the statutory language, and consider various constructions, ultimately preferring the interpretation that only the exercise of the power of sale is relevant.[59] Drawing on their work, Higgins suggests that it is not thought necessary for a purchaser to satisfy themselves that a calling-up notice or notice of default has been properly served, or that decree has been properly obtained.[60]

13.21 A purchaser will, however, scrutinise the exercise of the power of sale to determine whether the security holder has discharged its obligations under section 25 of the 1970 Act. This scrutiny would seem necessary primarily because the *ex facie* regularity of the exercise of the power of sale is a condition of the protection of title. However, it also appears to be considered necessary to discharge the purchaser's duty of inquiry in relation to the requirement of good faith.[61] The duty of inquiry is not considered to extend to the procedure by which power of sale is established.[62] However, if the security holder offers information in relation to this procedure, it is accepted that the purchaser must satisfy themselves that it is in order to remain in good faith.[63] The purchaser may also find that they are not in good faith for other reasons, for example where they are a close associate of the security holder.[64]

13.22 There are no reported cases on the interpretation of section 41(2). The circumstances in which the purchaser's title will be protected remain unclear at present.

Consequences of sale

13.23 Section 26(1) of the 1970 Act provides that, following sale, once a security holder:

> "grants to the purchaser or his nominee a disposition of the subjects sold thereby, which bears to be in implement of the sale, then, on that disposition being duly registered or recorded, those subjects shall be disburdened of the standard security and of all other heritable securities and diligences ranking *pari passu* with, or postponed to that security."

13.24 It is notable that there is no provision in the 1970 Act regarding how a transfer of ownership of the security property is to be implemented following sale. While section 26 assumes that the security holder has the power to grant a disposition in the purchaser's favour, MacLeod describes it as "curious" that there is no express provision in this regard.[65]

Future law

13.25 Any new legislation on standard securities must continue to provide for the remedy of sale of the security property, or part of it. The discussion above shows that the current law on sale operates reasonably well, and dramatic reform is not required. However, it would be sensible to take the opportunity to clarify ambiguities in the existing provisions, whilst also

---

[59] Cusine and Rennie, *Standard Securities* para 8.65.
[60] Higgins, *Enforcement* para 14.21; Cusine, "The power of sale under a standard security" 1991 JR 69, 185-186.
[61] *Ibid.*
[62] *Ibid.*
[63] Gretton and Reid, *Conveyancing* para 23-36; Cusine, "The power of sale", 186.
[64] *Davidson v Scott* 1915 SC 924.
[65] MacLeod, *Enforcement* paras 4.71-4.72.

ensuring the remedy fits appropriately within our proposed new enforcement framework as a whole. We turn our attention to that issue now.

Should a court order be required?

13.26 On the basis of the revised enforcement procedure we proposed earlier in this Discussion Paper, remedies under a standard security may generally be exercised without the need for a court order, with the security holder proceeding solely on the basis of the expired default notice.[66] Cases to which the enhanced debtor protection measures apply are an exception to this general rule, and warrant of the court will be required in these cases for the exercise of any remedy including sale.[67] In Chapter 10, we considered whether a further exception to this general rule should apply in relation to ejection, so that a court order would be required for exercise of that remedy even in the standard case (meaning a case outwith the enhanced debtor protection regime).[68] The same question arises here. Should a security holder be required to obtain warrant of court to exercise the power of sale even in the standard case?

13.27 Under the current law, other than in cases where the security property is used to any extent for residential purposes, power of sale may be exercised on the basis of an expired calling-up notice. No real criticism of this approach can be found in the commentary or case law, and we have not been made aware of any appetite for reform in this respect. On current information, there appears no reason to deviate from the status quo in any new legislation. Our provisional view is that a security holder should be able to exercise the power of sale on the basis on an expired default notice in the standard case. However, we seek views.

13.28 We ask:

62. Should a court order be required for the security holder to exercise the power of sale?

Method of sale

13.29 Under the 1970 Act, the security holder may sell by way of public auction or private bargain, and has a free choice between the two options. Is there a need to reform this aspect of the law?

13.30 The option to sell by private bargain was included in the 1970 Act to address difficulties identified with the older law of heritable securities. Under a bond and disposition in security, sale could be effected only by public auction, which was noted in the Halliday Report to be "probably the greatest disadvantage of this form of security".[69] In *Bisset,* Lord Hamilton noted that "the older procedure which required sale by public roup was not in modern circumstances best designed to achieve that objective [of maximisation of the sale price]."[70] Gretton and Reid suggest that a sale by private bargain is likely to attract a higher price for the security property

[66] Paras 6.16-6.20.
[67] Para 7.49.
[68] Para 10.24-10.28.
[69] Halliday Report, para 111. The report refers to "selling the security subjects only by public exposure" which is synonymous with sale by public auction. See also para 13.3 above.
[70] *Bisset v Standard Property Investment Plc* 1999 GWD 26-1253.

as it ensures that sale in exercise of a standard security is no different to a "normal" sale of heritable property.[71]

13.31 The disadvantage of sale by private bargain, on the other hand, is the lack of independent oversight of the process. It should be kept in mind in this respect that the interests of the security holder in relation to the price obtained for the security property do not wholly align with those of the debtor, or with other creditors of the same debtor. In essence, the security holder only has an incentive to obtain a price sufficient to repay the secured debt.[72] The interest of the debtor and other creditors is, however, to maximise the proceeds of the sale. To address this concern, it was recommended in the Halliday Report that sale should be effected at "a price not less than the market value of the subjects as determined by an independent professional valuer instructed by the creditor".[73] The 1970 Act, as discussed above, incorporated the more limited safeguard of imposing a duty on the security holder to obtain the best price. Although this does provide a remedy in respect of sale at undervalue by a security holder concerned only to recoup the secured debt, it leaves the onus of making a challenge on the debtor or other creditors. Placing this responsibility on the debtor might be considered unfair, particularly where the debtor is not legally advised and there are no other creditors with an interest.

13.32 The comparative law analysis shows a division between the common law and civilian jurisdictions regarding the preferred method of sale.[74] In England and New Zealand, sale is generally carried out by private bargain. In civilian jurisdictions, where exercise of a security is more likely to be carried out by means of judicial execution, public auction tends to be favoured.[75] However, in France and Germany there is a shift towards allowing private sale in a wider range of circumstances. In France, this has come about through the *fiducie-sûreté*, whereby sale is undertaken by the *fiduciaire*.[76] In Germany, a recent review of the governing legislation showed support for introducing private sale as a choice for a selling creditor under both the *grundschuld* and *hypothek*.[77] In South Africa, although public auction remains the predominant method of sale under a mortgage bond, the law allows for a post-default agreement between the debtor and creditor giving the creditor permission to sell the security property on the debtor's behalf.[78] The availability of private sale remains restricted in these jurisdictions, but it is evident that there is an appetite for it. The same cannot be said for public auction in common law jurisdictions.

13.33 It is worth noting that the risk a private sale may be detrimental to the interests of the debtor and other creditors may exist more in theory than in practice. In reality, the security property will seldom attract a price sufficient even to repay the secured debt. In 2009, the Scottish Government's Repossessions Group found that on average a creditor who takes

[71] Gretton and Reid, *Conveyancing* para 23-35.
[72] *Ibid*.
[73] Halliday Report, para 111.
[74] See MacLeod, *Enforcement* paras 4.73-4.80.
[75] See, for example, German Act on Enforced Auction and Receivership (ZVG) §§ 66-94.
[76] This is not subject to the same procedural requirements as sale by public action. Compare French Civil Code art 2488(3) against Code of Civil Enforcement Procedures arts L322-1-L322-13.
[77] Bundesministerium der Justiz und für Verbraucherschutz *Das ZVG auf dem Prüfstand: Teil I Rechtstatsachen – Kurzfassung* (2017) 12.
[78] R Brits, *Real Security Law* (2016) 64; *In re Cradock Building Society* (1896) 13 SC 99; *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T).

possession of security property suffers a loss of around £35,000.[79] Moreover, we are not aware of significant criticism within the case law or commentary in relation to the current provision on methods of sale, or of any calls for reform in this respect.

13.34 Taking into account all of the above, our tentative view is that the case has not been made for reform here. The current approach appears to be working well in practice, and any risk to the interests of the debtor and other creditors is sufficiently mitigated by the best price duty, which we suggest below should be retained in any new legislation in a slightly revised form. We would, however, be grateful for the views of consultees.

13.35 We ask:

> **63. Should the selling security holder continue to have the choice to sell by private bargain or by public auction? If not, what reform would you propose here?**

Duty to obtain the best price

13.36 It follows from the discussion on methods of sale above that new legislation must continue to place a best price duty on a selling security holder to ensure the interests of the debtor and other creditors are protected. The duty as set out in section 25 may usefully be reformulated to remove ambiguity, however.

13.37 First, the duty is currently expressed as being to ensure that the price obtained is "the best that can be reasonably obtained". The formulation is familiar from our comparator common law jurisdictions[80] and echoed in the Financial Conduct Authority requirement that "the best price that might reasonably be obtained is paid."[81] In our Report on Moveable Transactions, we recommended that a duty expressed in the same terms be adopted in relation to realisation of pledged property in line with relevant international comparators.[82] Case law in the common law jurisdictions,[83] as in Scotland under the current law,[84] has clarified that "market value" is generally what is meant by "the best price reasonably obtainable". From the perspective of legislative clarity and accessibility, there may be a benefit to stating this plainly. However, reformulating the duty along these lines ignores the small number of cases in which the best price that can reasonably be obtained is less than market value. Our advisory group did not support a reformulation of the duty, noting that the current form of words is well understood in practice and is not giving rise to any difficulty.

13.38 Even where market value is not achieved, the duty is discharged so long as all reasonable steps have been taken by the security holder. Although the approach taken to

---

[79] Scottish Government Repossessions Group, *Final Report* (Scottish Government, 2009) para 4.4 avaiable at: https://www.webarchive.org.uk/wayback/archive/20171001142618/http:/www.gov.scot/Publications/2009/06/08164837/13.

[80] *Silven Properties Ltd v Royal Bank of Scotland Plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997; *Dean v Barclays Bank Plc* [2007] EWHC] 1390 (Ch); *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (England); Property Law Act 2007 s 176(1) (New Zealand). Since our comparator civil law jurisdictions favour public auction as the mechanism by which to ensure a fair price is achieved, this issue does not arise.

[81] MCOB 13.6.1.

[82] Report on Moveable Transactions paras 28.5, 28.8 and Draft Bill s 73.

[83] *Silven Properties Ltd v Royal Bank of Scotland Plc* [2003] EWCA Civ 1409; *Commercial and General Acceptance Ltd v Nixon* (1981) 452 CLR 491.

[84] *Dick v Clydesdale Bank Plc* 1991 SC 365 at 370 per Lord President (Hope); *Wilson v Dunbar Bank Plc* 2008 CSOH 27; 2008 SC 457 at paras 6 and 18; *Peters v Belhaven Finance Ltd* 2016 SLT (Sh Ct) 156 at 166.

marketing the property will almost invariably be relevant in this respect, advertising is not a duty in its own right, and the wording adopted in any new legislation should reflect this. The reasonable steps required of a security holder will vary from case to case, and a return to the rigid prescription of the 1924 Act as to what steps are required seems to us unlikely to be sufficiently flexible for the modern market. It may be, however, that there is some value in providing a non-exhaustive list of factors for the court to take into account when considering whether this duty has been met, including the period of time during which the property was exposed for sale,[85] the nature and extent of advertising undertaken and the employment (or not) of professional marketing agents. If such a list is included, in order to maintain flexibility, it may be sensible to allow for it to be amended by way of secondary legislation. We would be grateful for the views of consultees on these issues.

13.39 We ask:

64. (a) Should the selling security holder be placed under a duty to take all reasonable steps to obtain (i) the best price reasonably obtainable, (ii) the market value of the security property or (iii) some other objective?

(b) Should the legislation include a non-exhaustive list of factors (capable of amendment by secondary legislation) to be considered by the court in determining whether this duty has been discharged? If so, which factors should be included, and why?

Purchaser protection

13.40 Statutory protection of the title of a good faith purchaser for value is a familiar feature of the law of transfer in Scotland.[86] Some protection has been afforded to the title of a purchaser from a heritable security holder since at least 1924. Legal certainty in relation to who owns land and buildings is clearly desirable, and there are obvious policy grounds for preferring a diligent purchaser who has done all that can reasonably be expected to establish the safety of their title over a challenger who, with appropriate diligence, could have prevented the transfer from taking place. We do not think it is controversial to suggest that new legislation on standard securities should continue to provide protection of title to purchasers from security holders for these reasons.

13.41 The protection currently provided under section 41(1) of the 1924 Act is clear. A sale by a security holder will be valid notwithstanding the lack of capacity of the debtor, the owner, or any other party entitled to receipt of notice of enforcement proceedings under the security. There seems no difficulty with suggesting that equivalent provision should be made in any new legislation.

13.42 The protection currently made available under section 41(2) is less clear. The subsection applies to the title of a purchaser from a security holder where three conditions are fulfilled, namely: (i) the security holder's exercise of the power of sale was *ex facie* regular; (ii) the purchaser is bona fide; and (iii) the purchaser paid value for the security property. Where the conditions are met, the purchaser's title will not be challengeable on the grounds that

---

[85] This was relevant to the determination of damages in *Strickland v Blemain Finance Ltd* 2014 Hous LR 75 at para 14.

[86] See for example Sale of Goods Act 1979 s 24; Land Registration etc. (Scotland) Act 2012 s 86.

either: (a) the secured obligation had ceased to exist, unless the purchaser had actual or constructive knowledge of that fact; or (b) there was any irregularity relating to the sale or in any preliminary procedure thereto.

13.43 The drafting here causes confusion for three reasons. First, there is scope for debate over what is meant by "the exercise of the power of sale", as discussed above.[87] Second, it is not clear what is required in order for the purchaser to remain bona fide. It does not appear as though the good faith of the purchaser is dependent on their actual or constructive knowledge of the existence of grounds (a) or (b) in relation to their purchase. If that was the intention behind the good faith condition, it would not seem necessary for the legislation to make explicit provision about the purchaser's state of knowledge as regards ground (a).

13.44 Finally, protection is provided against a challenge to the title arising from "any irregularity relating to the sale or in any preliminary procedure thereto". It seems clear that a challenge to the purchaser's title could arise from irregularity "in any preliminary procedure", if that phrase is understood to refer to the procedure by which the security holder's power of sale is established. Where the calling-up procedure, for example, is incompetent, the security holder will have no capacity to transfer ownership of the property, and any purported title obtained by the purchaser will be void.[88] It seems less clear, however, that a challenge to the purchaser's title could arise from "irregularity relating to the sale". If that phrase is understood to point to the security holder's obligations under section 25 of the 1970 Act, there seems no basis on which to argue that irregularity (in other words, breach of those obligations) could affect the validity of the purchaser's title.[89] The phrase could perhaps encompass other irregularities in the sale process which can affect a purchaser's title, for example failure to comply with the formalities of transfer set out in the Requirements of Writing (Scotland) Act 1995. However, there is no support for this interpretation in the materials preceding the 1970 Act, and it is difficult to see a policy justification here for protection against irregularities that could arise in any sale, as opposed to those with a particular connection to the context of sale by a security holder.

13.45 Taking into account the policy justifications for a provision of this kind, we have developed a tentative proposal for new legislation which clarifies the law whilst providing what we think may be considered appropriate protection to the purchaser's title. We would suggest that the title of a purchaser from a security holder should be free from any challenge resulting from: (a) the secured obligation ceasing to exist prior to registration of the disposition; or (b) any irregularity in the process by which the security holder's power of sale was established. This protection will be available where: (i) the purchaser paid value for the security property; and (ii) the purchaser is in good faith.

13.46 The good faith requirement will encompass several elements. First, a purchaser will not be in good faith where they have actual or constructive knowledge that the transfer is affected by grounds of challenge (a) or (b). The purchaser will have constructive knowledge of ground (a) where the extinction of the secured obligation is clear on the face of the Land Register. This mirrors the existing position. The purchaser will have constructive knowledge

[87] Para 13.17-13.21.
[88] Erskine II.1.18; Stair III.2.4. A void title is no title at all: Reid, *Property* para 601.
[89] An argument that the offside goals rule might apply in this context was rejected in *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries Ltd* 1978 SC 86 at 93-95. Breach of the statutory duty may give rise to damages or interdict as discussed at paras 13.12-13.14.

of ground (b) where the process by which the security holder's power of sale was established was not valid *ex facie*. This may not be required under the current law. However, under the revised enforcement process we propose, power of sale will be established through an expired default notice or court decree. We do not think it is unduly burdensome to expect the purchaser to require sight of the notice and proof of service, or sight of the decree, in order to verify their validity *ex facie*. Second, a purchaser will not be in good faith if they have failed to satisfy themselves that the security holder has complied with its best price duty. This accords with current practice. Finally, the purchaser will not be in good faith where they are a close associate of the security holder. This is also in line with current law.

13.47 We would be grateful for the views of consultees. We ask:

65. Where a purchaser acquires property from the security holder exercising its power of sale under the security, should legislation provide that:

(a) The transfer is valid notwithstanding the lack of capacity of the debtor, the owner, or any other party entitled to receipt of notice of enforcement proceedings under the security; and

(b) The title acquired is protected against any challenge arising from extinction of the secured obligation or from defects in the process by which the security holder's power of sale is established, so long as certain conditions are fulfilled?

66. Do consultees agree that the conditions referred to in part (b) above should be as follows:

(a) The purchaser paid value for the security property;

(b) The purchaser was in good faith prior to the conclusion of missives, with the following factors taken into account in determining whether this requirement has been met:

(i) The purchaser's actual or constructive knowledge that the secured obligation had been extinguished;

(ii) The purchaser's actual or constructive knowledge of defects in the process by which the security holder's power of sale was established;

(iii) Attempts made by the purchaser to satisfy themselves that the purchaser has discharged its best price duty;

(iv) Whether the purchaser is a close associate of the security holder?

Consequences of sale

13.48 Any new legislation should make provision for the power of a security holder to grant a disposition in respect of the security property following conclusion of missives. As noted above, the absence of provision in this respect in the 1970 Act is somewhat odd. Beyond that,

in the interests of certainty, new legislation should continue to provide for the consequences of registration of the disposition as currently set out in section 26. We are not aware of any difficulty with the law in this respect at present.

13.49 We ask:

67. Do consultees agree that any new legislation should provide that:

(a) The security holder's remedy of sale of the security property includes the power to grant a disposition transferring ownership of that property.

(b) Registration of a disposition granted under this power has the effect of disburdening the property sold of the standard security, and of any *pari passu* and postponed securities?

Chapter 14 Foreclosure

Introduction

14.1 Colloquially, the term foreclosure is sometimes used to refer to exercise of a standard security in a broad sense. The meaning of the term in Scots law is more precise, denoting the remedy by which the holder of a standard security acquires the security property itself in satisfaction of the secured obligation. Described by Higgins as "effectively the remedy of last resort"[1] under a standard security, foreclosure is seldom used in practice and is rarely a focus in case law or commentary. In this Chapter, we set out the current law, consider the comparative position and seek views on options for reform.

Current law

14.2 The remedy of foreclosure is available to the security holder by virtue of Standard Condition 10(7), with the relevant procedure set out in section 28 of the 1970 Act. Where the security is held in the ownership of land and buildings, foreclosure will result in acquisition of that ownership. Where the security property is the tenant's interest in a registered lease of land or buildings, the foreclosure process could be used to acquire that interest,[2] assuming that the registered tenant has the power to assign it.[3]

14.3 Foreclosure requires decree of the court. An application for decree cannot be made unless the security holder has first established its power of sale by way of calling-up procedure, court order or otherwise,[4] then exercised its power by exposing the property for sale at public roup (auction).[5] The property must be advertised at an upset price equal to or less than the amount owed under the security and any prior or *pari passu* securities.[6] Application for decree cannot be made until at least two months after the property is exposed for sale at this price.[7] If a buyer cannot be found for the property as a whole, it may be sold in parts, [8] though exposure for sale on this basis does not appear to be a prerequisite of application for decree.

14.4 Application for decree must be served on the debtor, the owner or registered tenant of the security property and any other heritable creditor disclosed by a 20-year search of the Register of Sasines or by examination of the title sheet in the Land Register.[9] On application, the security holder must lodge a statement setting out the amount owed to them under the standard security,[10] sufficient to satisfy the court that this sum is not less than the price at which the property was exposed for sale or at which part of the property has been sold.[11] The

---

[1] Higgins, *Enforcement* para 13.11.
[2] 1970 Act s 30(2) provides that where the security subjects are a registered lease, references to the "proprietor" should be read as references to the "lessee" and so on.
[3] The security holder's power to transfer the interest derives from the registered tenant, and will be subject to any limitations placed on that power by the lease: see para 13.2 for discussion.
[4] See para 13.2-13.3.
[5] 1970 Act s 28(1).
[6] *Ibid.*
[7] *Ibid;* Gordon and Wortley, *Land Law* para 20-157.
[8] Higgins, *Enforcement* para 13.11 fn 145, citing Halliday, *Conveyancing Law and Practice* Vol II para 54-76.
[9] 1970 Act s 28(3).
[10] *Ibid*, s 28(2).
[11] *Ibid.*

statement is open to challenge by the debtor or owner or registered tenant of the security property.[12]

14.5 The court has authority to make various orders in respect of the application. It may allow the debtor a grace period of up to three months to repay the whole of the debt owed.[13] It may order "such intimation or inquiry as it thinks fit",[14] which may involve remit to a person of skill.[15] It may order the property or the unsold part thereof to be re-exposed for sale at a price determined by the court, which gives the security holder the opportunity to purchase it.[16] Lastly, the court may grant decree of foreclosure, which allows for title to the property to be transferred to the security holder.[17]

14.6 Decree of foreclosure contains a warrant for extract decree to be registered in the Land Register or recorded in the Register of Sasines. The decree describes the security property using a particular or statutory description[18] and specifies any real burdens affecting the security property.[19] Title is acquired at the price at which the property was last exposed for sale (minus any amount paid if part of the property was successfully sold at public roup).[20] Land and Buildings Transaction Tax is payable on the transfer.[21]

14.7 Registration of the extract decree has three key effects. First, any right to redemption is extinguished[22] and title to the security property is acquired by the security holder as though a disposition has been granted in its favour.[23] Secondly, the security property is disburdened of the security and any postponed securities.[24] Finally, the security holder obtains a right to redeem any prior or *pari passu* securities.[25] Once registered, the security holder's title is unchallengeable on grounds of irregularity in the proceedings for foreclosure, calling-up or default.[26] However, where such irregularities exist, a debtor may seek damages.

14.8 Where the price at which the property was acquired by the security holder is less than the amount owed under the secured obligation, the debtor remains personally liable to the creditor for the remainder.[27]

---

[12] 1970 Act s 28(2).
[13] *Ibid,* s 28(4).
[14] *Ibid.*
[15] Higgins, *Enforcement* para 13.11; Gordon and Wortley, *Scottish Land Law* para 20-159; See also Gordon, *Scottish Land Law* (2nd edn, 1999) paras 20-79–20-83.
[16] 1970 Act s 28(4)(a).
[17] *Ibid*, s 28(4)(b).
[18] By reference to a description in the Conveyancing (Scotland) Act 1924 Sch D or Titles to Land Consolidation (Scotland) Act 1868 Sch G.
[19] 1970 Act s 28(5).
[20] *Ibid.*
[21] Land and Buildings Transaction Tax (Scotland) Act 2013. See also D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) 296-297; Halliday, *Conveyancing Law and Practice*, Vol II para 54-85; Higgins, *Enforcement* para 13.11; and *Commissioners of Inland Revenue v Tod* [1898] AC 399 at 143, where the court considered stamp duty payable upon decree of foreclosure in a bond and disposition in security, characterising the transaction as analogous to a sale.
[22] This includes rights held by the debtor and any other party who may have had a right to redemption, such as the owner where the security property is not owned by the debtor: Reid, *Property* para 211.
[23] 1970 Act s 28(6)(a). "Disposition" should be read as "assignation" where the property concerned is the tenant's interest under a registered lease: 1970 Act s 30(2).
[24] *Ibid*, s 28(6)(b).
[25] *Ibid*, s 28(6)(c).
[26] *Ibid*, s 28(8).
[27] *Ibid*, s 28(7).

Discussion

14.9 Foreclosure is rare in Scotland – only one of the practitioners we spoke to in early consultation for this project had experience of it – and there is little by way of reported case law or commentary on the process. MacLeod suggests that creditors are likely to be reluctant to foreclose: if sale of the security property at public roup has failed, it follows that the property is not seen as worth the upset price, so foreclosing at that price results in a loss to the security holder in real terms.[28] Moreover, institutional security holders are unlikely to want title to heritable property, their interest extending only to the financial value of the asset rather than its use.[29] For these reasons, it seems likely that foreclosure will remain an uncommon remedy regardless of any reform implemented by new standard securities legislation.

14.10 It has been represented to us by some practitioners that the foreclosure process is somewhat convoluted or "fussy". Whilst it is difficult to disagree with this criticism, it is important to bear in mind that the procedural complexity results, at least in part, from the need to protect debtors against the possibility of an opportunistic security holder seeking to take title to security property with a greater value than the debt owed.[30] Should foreclosure become too readily available, the risk is that an unscrupulous security holder may seek a windfall.[31]

14.11 Our outline of the current law shows that debtors are protected in three main ways. First, foreclosure is only possible by decree of the court. Secondly, an attempt must be made to sell the property at public auction for the amount outstanding under the secured obligation before an application for decree can be made. Thirdly, the court has a wide discretion in disposing of the application, with little constraint on how that discretion may be exercised. Any reforms proposed with the intention of streamlining the foreclosure procedure must ensure an appropriate level of protection for the debtor remains in place.[32]

Comparative position

14.12 Before looking at options for reform of the foreclosure process in Scotland, it is useful to consider how our comparator jurisdictions approach acquisition of the security property by the security holder.

14.13 Looking first at the civil law jurisdictions, in Germany, a security holder has no right to directly acquire the security property. Enforcement can proceed only by way of judicial auction or receivership.[33] In France, by contrast, unless parties to a *hypothèque* have agreed otherwise or the security holder has initiated sale by way of judicial execution, the creditor is entitled to apply to court for the transfer of ownership of the security property in lieu of payment.[34] Alternatively, parties may institute a *pactum commissorium*, allowing for forfeiture of the security property by the owner upon default.[35] Neither of these provisions may be implemented where the security property is the owner's main residence,[36] and in both cases if

---

[28] MacLeod, *Enforcement* paras 4.96-4.97.
[29] *Ibid*, para 4.25.
[30] Higgins, *Enforcement* para 13.11.
[31] See the discussion of the South African case *ASBA Bank Ltd v Bisnath NO* 2007 (2) SA 583 (D & CLD) in MacLeod, *Enforcement* paras 4.101-4.103.
[32] Higgins, *Enforcement* para 13.11.
[33] German Civil Code § 1147; German Code of Civil Procedure § 866 I. A security holder may bid to purchase the property at auction in the usual way.
[34] French Civil Code arts 2388 and 2458.
[35] *Ibid,* art 2459.
[36] *Ibid*, arts 2458 and 2459.

the security property's value exceeds the amount owed, the creditor must account for the surplus to lower ranking mortgagees or the debtor.[37]

14.14 Turning to the common law jurisdictions, in New Zealand, the remedy of foreclosure has been abolished.[38] As in Germany, a security holder who wishes to acquire the security property can do so only by buying it in a sale process administered by the court.[39]

14.15 In English law, however, the remedy of foreclosure remains. The effect of foreclosure in an English mortgage is to extinguish the mortgagor's equity in redemption, which arises following the expiry of their legal right to redeem.[40] Foreclosure requires an order of the court.[41] Upon receiving an action for foreclosure, the court has two options. It may make an order for foreclosure, which, upon expiry of a period in which the debtor may repay the debt and redeem the property, vests the mortgaged property in the mortgagee and extinguishes the debtor's equity of redemption.[42] Alternatively, if requested to do so by the debtor or owner, it may order the property to be subject to sale in lieu of foreclosure.[43]

14.16 In South Africa, where the remedies available to a mortgage holder are generally determined by the contract, a *pactum commissorium* is invalid.[44] However, parties may agree[45] to allow a mortgagee to acquire the mortgage property at fair value.[46] Fair value in this case seems to be an amount agreed between the parties which results in the secured obligation being immediately and unconditionally extinguished.[47]

Future law

14.17 In Chapter 9 of this Discussion Paper, we considered the range of remedies currently available under a standard security and sought views on whether the same remedies should be provided for under any new legislation.[48] Assuming consultees support the retention of foreclosure as a remedy, the question arises of whether any changes to the procedure are desirable.

14.18 It is to be hoped that a restatement of the law in modern statutory language would go some way towards ameliorating the complexity of the legislation as presently drafted. However, more substantive changes may also be considered. As noted above, the concern here is to ensure the overall process provides a sufficient degree of protection to the debtor. Accordingly, we review a number of potential changes below, and seek a general view from consultees thereafter.

14.19 First, it may be asked whether it remains necessary to require decree of the court for this remedy to be effected. Under our proposals for reform of the enforcement process,

---

[37] French Civil Code art 2460.
[38] Property Law Act 2007 s 117.
[39] *Ibid*, ss 176(2), 196 and 200.
[40] Law of Property Act 1925 ss 88(2) and 89(2).
[41] *Ibid*; MacLeod, *Enforcement* para 4.07.
[42] *Ibid.*
[43] Law of Property Act 1925 s 91(2).
[44] *Mapenduka v Ashington* 1919 AD 343.
[45] A term to this effect may be inserted in the mortgage bond itself or may be agreed to in a subsequent independent agreement: P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006) para 16.4.4. See also *Mapenduka v Ashington* 1919 AD 343 and *Ex parte Mabunya* (1903) 20 SC 165.
[46] P J Badenhorst et al. *The Law of Property* paras 16.4.4 and 16.4.11.
[47] *Ibid.*
[48] Paras 9.2-9.5.

remedies under a standard security can generally be exercised on the basis of an expired default notice,[49] other than in cases to which the enhanced debtor protection measures apply.[50] Requiring a court order for foreclosure would be an exception to this general rule in the standard case.[51] Justifications for this exception can readily be found, however. Judicial oversight is the most important protection available to a debtor at risk from an unscrupulous creditor, and it is notable that the involvement of the court is required in all of our comparator jurisdictions where direct acquisition of the security property by the security holder is possible. We would note also that, from a practical perspective, issue of the decree presently provides the mechanism by which the conveyance of the property occurs, although no doubt an alternative solution could be devised.

14.20 Second, consideration could be given to replacing the requirement for attempted sale by public auction with a requirement for attempted sale by private bargain. In our discussion of methods of sale in the preceding Chapter, we noted that sale by auction may be considered outmoded and unlikely to result in the best possible price for the property being achieved.[52] The benefit of sale by auction is that it provides some independent oversight of the process,[53] but if the requirement for decree to foreclose is maintained, that oversight is arguably provided by the court in any event. Our advisory group was broadly supportive of reform to the procedure in this respect.

14.21 Finally, limitations could be placed on the breadth of the court's discretion in relation to disposing of an application for decree. In particular, it could be argued there is little justification for the court to be empowered to order a further attempt at exposure to sale unless a defect is identified with previous attempts. In practice, given the rarity of foreclosure proceedings, a change of this kind may do little to streamline the process as a whole.

14.22 We seek views. We ask:

68. Is any reform required to the foreclosure process? If so, which reforms would be appropriate?

[49] Paras 6.16-6.20.
[50] Para 7.49.
[51] Under our proposals, even if a court order was no longer a requirement of foreclosure in the standard case, it would continue to be required in cases to which the enhanced debtor protection measures apply, since a court order is required for the exercise of any remedy within that regime.
[52] Para 13.30.
[53] Para 13.31.

Chapter 15 Expenses

15.1 A security holder may incur expenses in relation to a standard security at various points from its creation through to its termination. In our first Discussion Paper in this project, we considered the debtor's liability for those expenses, and consulted on potential reform.[1] However, our analysis in DP1 specifically excluded expenses incurred by the security holder when enforcing the secured obligation by exercising the security. It is to that issue that our attention now turns.

15.2 This chapter will look at the current rules in relation to the liability of the debtor for expenses incurred during enforcement of the secured obligation, and highlight some difficulties with the law. It will conclude with proposals for reform.

Current law

15.3 The principle that the debtor should be liable for expenses incurred by the creditor in exercising the security is of long standing.[2] Current provision is made under Standard Condition 12 which, in relation to enforcement expenses, provides:

> "The debtor shall be personally liable to the creditor for…all expenses reasonably incurred by the creditor in calling-up the security and realising or attempting to realise the security subjects, or any part thereof, and exercising any other powers conferred upon him by the security."

Connected provision is made in section 27 which, as discussed in Chapter 9,[3] regulates how the proceeds of sale of the security property are to be applied. First on the list of debts to be satisfied by the proceeds are "all expenses properly incurred by the security holder in connection with the sale or any attempted sale".

Discussion

15.4 Commentary and case law identifies a number of ambiguities in the provisions on expenses as currently drafted.

15.5 First, standard condition 12 provides that the debtor shall be liable for expenses "reasonably incurred" by the security holder. Section 27, however, applies the proceeds of sale to expenses "properly incurred." There is nothing in the materials leading to the introduction of the Act to explain why two different terms were adopted here. Cusine suggests that expenses may be "properly incurred" where justified by the provisions of the Act, and "reasonably incurred" where the amount of the expense concerned is reasonable.[4] The variation in terminology has not been the subject of any reported case law.

---

[1] DP1 paras 7.28, 7.37, 7.40-7.49.
[2] Bell, *Commentaries* (7th edn, 1870) Vol I at 701.
[3] Paras 9.29-9.31.
[4] D J Cusine, "Expenses under a standard security" 1994 JR 18, 19-21.

15.6 Second, questions arise as to the relationship between Standard Condition 12 and the expenses of litigation where a court order has been sought in the process of exercising a security. As a general rule of civil litigation, liability for the expenses of an action are determined by the court or by agreement between the parties. Most commonly the extent of this liability is restricted to what can be claimed on a "party and party" basis, which will fall some way short of the actual cost of the litigation.[5] Do the terms of Standard Condition 12 allow a security holder to pursue recovery of these costs in full regardless of any award made or agreement reached at the conclusion of the proceedings?

15.7 The issue was considered in *Clydesdale Bank plc v Mowbray*,[6] in which the creditor sought repayment under standard condition 12 of both judicially awarded party and party expenses and additional costs not covered by the judicial awards in respect of four previous hearings in the case. The additional costs included the expenses of two hearings in which the court had found that no expenses were due to or by either party. Non-litigation expenses were also sought. At first instance, the court found the effect of standard condition 12 to be that the litigation expenses recoverable by the creditor could not be restricted to the judicial award. On appeal, an Extra Division of the Inner House held that the matter had not been sufficiently argued before them for a determination to be made, but allowed the case to proceed to proof before answer on the basis that some of the non-litigation expenses sought, such as the costs of the calling-up procedure, were clearly covered under standard condition 12.

15.8 No further procedure was reported and the position remains unclear. Higgins notes that, in enforcement-related litigation, some security holders will decline to seek judicial expenses to avoid the risk that a party and party award might prevent them pursuing more comprehensive expenses for the litigation under standard condition 12 at a later stage.[7] Concern has been expressed in the commentary that allowing for recovery of litigation expenses beyond those judicially awarded "circumvents" the power of the court, particularly where the court has ordered that the expenses awarded should be reduced to nil on the grounds that the party directed to pay is in receipt of legal aid.[8] It has also been pointed out to us that security holders might be entitled to seek recovery of litigation expenses even in cases where they have been unsuccessful if the judicial award is not considered to settle matters between the parties.[9]

15.9 A final issue that has been raised in relation to the current law concerns uncertainty over what costs will be considered to have been "reasonably incurred" in the meaning of the statute.[10] Cusine addresses some difficult examples. One is the situation where a challenge to the exercise of a security is brought by someone who is not a party to the security arrangement, such as a non-entitled spouse asserting occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. He suggests that expenses arising here should be recoverable by the security holder since this situation will usually have resulted from

---

[5] Expenses may instead be awarded on an agent and client basis, which allows for a wider range of costs to be claimed. This generally occurs only in exceptional circumstances, for example where there has been unreasonable conduct by the party against whom expenses are awarded. For discussion, see T Welsh (ed), *Macphail's Sheriff Court Practice* (3rd edn, 2006) paras 19.43-19.47

[6] 2000 SC 151.

[7] Higgins, *Enforcement* para 11.3.

[8] Legal Aid (Scotland) Act 1986 s 18. For discussion, see M Dailly, "Expenses in Mortgage Repossession Cases" (2004) 60 (Dec) Civ PB 6.

[9] See further: Govan Law Centre, "Security of your home" (2013) 58(7) JLSS 16.

[10] For general discussion, see D J Cusine, "Expenses under a standard security" 1994 JR 18.

a mistake or omission on the part of the debtor.[11] Cusine also raises the question of expenses where a factor is appointed by the security holder to manage the security property, noting that although these expenses would not have been recoverable by a heritable creditor prior to the 1970 Act,[12] the legislation is arguably drafted sufficiently widely to alter that position. In *Royal Bank of Scotland Plc v Kinnear*, the Sheriff Principal did not consider it reasonable, for the purposes of a judicial award of expenses, for a security holder to seek a court order confirming its power of sale in circumstances where the debtor was already in the process of selling the security property.[13] Taking into account the ambiguous relationship between judicially awarded expenses and standard condition 12, it is not clear to what extent this decision can be relied upon in interpreting the statute, however.

Future law

15.10 It seems uncontroversial to suggest that new legislation on standard securities should continue to allow for a security holder to recover the expenses of exercising the security from the debtor, in keeping with longstanding legal principle. As noted above, the 1970 Act uses inconsistent terminology in relation to the extent of the debtor's liability in this respect. This ambiguity might most appropriately be resolved by framing the debtor's liability in new legislation as being for expenses "reasonably incurred" by the security holder, with reasonableness understood to cover both the reasonableness of incurring the expense, and the reasonableness of the amount of the expense. This framing has the benefit of continuity with standard condition 12, and is consistent with the approach taken in England and Wales[14] and in the FCA guidance.[15]

15.11 Any test of "reasonableness" will always be subject to the criticism that it is insufficiently precise. However, as in other areas of standard securities law where we suggest that a reasonableness standard be carried into new legislation,[16] we think the flexibility provided by a standard of this kind is the only practical option. Which expenses are reasonable, for example in relation to marketing a property for sale, will vary widely depending on the type of property concerned, its location, the current state of the property market and so on. Taking a more prescriptive approach in the statute, for example by listing expenses which can be claimed, therefore seems unwise. As at present, it would be open to a debtor who considered a security holder to be claiming expenses unreasonably to challenge the claim in court.

15.12 New legislation should clarify the relationship between the security holder's statutory right to recover and litigation expenses as determined by the court or agreed between the parties. The expenses recoverable by the successful party to a litigation are generally limited to those claimable on a party and party basis for obvious reasons of access to justice. We see force in the criticism that this policy should not be undercut by the statute, particularly since additional policy objectives may be relevant to the court's determination, as in cases where

---

[11] Cusine, "Expenses", 28.
[12] *Creditors of Kildonan v Douglas Heron & Co* (1785) Mor 14135, cited by Cusine, "Expenses", 31.
[13] 2005 Hous LR 2. For a critical view of this decision, see K G C Reid and G L Gretton, *Conveyancing 2005* (2006) 17.
[14] CPR Practice Direction 44 - General Rules about Costs para 7.3 available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs/part-44-general-rules-about-costs2.
[15] MCOB r 12.4.1 available at: https://www.handbook.fca.org.uk/handbook/MCOB.pdf.
[16] See, for example, the requirement that the security holder make reasonable efforts to agree a resolution with a debtor in respect of default before proceeding to exercise its security in cases to which the enhanced debtor protection measures apply, discussed at paras 8.3-8.5.

expenses are assessed at nil for a legally aided party. It is also difficult to understand why a security holder should not be bound by any agreement it has made in relation to litigation expenses. Bearing these arguments in mind, it may be appropriate to provide in any new legislation that litigation expenses are recoverable only insofar as agreed between the parties or awarded by the court, including where the court has found that no award should be made.

15.13 We would be grateful for the views of consultees on these connected matters. We ask:

69. (a) Should the debtor be liable to the security holder for expenses reasonably incurred in exercising the security?

(b) Should the expenses of litigation be "reasonably incurred" only to the extent of any award by the court or agreement between the parties?

(c) Is there an alternative approach to the debtor's liability for expenses that you would consider more appropriate, and if so, why?

Chapter 16 Summary of questions

1. What information or data do consultees have on:

   (a) the economic impact of the current legislation on heritable securities, or

   (b) the potential economic impact of any option for reform proposed in this Discussion Paper?

(Paragraph 1.22)

2. When exercising a standard security, should a security holder be subject to a duty to conform with reasonable standards of commercial practice?

(Paragraph 2.29)

3. Do consultees have any comments on our approach to redemption post-default as outlined above?

(Paragraph 2.38)

4. (a) Do consultees consider that any new legislation should make provision regarding the enforcement of *ex facie* absolute dispositions?

   (b) If so, what should the effect of any such provision be?

(Paragraph 2.44)

5. Should new legislation restate the principle *prior tempore, potior jure* as it applies to security over heritable property?

(Paragraph 3.24)

6. (a) Should a subsequent standard security holder be able to restrict the priority of an earlier standard security by giving notice?

   (b) If so, should post-notice voluntary advances by the prior security holder be unsecured, or treated in some other way?

(Paragraph 3.32)

7. Do consultees agree that under any new legislation:

   (a) The parties to a standard security and any other right in security should be free to enter into a ranking agreement intended to vary the terms of the security?

   (b) Such agreements must be set out in writing?

(c) Registration of the agreement in the Land Register is required to vary the terms of the standard securities concerned?

(Paragraph 3.36)

8. A security holder may exercise remedies under a standard security where:

(a) there is a failure to perform the secured obligation; or

(b) in such other circumstances, if any, as are agreed between the debtor, the owner or registered tenant of the security property, and the security holder.

Do consultees agree?

(Paragraph 4.47)

9. (a) Should new legislation specify circumstances in which a security holder may exercise remedies under a standard security beyond those listed in question 8 above?

(b) If so, which circumstances should be specified in the legislation?

(c) Should the specified circumstances be subject to variation by the parties to the security?

(Paragraph 4.50)

10. Do consultees agree with the proposal that:

(a) Prior to exercising remedies under a standard security, the security holder will be required to serve a notice known as a default notice?

(b) The security holder will not be entitled to exercise remedies unless and until the default notice expires?

(Paragraph 5.11)

11. Do consultees agree that the form of the default notice should be prescribed by legislation?

(Paragraph 5.15)

12. (a) Should the form of the default notice be prescribed in primary or secondary legislation?

(b) What comments do consultees have on the suggested list of key information to be included in the default notice?

(c) What further key information, if any, should be included?

(Paragraph 5.18)

13. Do consultees agree with the proposal that a default notice may be served by the security holder or its agent?

(Paragraph 5.20)

14. Do consultees agree with the following provisional proposals?

(a) A default notice must be served on the debtor, the owner or registered tenant of the security property, and any other person against whom the security holder wishes to preserve a right of recourse in respect of the secured obligation.

(b) Where a natural person on whom service should be made is deceased, service must instead be made on any person appearing from the title to have succeeded to the security property, or on the confirmed executor of the deceased estate. If no successor appears on the title and no executor has been confirmed, service must be made on the Lord Advocate.

(c) Where a natural person on whom service must be made has been sequestrated, service must also be made on the trustee in sequestration (unless discharged).

(d) Where service is to be made on a body of trustees, it is sufficient for service to be made on the majority of trustees.

(e) Where a company on which service should be made has been removed from the Register of Companies, service should be made on the Lord Advocate.

(f) Where the address of the person upon whom service should be made is unknown, or it is unknown whether the person is alive, or the notice is returned with intimation that delivery was unsuccessful, service is to be made on the Extractor of the Court of Session.

(Paragraph 5.29)

15. Where a security holder has been made aware that a guardian or attorney is acting on behalf of an intended recipient of a default notice who is an adult with incapacity, should service be made solely on the guardian or attorney on that adult's behalf?

(Paragraph 5.31)

16. Should it be competent to serve a default notice by:

(a) Sheriff officer, using the methods specified in the Ordinary Cause Rules 1993, rule 5 (namely delivery into the hands of a recipient who is a natural person; leaving the notice in the hands of a resident at the recipient's dwelling or in the hands of an employee at the recipient's place of business; letterbox delivery following diligent enquiry; or leaving the notice at the recipient's dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry)?

(b) Sending it to the intended recipient by a postal service which provides for delivery of the notice to be recorded?

(c) Electronic transmission where the electronic form of the notice and the electronic address for service has been agreed in writing by all relevant parties in advance?

(Paragraph 5.40)

17. Which, if any, other methods of service should be competent for default notices?

(Paragraph 5.41)

18. Should relevant parties be permitted to agree in writing, prior to service of a default notice, that it must be served:

(a) By one (or more than one) of the methods specified in the statute?

(b) At a specified address?

(Paragraph 5.43)

19. Should the time limit for compliance with a default notice be:

(a) 14 days after service?

(b) One month after service?

(c) Two months after service?

(d) Some other period, and if so, what?

(Paragraph 5.46)

20. Do consultees agree that the time limit for compliance with a default notice may be varied or dispensed with following service of the notice where consent is given in writing by all the following parties:

(a) the debtor;

(b) the owner or registered tenant;

(c) holders of any prior or *pari passu* securities;

(d) the spouse of the debtor, owner or registered tenant where the security property is a "matrimonial home" in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 22;

(e) the civil partner of the debtor, owner or registered tenant where the security property is a "family home" in terms of the Civil Partnership Act 2004 s 135(1);

(e) any “entitled resident” of the security property as defined in the enhanced debtor protection provisions of any new standard securities legislation?

(Paragraph 5.48)

21. Should section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 be excluded from application to any new standard securities legislation, and if so, why?

(Paragraph 5.54)

22. Should a bespoke route of challenge to a default notice (similar to that found in section 22 of the 1970 Act) be provided for in any new legislation?

(Paragraph 5.59)

23. (a) After what period of time should the rights of a security holder to exercise remedies on the basis of an expired default notice be extinguished by prescription?

(b) Why?

(Paragraph 5.64)

24. Should an expired default notice continue to provide a valid basis for the exercise of remedies where the default giving rise to the notice is subsequently purged? Why or why not?

(Paragraph 5.68)

25. Do consultees agree that a court order should not be required to exercise a remedy under a standard security, except where legislation specifically so provides?

(Paragraph 6.20)

26. Should a security holder be able to apply to the court for relevant orders in relation to the exercise of remedies even where such an order is not required by legislation?

(Paragraph 6.21)

27. Should court proceedings in respect of the exercise of standard securities be raised by way of ordinary cause procedure, except in cases to which the enhanced debtor protection measures apply?

(Paragraph 6.23)

28. (a) Should the obligation to obtemper a decree of court obtained under legislation on standard securities continue to be subject to the long 20-year prescription?

(b) If not, why not?

(Paragraph 6.27)

29. Should the person criterion for application of the enhanced debtor protection measures be satisfied where both the debtor and the owner of the security property are natural persons (including where the debtor and owner are the same person)? If not, what difficulties do you identify with this proposal?

(Paragraph 7.55)

30. Where the debtor is a natural person and the owner of the security property is a juristic person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

(Paragraph 7.55)

31. Where the debtor is a juristic person and the owner of the security property is a natural person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

(Paragraph 7.55)

32. (a) Should the property criterion for application of the enhanced debtor protection measures be satisfied where the security property comprises or includes a dwellinghouse?

(b) If not, what difficulties do you identify with this proposal, and what would you propose as an alternative?

(Paragraph 7.62)

33. Should new the term “dwellinghouse” be defined in new legislation, if the property criterion is that the security property “comprises or includes a dwellinghouse” as suggested above?

(Paragraph 7.62)

34. (a) Should buy-to-let properties be excluded from the application of the enhanced debtor protection measures?

(b) Should the legislation provide for any other exceptions, and if so, what?

(Paragraph 7.62)

35. Where a default notice is served in relation to a security property which meets the property criterion for application of the enhanced debtor protection measures, the security holder must give notification of the same to the occupier(s) of the property and to the local authority in which the property is located.

Do consultees agree?

(Paragraph 7.67)

36. Are any amendments, additions or deletions to the PARs required? If so, what?

(Paragraph 8.6)

37. Should the “headline” requirements of the PARs continue to be provided for in primary legislation, with further detail in secondary legislation and guidance, as at present?

(Paragraph 8.7)

38. Other than those outlined in this Discussion Paper, what difficulties exist with the procedure for application for warrant under the 1970 Act, section 24(1B)?

(Paragraph 8.10)

39. (a) Should new legislation continue to provide a non-exhaustive list of factors to be taken into account by the court when determining an application for warrant to exercise remedies where the debtor appears or is represented, modelled on the current section 24(7)?

(b) Should the final factor listed in section 24(7) be amended in new legislation to restrict the court's consideration to the ability of the debtor, the owner, any entitled resident and any child of the foregoing parties residing with them to find reasonable alternative accommodation?

(c) Are any other amendments, additions or deletions to the section 24(7) factors required? If so, what?

(Paragraph 8.14)

40. Should new legislation provide the court with guidance on how to balance the interests of the debtor, owner and entitled residents in considering factors equivalent to those currently listed at section 24(7)? If so, what guidance should be given?

(Paragraph 8.15)

41. Are any amendments, additions or deletions required to the definition of entitled resident set out in section 24C? If so, what?

(Paragraph 8.18)

42. (a) Following expiry of a default notice, should the requirement for warrant of the court under the enhanced debtor protection regime be waived where the debtor, the owner and any entitled residents confirm in writing that:

(i) they are not in occupation of the security property;

(ii) they consent to the exercise of remedies under the security;

(iii) their consent was given freely and without coercion of any kind?

(b) Should the debtor, the owner and any entitled resident also be required to confirm that the security property is unoccupied?

(Paragraph 8.22)

43. (a) Should new legislation on standard securities make available the same remedies as current legislation?

(b) Should new legislation include any remedy not currently provided for, and if so, which remedy?

(Paragraph 9.5)

44. Should receivership be available as a remedy under any new legislation on standard securities? If so, what powers should be available to the receiver?

(Paragraph 9.12)

45. Should any restriction be placed on the security holder's choice between the remedies of sale and management of the security property? If so, what form of restriction is appropriate?

(Paragraph 9.17)

46. Do consultees agree that it should not be possible to vary the statutory provisions on exercise of remedies under a standard security?

(Paragraph 9.23)

47. Do consultees agree that remedies under a standard security should continue to be exercisable by or on behalf of the security holder?

(Paragraph 9.24)

48. What comments do consultees have as to the powers of postponed (or *pari passu*) security holders to exercise remedies without the consent of prior (or *pari passu*) security holders?

(Paragraph 9.28)

49. (a) Should provision equivalent to section 27 of the 1970 Act on application of the proceeds of sale be made in any new legislation?

(b) Should this provision be extended to cover the proceeds of any remedy exercised under a security?

(Paragraph 9.31)

50. Should new legislation on standard securities provide that a security holder may seek decree of ejection against any person in natural possession of the land or buildings in which the security is held where that person has no legal basis to occupy?

(Paragraph 10.11)

51. Do consultees agree that the only basis for ejection under a standard security should be the relevant statutory provision?

(Paragraph 10.13)

52. When seeking to remove an assured or private residential tenant from the security property, should a security holder be required to obtain an order for possession under the relevant tenancy legislation?

(Paragraph 10.21)

53. (a) Should new legislation on standard securities provide guidance on how the security holder's duty of care in relation to moveables left in the security property may be discharged?

(b) If so, what guidance would be appropriate?

(Paragraph 10.26)

54. (a) In future legislation, should "taking possession" be defined to mean taking action to physically secure the land or buildings in which the security is held, including taking possession through a third party such as a tenant? If not, why not?

(b) Should the legislation include a non-exhaustive list of actions which meet the definition of possession? If so, which actions should be included?

(Paragraph 11.36)

55. On entry into possession, should a security holder be able to exercise the rights of the owner or registered tenant in relation to the management and maintenance of the security property where:

(a) Management of the security property includes exercise of any rights required in connection with the aim of enforcing performance of the secured obligation;

(b) Maintenance of the security property includes any reconstruction, alteration or improvement reasonably required for the purpose of maintaining its market value?

(Paragraph 11.41)

56. On entry into possession:

(a) Should a security holder assume the obligations of the owner or registered tenant in relation to the management and maintenance of the security property?

(b) Should this include responsibility for outstanding costs previously incurred by the owner or registered tenant in relation to the management and maintenance of the security property?

(Paragraph 11.46)

57. Do consultees agree that the security holder's right to collect rents and grant and administer leases under any new legislation should follow from entry into possession of the security property?

(Paragraph 12.3)

58. Should the security holder's remedy of collection of rents cover:

(a) Rents which fall due on or after the security holder's entitlement to rents arises?

(b) Rents which fell due prior to the security holder's entitlement arising, but have yet to be paid?

(Paragraph 12.7)

59. In any new legislation, should the power to grant a lease should be available under a standard security where the security property is ownership of land or buildings.

(Paragraph 12.9)

60. In relation to the grant of (sub-)leases by the security holder:

(a) What comments do consultees have on the current use of this remedy in practice?

(b) What duration of lease should the security holder be entitled to grant without warrant of the court?

(c) Would the extension of the seven-year limit in relation to leases give rise to any debtor protection concerns? If so, what measures should be taken to address these concerns?

(d) What limits, if any, should be placed on the power of a security holder to grant a private residential tenancy?

(Paragraph 12.15)

61. We provisionally propose that, on entering into possession of the security property:

(a) A security holder should be entitled to exercise the rights of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property; and

(b) A security holder should assume the obligations of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property.

Do consultees agree?

(Paragraph 12.18)

62. Should a court order be required for the security holder to exercise the power of sale?

(Paragraph 13.28)

63. Should the selling security holder continue to have the choice to sell by private bargain or by public auction? If not, what reform would you propose here?

(Paragraph 13.35)

64. (a) Should the selling security holder be placed under a duty to take all reasonable steps to obtain (i) the best price reasonably obtainable, (ii) the market value of the security property or (iii) some other objective?

(b) Should the legislation include a non-exhaustive list of factors (capable of amendment by secondary legislation) to be considered by the court in determining whether this duty has been discharged? If so, which factors should be included, and why?

(Paragraph 13.39)

65. Where a purchaser acquires property from the security holder exercising its power of sale under the security, should legislation provide that:

(a) The transfer is valid notwithstanding the lack of capacity of the debtor, the owner, or any other party entitled to receipt of notice of enforcement proceedings under the security; and

(b) The title acquired is protected against any challenge arising from extinction of the secured obligation or from defects in the process by which the security holder's power of sale is established, so long as certain conditions are fulfilled?

(Paragraph 13.47)

66. Do consultees agree that the conditions referred to in part (b) above should be as follows:

(a) The purchaser paid value for the security property;

(b) The purchaser was in good faith prior to the conclusion of missives, with the following factors taken into account in determining whether this requirement has been met:

(i) The purchaser's actual or constructive knowledge that the secured obligation had been extinguished;

(ii) The purchaser's actual or constructive knowledge of defects in the process by which the security holder's power of sale was established;

(iii) Attempts made by the purchaser to satisfy themselves that the purchaser has discharged its best price duty;

(iv) Whether the purchaser is a close associate of the security holder?

(Paragraph 13.47)

67. Do consultees agree that any new legislation should provide that:

(a) The security holder's remedy of sale of the security property includes the power to grant a disposition transferring ownership of that property.

(b) Registration of a disposition granted under this power has the effect of disburdening the property sold of the standard security, and of any *pari passu* and postponed securities?

(Paragraph 13.49)

68. Is any reform required to the foreclosure process? If so, which reforms would be appropriate?

(Paragraph 14.22)

69. (a) Should the debtor be liable to the security holder for expenses reasonably incurred in exercising the security?

(b) Should the expenses of litigation be "reasonably incurred" only to the extent of any award by the court or agreement between the parties?

(c) Is there an alternative approach to the debtor's liability for expenses that you would consider more appropriate, and if so, why?

(Paragraph 15.13)

Appendix

Advisory Group Members

Rob Aberdein, Esson & Aberdein

Zibya Bashir, Miller Samuel Hill Brown LLP

Morag Campbell, Dentons UK and Middle East LLP

Darren Craig, CMS Cameron McKenna Nabarro Olswang LLP

Mike Dailly, Govan Law Centre

Sheriff Anthony Deutsch, formerly Glasgow Sheriff Court

Professor George Gretton, University of Edinburgh

Mark Higgins, Irwin Mitchell LLP

Andrew Hinstridge, Virgin Money Group PLC

Mathew Jupp, UK Finance

Andrew Kinnes, Shepherd and Wedderburn LLP

John Lunn, Morton Fraser LLP

Ian Lyall, formerly Pinsent Masons LLP

Dr John MacLeod, University of Edinburgh

Tom McEntegart, TLT LLP

Myra Scott, Aberdein Considine and Company

Adrian Stalker, Advocate

Bruce Stephen, Brodies LLP

Professor Andrew Steven, University of Edinburgh

Ken Swinton, formerly University of Abertay

Others who have helped

Ian Bowie, MacRoberts

Caroline Drummond, formerly Scottish Law Commission

Martin Gavin, Homeless Network Scotland

Calvin Gordon, Shelter Scotland

Janice Higgins, Homeless Network Scotland

Denise Loney, Yuill + Kyle

John Maciver, Pinsent Masons LLP

Dr Alisdair MacPherson, University of Aberdeen

Kyle McAra, QLTR

Harry Murray, Registers of Scotland

Stephen Philips, CMS Cameron McKenna Nabarro Olswang LLP

Ailsa Robertson, Registers of Scotland

James Tatch, UK Finance

Serena Weir, Shepherd and Wedderburn LLP

Scott Wortley, University of Edinburgh

Published on behalf of the Scottish Law Commission by APS Group Scotland

This Document is also available for download from:
www.scotlawcom.gov.uk/

ISBN 978-1-9989963-1-5

PPDAS992306 (12/21)