

MOVEABLE TRANSACTIONS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Moveable Transactions (Scotland) Bill (which was introduced in the Scottish Parliament on 25 May 2022) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill will modernise the law of Scotland in relation to moveable transactions, in implementation of the Scottish Law Commission Report on Moveable Transactions (Scot Law Com No. 249)¹ published in December 2017. The Bill deals with the law relating to:

- the assignation of a claim to the right to the performance of an obligation (typically the right to be paid money);
- the law of pledges – both possessory pledges and the new statutory pledge created by the Bill which will be able to be granted over corporeal moveable property (such as vehicles, equipment including plant and machinery, whisky or livestock) and certain kinds of incorporeal moveable property (specifically, intellectual property – which includes copyright, trademarks, design rights and patents).

OVERVIEW OF THE BILL

5. The Bill has 123 sections. Section 116 is the main interpretation section in the Bill but there are also separate interpretation sections for each of Part 1 and Part 2. The Bill is organised into three Parts as follows:

¹ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/security-over-corporeal-and-incorporeal-moveable-property/>

- Part 1 makes provision about the law of assignation of claims in Scotland. Chapter 1 consolidates and modernises the law on assignation of claims, which includes introducing registration as an alternative means to completing an assignation and providing for the protection of debtors. Chapter 2 provides for the establishment and operation of the new Register of Assignations. Chapter 3 repeals the existing law on assignation of debt in Scotland and also includes a section on the interpretation of Part 1.
- Part 2 modernises the law on security over moveable property in Scotland. Chapter 1 updates and consolidates the law of pledge (including possessory pledge). It also introduces the statutory pledge. Chapter 2 provides for the establishment and operation of the new Register of Statutory Pledges. Chapter 3 removes the ability to create an agricultural charge and also includes a section on the interpretation of Part 2.
- Part 3 provides for the interpretation of terms that are used in both Part 1 and Part 2, and provides for general matters such as ancillary provision and secondary legislation. It also includes provision allowing the Keeper of Registers of Scotland to operate the registers and carry out related duties electronically, makes provision about the registration of electronic documents, and makes provision about the burden of proof where there is a dispute as to whether a party is in good faith. It also provides for a review of the Act to be carried out.

COMMENTARY ON SECTIONS

Part 1 - Assignation

Chapter 1 - Assignation of claims, protection of debtors and related matters

Assignation of claims

Section 1 – Assignation of claims: general

6. Section 1 sets out key rules on assignation (i.e. transfer) of claims. A claim is the right to the performance of an obligation, usually the right to payment of a debt. See section 39(1) of the Bill for the full meaning of “claim”.

7. Subsection (1) has the effect that a claim must be assigned by means of a document (an “assignation document”) which is executed or authenticated by the assignor. This means that it must be signed by or on behalf of the assignor, either in ink if a hard copy (“executed”) or with an electronic signature if an e-document (“authenticated”). The assignor means the person assigning the claim. See section 39 for the definition of “assignor” and section 116(1A) for the meaning of “executed” and “authenticated”.

8. Subsection (2) requires the claim to be identified (either in the assignation document or by cross-reference to another document), but subsection (3) makes it clear that claims do not need to be individually identified in the assignation document, provided that these fall within an identifiable class and are identified as such. Thus, for example, it would be possible for a business to assign all invoices raised against a particular customer, or all invoices rendered in a period specified in the assignation document.

9. Subsection (4) provides that a claim that is not yet held by the assignor at the date of the assignment, including a claim that has not yet come into being, can be assigned. For example, a plumbing business may wish to assign to a factor the invoices for work not yet instructed by a customer. It is not possible to complete the assignment by intimating such a claim until the work has been done and the debtor can be identified. However, it will be possible to assign such a future claim by registering it in the Register of Assignations under section 18 of the Bill.

10. Subsection (5) provides that nothing in Part 1 applies to the assignment of a claim as part of a financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No.2) Regulations 2003. For example, a credit card company assigning the amounts due to it by its customers to its bank as security for its obligations would constitute such an arrangement (specifically, a title transfer financial collateral agreement). The law in relation to such matters is left unchanged by the Bill.

Section 2 – Assignment of claim subject to a condition

11. This section provides that an assignment can be made subject to a condition which must be satisfied before the claim is transferred. For example, the assignment might be conditional on the grant of planning permission or on the assignee getting married.

12. Subsection (2) requires that the condition is set out in the assignment document, in order to enable a third party to be able to discover from the document whether there is such a condition. In the case of a registered assignment document, a copy of the document will be included in the assignments record.

13. Subsection (3) provides that a condition may relate to a thing happening, or not happening (in either case regardless of whether or not it is certain that the thing will happen). The condition can also be simply the occurrence of a specified date being reached.

14. Subsection (4) enables a condition to be specified by reference to another document (for example, the loan agreement that relates to an assignment in security).

Section 3 – Transfer of claims

15. This section provides for the transfer of an assigned claim where there is a validly constituted assignment document in accordance with section 1. The person to whom the obligation under the claim must be performed is the “holder” of the claim. The assignee is the person to whom the claim is assigned (who becomes the new holder, in place of the assignor).

16. Subsection (1) provides that a claim is transferred when the four conditions in subsection (2) are all met. The conditions can be met in any order. Subsection (2) has the effect that a claim will transfer when:

- (a) the assignor is the holder of the claim,
- (b) the assignment is intimated (see section 8(1)), or registered in the Register of Assignations (“RoA”),
- (c) the claim is identifiable as a claim to which the assignment document relates, and

(d) any condition to which the assignation is subject is met.

17. It follows that if a claim is not identifiable then the transfer is postponed until it becomes so identifiable.

Example 1

Arthur assigns to Barbara his claim to a current debt of £1,000 owed by Zoe. Barbara registers the assignation in the RoA. The claim transfers on registration because the claim as constituted by the debt exists and is clearly identifiable.

Example 2

Debra assigns to Excellent Factors claims in respect of customer invoices to be issued by her as described in schedules to be sent from time to time to the factors. Excellent Factors registers the assignation in advance of any such schedule being sent. There is no transfer at the date of registration as no claim can be identified (and might not exist). The claims listed in the first such schedule transfer when that schedule is issued as they exist and can be identified at that time.

18. Subsection (3) provides that any rule of law as to accretion is to be disregarded in determining any matter which relates to the transfer of such claims as are mentioned in section 1(4) of the Bill (assignation of a claim not yet held by the assignor). A person cannot convey property which that person does not own. However, as a general principle, accretion may operate where a person has purported to do that and then subsequently acquires the property. The effect of accretion would be to cure the defect in the title of the assignee. It is, however, not clear that accretion applies where “future” claims are assigned, so subsection (3) clarifies that it does not, with the effect that the measures in the Bill replace any common law rule.

19. Subsection (4) provides that although registration of an assignation document can be one of the elements which allows a claim to transfer, it is only effective registration that counts (see section 25).

20. Subsections (5) and (6) make provision for the situation where there are competing assignation documents in relation to the same claim. In most cases, the claim will transfer to whichever assignee first registered or intimated the assignation document, because that will usually be the final requirement to be met under subsection (2) and so will give rise to the transfer. However, if the assignor is not the holder of the claim at the time of granting the competing assignation documents, them becoming so might be the final requirement to be met. That would mean that all of the competing documents would meet the requirements of subsection (2) at the same time. Similarly, the competing assignations could be made subject to conditions. Those could be the final requirement to be met under subsection (2), and might all be met at the same time. Alternatively, the claims might not be identifiable initially as claims to which the assignation documents relate. Them becoming so could be the final requirement to be met under subsection (2) and could be met in relation to the competing assignations at the same time. The result of subsection (6) is that in such cases the claim would therefore transfer to whichever of the assignees first meets the requirement as to intimation or registration.

21. Subsection (7) provides that the rule about claims transferring is subject to section 4. That section makes provision about the effect of insolvency on assignations where the claims being

assigned are not held by the assignor at the time of granting the assignment document (either because the claim does not exist yet, or because it exists but someone else is the holder).

22. Subsection (8) enables the Scottish Ministers to prescribe certain categories of claim which can only be transferred by registration of the assignment. For example, in some jurisdictions, assignments in respect of invoices that have yet to be paid must be registered to have third party effect. If registration of assignments of so-called trade receivables was to become required in England and Wales then there may be support for this to be the position in Scotland as well.

Section 4 – Assignment of claims: insolvency

23. Section 4 sets out what the legal effect of an assignment document is in the event of the assignor's insolvency.

24. Subsection (1) provides that this section is relevant only where the claim that was assigned was not held by the assignor at the time of granting the assignment document. This covers assigning a claim that is not yet in existence, as well assigning a claim which exists but which the assignor does not yet hold. Where the assignor becomes insolvent after granting an assignment document in respect of such a claim, this section will apply.

25. Subsection (2) provides that an assignment of such a claim is, subject to subsection (3), ineffective if the assignor becomes the holder of the claim after becoming insolvent (i.e. during the period of the insolvency or after being discharged).

Example

A tradesman assigns future invoices to a factor. The tradesman is sequestrated, and then issues an invoice for a new job carried out after the date of sequestration. The tradesman only becomes the holder at that point. The claim in respect of that invoice will not transfer to the factor.

26. Subsection (3) has the effect that an assignment is, however, effective where the claim is in respect of income from property in existence at the time the assignor becomes insolvent, and is not attributable to anything done or agreed to be done by the assignor after the insolvency.

Example 1

A musician has licensed the use of a song in an advert, and assigns the royalties due in respect of that use. The assignment is effective even if the musician becomes insolvent.

Example 2

A landlord assigns the future rent on a property to a bank. The landlord is sequestrated. The assignment remains effective for rents arising after the date of sequestration because the rents derive from an asset (the property) of, and not from efforts by, the landlord.

27. An assignment that is ineffective under subsection (2) does not become effective if the assignor is discharged from the insolvency. However, subsection (4) provides that claims that remain effective on an insolvency (i.e. they survive under subsection (3)) become ineffective under subsection (5) if the assignor is discharged from a sequestration or from a protected trust deed.

The effect is that any claim which comes into being after such a discharge is not transferred by the assignation, with the effect that the assignor makes a fresh start after insolvency.

28. Subsections (4) and (5) will mainly benefit individuals, as only a few types of legal person can be sequestrated (for example, partnerships). This protection does not otherwise apply to legal persons, and indeed the effect of a corporate insolvency is in nearly all cases the dissolution of the corporation.

29. Subsection (6) provides for the meaning of insolvency for the purposes of section 4, in respect of both individuals and legal persons (such as limited companies).

30. Subsection (7) gives the Scottish Ministers power to amend the list of insolvency processes listed in subsection (6), as well as to apply subsections (4) and (5) to circumstances other than sequestration or the granting of a trust deed.

Section 5 – Assignation in part

31. Subsection (1) provides that a claim may be assigned in whole or in part.

Example

Andrew lends £2,000 to Brenda. He then has a claim for repayment of that sum. But he could assign £500 of that claim to Carol and the other £1,500 to Doris. These would be assignations in part.

32. Subsection (2) provides that where the claim is not one requiring payment of money, assignation in part is only permissible where the claim is divisible and one of two circumstances applies:

- (a) the first is where the debtor (i.e. the person against whom the obligation is enforceable) consents,
- (b) the second is where the assignation in part is not likely to result in a significantly greater burden on the debtor.

33. For example, say Elaine has an obligation to deliver 30 motor vehicles to Frank. Her obligation may not become significantly more burdensome if Frank assigns part of his claim to one person and the remainder to another. If, however, Frank assigns the claim to 30 persons then the obligation may well be likely to become significantly more burdensome (and therefore not assignable in part in that manner). The assessment as to result is carried out at the time of making the assignation in part and is based on the likely outcome, which means that the assignation in part could not appear to be valid and then be challenged in future as a result of unforeseen events arising.

34. Subsection (3) enables the debtor to recover from the assignor, unless agreed otherwise with the then-assignor, the expenses attributable to a claim being assigned in part under subsection (1). For example, sending payments to several partial assignees rather than one assignee may be more costly. The additional cost in doing so is therefore recoverable.

35. This section does not make provision as to how any consent or agreement for the purposes of this section is to be constituted. It might, for example, be in the agreement which gives rise to the claim or in a subsequent agreement.

Section 6 – Limitations as to assignability: general

36. Subsection (1) continues the effect of any current enactment or rule of law that prevents the assignation of a claim. For example, the assignation of a claim to certain social security payments is barred by section 187 of the Social Security Administration Act 1992.

37. Subsection (2) excludes the preservation of other enactments or rules of law which contradict provision made in this Part of the Bill that allows for the assignation to be effective. In particular, it was previously a rule of law that future claims could not be assigned (due to the impossibility of intimation until a debtor existed). That rule of law is now displaced by section 1(4) and that prevails over section 6(1).

38. Subsection (3) makes it clear that the debtor and the holder of the claim can agree (or a person giving a unilateral undertaking can state) that the claim cannot be assigned, or cannot be assigned in part. This is known as an anti-assignation (or, following England and Wales, a non-assignment) clause and is a permitted clause in a contract or undertaking.

39. Subsection (4) provides that although the language of “the holder of the claim” is used in subsection (3), this includes a person who is not yet the holder at the time of agreement. This allows anti-assignation agreements to be entered into in anticipation of becoming the holder of a claim (for example, because the assignation is of future claims).

40. Subsection (5) has the effect that subsection (3) is subject to any enactment which renders anti-assignation clauses ineffective, such as sections 1 and 2 of the Small Business, Enterprise and Employment Act 2015.

41. As with section 5, this section does not make express provision as to how any agreement or statement is to be constituted.

Section 7 – Claim in respect of wages or salary

42. This section prevents an individual assigning a claim to payments of wages or salary due to them, including for this purpose any associated payments such as bonus and redundancy payments.

43. This section will sit alongside other, more specific statutory provisions restricting the assignation of income, which also continue to have effect unless and until they are repealed. However, there are some limited cases where the assignation of such a claim is possible – for example, section 34 of the Merchant Shipping Act 1995 generally restricts the assignation of wages, but some exceptions are made to this (such as for those payable to a relevant fund under subsection (3)). Those exceptions are preserved by section 7(3).

Section 8 – Intimation of the assignation of a claim

44. Section 3 of the Bill sets out that an assigned claim may be transferred by intimation under subsection (1) of this section (where the other requirements of section 3(2) have also been met).

45. Subsection (1) sets out a new rule governing the types of intimation that must be used in order to effect the transfer of a claim which otherwise satisfies the requirements of section 3(2). It replaces the existing statutory rules on intimation in the Transmission of Moveable Property (Scotland) Act 1862, which is therefore repealed by section 38 of the Bill. There are a number of different options under subsection (1), although subsection (1)(a) is likely to apply most often.

46. Subsection (1)(a) provides that either the assignee or the assignor may serve notice of the assignation on the debtor.

47. Subsection (1)(b) provides, first, for “constructive” intimation to a debtor who has knowledge of the assignation of the claim and acknowledges having such knowledge.

Example

Having become aware of the assignation other than by notice, the debtor may perform – or promise to perform – to the assignee something which the assigned claim obliges the debtor to perform to the holder of the claim. The claim is transferred by the performance or the promise without any need for written intimation to the debtor (provided that all of the other requirements as to transfer of the claim under section 3(2) have already been met).

48. Subsection (1)(b) provides, second, for intimation to be given where the debtor is a party to judicial proceedings in which the assignation is founded on.

Example

The assignee raises an action against the debtor for performance of the obligation to which the claim relates. Thus if Andrew lends £2,000 to Brenda, and then he assigns the right to repayment to Carol, intimation to Brenda would be effected by Carol raising proceedings against Brenda founding on the assignation. Provided that all of the other requirements as to transfer of the claim have already been met under section 3(2), this would therefore effect the transfer of the claim.

49. Subsection (2) provides that intimation to any one co-debtor is to be treated as intimation to all the co-debtors (as it is under the existing law).

Example

Kenneth lends £1,000 to Leslie and Max. If he assigns the right to repayment to Nicola then the claim will be transferred to her by intimation to either Leslie or Max.

50. Subsections (3) to (12) provide more detail on assignation by notice to the debtor.

51. Subsection (3) concerns the form and content of the notice. It should be read with section 14 of the Bill which sets out the right of the debtor to seek information about an assignment. The notice:

- must provide the name and address of both the assignor and assignee, as well as details of the claim (or part claim) being assigned,
- need not be set out in a single document (“document” is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and would include e-mails and attachments to e-mails),
- need not be signed either in ink or electronically; the effect is to authorise the practice of some factors whereby stickers are placed on invoices instructing the debtor to pay the factor, but the stickers are not signed,
- can, in the case of a monetary claim, be in a style form prescribed by the Scottish Ministers under regulations, although there would be no consequence to using or not using such a form.

52. Subsection (4) makes it clear that, in the case of an electronic intimation, the required information may be provided through a link to a website or portal.

53. Subsection (5) permits three forms of service: (a) by personal delivery; (b) by post or courier (including ordinary post, not just registered delivery); and (c) by transmission to an address provided for electronic communication. Intimation can be made either to the “proper address” of the debtor as defined in subsection (11), or an address supplied by the debtor.

54. Subsections (6), (7) and (8) allow the parties to make a determination that a notice must be served by means of a particular one of the permitted ways (e.g. by electronic means), or to a particular address. In other words, the default rules can be replaced up to a point. Intimation by oral means is not, however, permitted. A determination of this nature must be agreed in writing between both parties (the holder of the claim and the debtor) unless the claim arises from a unilateral undertaking, in which case it can be effected by that person in writing. However, once a determination of this nature has been agreed, it can be updated by the debtor unilaterally.

55. Subsection (9) provides that a notice served by post or other postal services in the UK is deemed to be received 48 hours later unless earlier receipt can be shown. Subsection (10) sets out a similar rule for electronic transmission, though in that case it is deemed to be received after 24 hours unless earlier receipt is shown. The effect is to provide, where required, certainty as to the time of intimation. This is important in a question with third parties, such as creditors carrying out diligence, as the claim will transfer on intimation (assuming the other requirements of section 3(2) are already met). If the notice has not actually reached the debtor (for example, by going missing in the post) then the good faith protection rule in section 10 may need to be relied upon by the debtor.

56. Subsection (11) makes it clear that a determination can be entered into between a debtor and the prospective holder of a claim. It also defines certain terms by reference to the Postal Services Act 2011, as well as providing for what the “proper address” of the debtor means.

57. Subsection (12) allows service to be made on a party who is authorised to act on behalf of the debtor for that purpose, such as a solicitor.

Section 9 – Warrantice implied in the assignation of a claim

58. This section provides for the warranties that an assignor is deemed, unless agreed otherwise, to give to the assignee in respect of an assigned claim when granting an assignation document. It replaces the current law and clarifies the effect of warrantice. See section 16(1)(d) for the repeal of the current law.

59. Subsection (2) provides that for assignation documents granted for value, the implied warrantice reflects the common law principle of warrantice *debitum subesse* (the debt exists). This principle means that the assignor guarantees to the assignee the existence of the claim. As such, if the assignee finds that the claim is barred because, for example, the assignor personally barred themselves from seeking performance, the assignor is in breach of warrantice and must compensate the assignee.

60. Subsection (3) provides that in the case of assignation documents granted gratuitously (for no value), the implied warrantice reflects the common law principle of warrantice of facts and deeds only.

61. Subsection (4) provides that the assignee is not held to warrant that the debt will be paid. In other words, the assignor does not guarantee that the debtor is solvent and can pay the debt.

62. Subsection (5) has the effect that the warranties are, where applicable, implied in any contract relating to the assignation of a claim as well as in the assignation document itself.

Protection of debtors

Section 10 – Protection of debtor who performs in good faith

63. Previously, a claim would only transfer if the assignation was intimated to the debtor. However, the effect of the changes in the Bill is both to extend the scope of intimation and to enable registration as a method of effecting a transfer of a claim. As such, the debtor may not know that a claim has been assigned, and may in good faith pay an assignor who is no longer the creditor.

64. This section has the effect that a debtor who does not, and should not, know that a claim has been assigned will still be discharged from the debt to the extent of any payment made to the assignor (or any person nominated by the assignor).

Example

Paul lends Roger £5,000. Paul assigns his right to repayment to Susan, and she registers the assignation in the RoA. The effect is to transfer the claim so that payment is due to Susan. But Roger, who knows nothing of the assignation repays Paul, and Paul accepts payment rather than telling Roger to pay Susan. Roger does not require to pay Susan any amount that he has paid in good faith to Paul.

65. Subsections (1) and (2) provide for a general rule protecting a debtor who performs in good faith to the assignor where a claim has been assigned in whole or in part. Co-debtors are also discharged to the extent of the performance, as if the debt is a joint one then it is discharged (to the extent of the performance) for all debtors, albeit that one debtor may have an ability to recover from the other. The “last known holder of the claim” formulation in subsection (1) deals with the fact that there may have been a chain of assignments rather than only one.

66. Subsection (3) provides that the fact that an assignment document has been registered, or that it is deemed to have been intimated, does not of itself mean that the debtor does not perform in good faith. In particular, debtors should not be expected to have to check the RoA.

67. Good faith is not further defined in this section. However, section 113 places the onus of showing that the debtor has performed other than in good faith on the person making such an assertion. Whether or not a debtor is in good faith will depend on the facts of the case.

Example

Susan might make intimation to Roger by means of sending him a 200-page document dealing with many matters, but including the words of intimation half way down page 172. Roger may be in good faith if he still pays Paul.

Section 11 – Further provision as to protection of debtor

68. This section provides protection for debtors who are in good faith where an assignor is not. It also protects debtors against inadvertent errors by assignors (such as forgetting that a claim has already been assigned).

69. Subsection (1) sets out the four criteria which must each be met in order for the protection in subsection (2) to apply:

- (a) The first criterion is that the holder of the claim grants more than one assignment document in respect of the same claim (or part claim) to different people,
- (b) The second criterion is that the claim is transferred by one of the assignment documents to the true holder (typically, by registration of the assignment),
- (c) The third criterion is that the debtor is informed that the claim is assigned to the purported holder (either by notice from the original holder of the claim or the purported holder, or by being made party to judicial proceedings), and
- (d) The fourth criterion is that by virtue of being so informed, the debtor performs to the purported holder.

70. Subsection (2) has the effect that if the performance to the purported holder is in good faith then the debtor is discharged from the claim (or part) to that extent, and does not need to compensate the true holder. This also extends to co-debtors (see paragraph 65 of these Notes).

Example

Liana owes Kimberley £1,000. Kimberley then assigns her claim to Monica. Monica registers the assignment in the RoA (and does not intimate). Kimberley then assigns the same claim again to Neil, who intimates to Liana. Liana pays Neil, who is not the true

holder, but provided she is in good faith she is discharged from the obligation to pay Monica.

71. Subsection (3) imports the rules that apply under section 10 of the Bill, namely that the debtor is not in bad faith merely because an assignation document has been registered in the RoA, or because intimation has been deemed to have taken place. See paragraph 66 of these Notes.

72. In relation to good faith, see paragraph 67 of these Notes and section 113 of the Bill.

Section 12 – Performance in good faith where claim assigned cannot be transferred by intimation

73. This section protects debtors who in good faith pay the assignee as a result of an assignation document that should have been registered (see section 3(8) of the Bill) but was not.

74. Subsection (1) sets out the two criteria which must each be met in order for the protection in subsection (2) to apply:

- (a) The first criterion is that the assignation relates to a claim of a type prescribed by the Scottish Ministers under section 3(8) of the Bill as being a claim that can only be transferred by registration, but the assignation has not been registered and this is the only reason that the claim has not transferred,
- (b) The second criterion is that, despite the claim not having transferred, the debtor performs in good faith to the (supposed) assignee (perhaps because the assignation has been intimated).

75. Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance to the assignee. This also extends to co-debtors (see paragraph 65 of these Notes).

76. Subsection (3) sets out that the debtor will not be in good faith if the debtor knows that the assignation has not been registered, and that registration was required in order to transfer the claim, and still performs to the purported assignee (who is not the holder).

Section 12A – Performance in good faith where claim assigned subject to condition

77. This section protects debtors who do not know that an assignation document is subject to a condition, or who mistakenly believe the condition has been satisfied. Although section 14(8) and (9) of the Bill grants an information-gathering right to debtors in respect of conditions, debtors are not required to be on guard against conditional assignments.

78. Subsection (1) sets out the criteria which must be met in order for the protection in subsection (2) to apply:

- (a) The first criterion is that the assignation is subject to a condition which must be satisfied before the claim transfers,

- (b) The second criterion is that the claim has not transferred and the only reason for this is that the condition has not been satisfied,
- (c) The third criterion is that, despite the claim not having transferred, the debtor performs in good faith to the assignee (perhaps because the assignation has been intimated without the debtor being told of the existence of the condition).

79. Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance to the assignee. This also extends to co-debtors (see paragraph 65 of these Notes).

80. Subsection (3) applies the rules set out in section 10(3) here too. See paragraph 66 of these Notes.

Section 13 – Asserting defence or right of compensation

81. This section puts the common law rule *assignatus utitur jure auctoris* (the assignee takes the rights of the assignor) into statutory form. The new rule applies by default, so that it is open to the debtor and the assignor to agree that the debtor may not assert a particular right. This section does not make express provision as to how any agreement is to be constituted, although it will need to pre-date the assignation document.

82. The effect of subsection (1) is that, unless agreed otherwise, any defences which the debtor can plead against the assignor can also be pled against the assignee.

Example

Ona sells goods to Peter at a price of £1,000. The sale is on credit, and Ona assigns her claim for payment to Quentin. It turns out that the goods are defective. If this entitled Peter to refuse to pay Ona then he is equally entitled to refuse to pay Quentin. It does not matter that Quentin is in good faith.

83. Subsection (4) states that any agreement made by the parties that a defence cannot be asserted against the assignee is subject to a contrary rule in any enactment. For example, a consumer debtor may be protected by the unfair contract terms provisions in the Consumer Rights Act 2015.

84. Subsection (6) provides that a debtor is not to be treated as having been told about the assignation of a claim only because the assignation document has been registered. This rule applies for the purpose of any enactment or rule of law about compensation, set-off, retention, balancing of accounts or counterclaims.

Section 13A – Report on waiver of defence

85. This section requires the Scottish Ministers to prepare and publish a report on the impact of the waiver of defence rule at section 13(1) (see paragraph 82 of these notes). They must do so within three years of section 13 coming into force. The report must set out any steps that Ministers intend to take to mitigate any negative impacts that have been identified.

Section 14 – Right to withhold performance until information as to assignation is provided

86. This section provides protections for debtors who:

- are unsure about the veracity of the intimation made to them (subsection (1)),
- are unsure whether an assignation document has been granted in a case where intimation has not been made to them (subsection (5)), or
- are unsure whether the assignation of a claim is conditional and/or whether the condition has been satisfied (subsection (8)).

87. The first information right is found in subsection (1). It will often be the case that the debtor has little or no knowledge of an assignee, either before or after an assignation document is intimated. There is no requirement to include a copy of the assignation document for the purposes of intimation. Subsection (1) therefore applies where notice of an assignation document having been granted has been given to the debtor by the assignee rather than the assignor. It has the effect that the debtor may request from the assignee reasonable evidence of the assignation document having been granted.

Example

George owes Henry £500. Henry assigns the claim for payment to Imogen, who registers the assignation document in the RoA, and then assigns the claim to Jay, who intimates to George. George can request reasonable evidence of the assignation document granted by Imogen to Jay.

88. Subsection (2) gives an example of “reasonable evidence”, namely written confirmation from the assignor of having granted the document. There is no express requirement to provide a copy of the assignation document as it may contain information confidential to the assignor/assignee or a third party.

89. Subsection (3) makes it clear that the right to request information in subsection (1) applies equally to a purported notice of assignation and a purported assignee as it does to a valid notice of assignation and a “real” assignee.

90. Subsection (4) sets out the remedy where no reply is received to an enquiry under subsection (1). Where an assignation document has been granted, the debtor will be entitled to withhold performance from each of the assignor and the assignee until the evidence is provided by the assignee. Where an assignation document has not been granted, the debtor will be entitled to withhold performance until either the purported assignee or the purported assignee confirms in writing that an assignation document has not been granted in respect of the claim. This deals with the situation where the “assignee” is a fraudster who wants to prejudice the holder of the claim by making a fake intimation, or where the intimation has been made in error.

91. The second information right is found in subsection (5). Subsection (5) applies where the debtor has not received formal intimation of the assignation, but has reasonable grounds to believe that an assignation document has been granted. The debtor may state those grounds to the supposed assignor, and ask that party to confirm the position in writing. If an assignation document has been granted then, if the assignor provides the requested written statement, subsection (6) requires

the statement to include the name and last known address of the assignee. Under subsection (7), if a written statement is requested under subsection (5), the debtor may withhold performance until a statement confirming whether the claim is the subject of an assignation document and (where applicable) fulfilling the requirements of subsection (6) is received.

92. The third information right is found in subsection (8). A claim that is the subject of a valid assignation document transfers upon the last of the requirements of section 3(2) being met. Where an assignation document is subject to a condition, that may be the last requirement to be met. Knowing that an assignation document has been granted in respect of the claim, and even that it has been intimated or registered, will only provide the debtor with part of the answer; they may still not know to whom they should perform. Subsection (8) therefore allows a debtor to ask the assignor or assignee to provide a written statement as to whether the assignation is subject to a condition. It also allows them to ask whether the condition has been fulfilled. Under subsection (9), performance can be withheld until a statement confirming the position has been received.

93. A request for evidence, or a statement of grounds, need not be in writing. The written statements which are provided in response can be provided electronically; the only requirement is that they are in writing.

94. The right to withhold performance under this section is a free-standing right and separate from the protections provided for by sections 11 to 13 of the Bill.

95. However, where there are co-debtors then subsection (10) provides that it is only the debtor who actually makes an information request under subsection (1) or (5) who is entitled to withhold performance pending the provision of that information.

Accessory security rights

Section 15 – Accessory security rights

96. It is an existing rule of Scots law that where a claim is transferred, the assignee is entitled to the benefit of any accessory rights enjoyed by the assignor. This section puts the rule onto a statutory footing as regards accessory security rights.

97. Subsection (1) provides for this section to apply only to a claim assigned in whole (and not to a claim assigned in part). However, it makes it clear that the rule in subsection (2) is a default rule, leaving it open to the parties to an assignation document to agree that a right will not be acquired despite a claim being assigned in whole, or to provide that a right will be acquired despite the claim being assigned only in part. If only part of the claim is assigned, it is less clear whether (and to what extent) the assignee should acquire an accessory right. Any such right may, for example, relate to the whole obligation, and parties will therefore likely make their own provision in such cases. If they do not then the partial assignation will not carry the security right.

98. Subsection (2) has the effect that the assignation will transfer any security (or, where formalities are required, the right to any security) which relates to the claim transferred and which is restricted to that claim.

Example 1

David lends Edgar £100,000. Edgar grants a standard security over his house in respect of the £100,000 debt. If David assigns the right to repayment of the £100,000 to Flora then she acquires the security unless agreed otherwise.

Example 2

As for example 1, but the standard security is granted for all sums due and that may become due. The assignation of the right to repayment of the £100,000 does not carry the security unless agreed otherwise, because the security is not restricted to the £100,000.

Example 3

Same as for example 2, but the assignation document expressly states that the all sums security is carried. Flora acquires the security.

99. In terms of subsection (3), if the assignee acquires a security under this section then the assignor is required as soon as reasonably practicable to perform any steps necessary to transfer the security. For example, in the case of a standard security, an assignation under section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970 would require to be registered in the Land Register of Scotland to be effective. If this is not done, it would be open to the assignee to enforce their right to this by making a claim for specific implement against the assignor.

100. Subsection (4) defines “security” as including both a right in security (see section 39(1) of the Bill) and cautionary obligations. A cautionary obligation is an accessory obligation given by a third party to ensure that a debt will be paid (for example, a personal security or guarantee).

Abolition of certain rules of law

Section 16 – Abolition of certain rules of law

101. Subsection (1) abolishes four common law rules insofar as they apply to assignments to which Part 1 applies:

- (a) The first is any rule that a mandate (personal instruction) to deal with a claim may operate as an assignment of the claim. The existing law on this matter is unclear.
- (b) The second is any rule under which an assignment is made ineffective by an instruction given to the debtor by the assignee to continue to perform to the assignor. There is some authority suggestive of such a rule existing, which is inconvenient in commercial practice.
- (c) The third rule is the one permitting the assignee to sue in the name of the assignor. The effect is that the assignee must raise proceedings in their own name.
- (d) The fourth rule is any rule in relation to the warrandice to be implied in an assignment, or a contract relating to an assignment. Section 9 now deals with this matter.

102. Subsection (2) provides that the abolition of the third rule described above does not affect any rule as regards subrogation. Subrogation is the legal principle whereby someone stands in the place of another person and acquires that person’s rights and responsibilities, which may be

regarded as a form of assignment. The effect is to preserve the well-established practice that insurers sue in the name of the insured in personal injury and other insurance cases.

Saving

Section 17 – Saving as respects International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015

103. This is a saving provision which relates to certain rights (known as “associated rights”) which are governed by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).

104. The 2015 Regulations implement the 2001 Convention on International Interests in Mobile Equipment (the “Cape Town Convention”). The Cape Town Convention makes provision, amongst other things, for an international security right in respect of aircraft objects (as defined in the Convention). There are special rules in relation to the assignment (assignment) of such a right, and the effect of this section is that these rules take precedence over the provisions in Part 1 of the Bill. For example, regulation 27 of the 2015 Regulations deals with the effect of the assignment of “associated rights” (rights to payment or to other performance) on the related international interest.

Chapter 2 – Register of Assignations

Register of Assignations

Section 18 – The Register of Assignations

105. Subsection (1) establishes a new register for the registration of assignment documents which relate to the assignment of claims. The register is to be known as the “Register of Assignations”.

106. Subsection (2) provides that the register is to be under the management of the Keeper of the Registers of Scotland. Various provisions in this Chapter also require payment of a fee to the Keeper for certain things. The Keeper has powers under section 110 of the Land Registration etc. (Scotland) Act 2012 to set the level of fees payable in relation to any register under the Keeper’s management and control. As such, the effect of subsection (2) is also that these powers apply automatically to the RoA.

107. Subsection (3) states that, subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the register is kept. That would include the RoA being kept in a wholly electronic form.

108. The RoA, as with the other registers under the Keeper’s control, is a public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the RoA from interference, unauthorised access or damage (for example by hacking).

109. See also section 37 of the Bill, which provides for the Scottish Ministers by regulations to be able to make rules (“RoA Rules”) as to the keeping of the RoA and related matters.

Structure and contents of the register

Section 19 – The parts of the register

110. This section provides that the Keeper must make up and maintain, as parts of the register, the assignments record and the archive record (see sections 20 and 21).

Section 20 – The assignments record

111. This section sets out the information which must be included in an entry in the assignments record, and provides that the assignments record is the totality of such entries.

112. The information which must be included is largely self-explanatory. However, subsection (1)(k) requires the inclusion of any other information that is required under the Bill. That might include, for example, information relating to a correction that is noted on the entry under section 28(2)(a).

113. The details of the assignee will be included in an entry in the assignments record, but a search against the assignee is not permitted under section 31 of the Bill (unless the Scottish Ministers specify in RoA Rules made under section 37 of the Bill that such a search is permitted). It will, however, be possible for an entitled person (within the meaning given in section 34 of the Bill) to request certain information about the assignment from the assignee.

114. An assignor or assignee may be a legal person with an identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these identifying numbers are to be included in the entry in the assignments record: see section 37(2)(a)(ii) of the Bill.

115. This section provides that an entry in the assignments record must include a copy of the assignment document. The Scottish Ministers may, however, specify in RoA Rules that information in the record, including information in the assignment document, will not be disclosed in a search of the RoA in order to protect confidential information of the parties (see section 37(2)(f)). Rules can also be made about information which can be redacted in the copy of the assignment document which is submitted (see section 37(2)(d) and (e)).

Section 21 – The archive record

116. This section sets out that the archive record consists of—

- first, all entries and copy documents which have been transferred to that record from the assignments record as a result of the correction of the assignments record (whether because an entry has been removed from the assignments record in its entirety, or whether a document on the assignments record has been replaced),
- second, copies of any document which discloses, or contributes to disclosing an inaccuracy in respect of which a correction has been made,
- third, any other documents the Keeper considers it appropriate to include, and
- fourth, any other information required to be entered in the record by RoA Rules.

117. Entries will not move from the assignment record to the archive record simply because the claim which is the subject of the assignment is performed. The assignments record is simply a record of assignment documents which have been granted and which the assignee has chosen to register. It is a snapshot of a moment in time, rather than an ongoing reflection of the status of the claim. However, an entry may be transferred to the archive record if a correction is made to reflect the fact that the entry should never have been created. For example, if a fraudulent assignment document is registered, a correction may be made to remove the entry.

Registration process

Section 22 – Application for registration

118. Subsection (1) enables the assignee, and only the assignee (or the assignee’s agent – see section 116(2)), to apply to the Keeper to register an assignment document in the RoA.

119. Subsection (2) requires the Keeper to deal with applications for registration of assignment documents in the order in which they are received. The effect is to protect the priority of registration of an assignment document (and therefore of ranking of claims in, for example, an insolvency).

120. Subsection (3) sets out that the Keeper must accept the application if it is submitted with a copy of the assignment document, contains all the information the Keeper requires to make up an entry, conforms to RoA Rules, and the fee due to the Keeper is – or will be – paid. Rules can be made about information which can be redacted in the copy of the assignment document which is submitted (see section 37(2)(d) and (e)).

121. Subsection (4) provides that the Keeper must reject an application if any of the requirements mentioned in subsection (3) are not satisfied.

Section 22A – Application for registration where claims assigned to different assignees

122. This section deals with the case where one assignment document assigns different claims to different assignees. It ensures that individual assignees will still retain control over registration as it relates to the claim assigned to them. It therefore provides that the application for registration will be made only in relation to the claim assigned to that individual.

123. Subsection (2) provides for how various terms in the Bill are to be read in cases where an assignment document of this nature is being or has been registered.

Section 23 – Registration

124. Subsection (1) provides that the Keeper must, on accepting an application, make up and maintain the appropriate entry in the RoA, which includes allocating a registration number (as defined in section 116(1) of the Bill).

125. Subsection (2) provides that an assignment document is taken to be registered on the date and at the time originally entered for it. In other words, even if the registration of an assignment document is ineffective and becomes effective only once it is corrected (see section 25(3)), the

date and time of registration of the assignment document will still be the date and time of the initial (i.e. ineffective) registration. However, it is the time of effective registration that is critical for transfer of the claim (see section 3).

Section 24 – Verification statement

126. Subsection (1) provides that the Keeper must, after registering an assignment document, send a statement to the assignee (i.e. the applicant) and the assignor verifying what has been done – but only if the application contains email addresses for them. If an email address has not been included for either the assignor or the assignee then there is no obligation on the Keeper to send that person a statement. Subsection (2) makes provision about the content of the statement.

127. As the application will have been made by the assignee, it can be assumed that they will provide their correct email address. However, the correct email address may not be given for the assignor. In circumstances where the assignor does not receive a verification statement from the Keeper (for example, because no email address was provided by the assignee or the email address provided was incorrect) the assignor may, under subsection (3), request a copy of the verification statement from the assignee. Under subsection (4), the assignee must supply the copy within 21 days.

Effective registration

Section 25 – Effective registration of assignment document

128. Subsection (1) sets out three cases in which a purported registration of an assignment document in the assignments record is ineffective, with the result that the claim will not transfer by reason of registration—

- The first case is that the entry does not include a copy of the assignment document.
- The second case is that the entry contains an inaccuracy which, as at the time of registration is “seriously misleading” (for which see section 26(1)).
- The third case is that the assignment document is invalid, for example because it is a forgery.

129. As such, it is crucial that the assignment document is included in the entry (and is valid). If anything else is missing from the entry, the registration will still be effective unless the entry is considered seriously misleading by reason of the omission (i.e. the second case cited above applies, under which missing or incorrect text can lead to the entry being considered seriously misleading).

130. The effect of determining whether or not an entry is seriously misleading as at the time of registration is that a supervening inaccuracy (for example, the record being incorrectly restored after an IT malfunction) will not render ineffective any transfer of the claim which took place by reason of the initial effective registration.

131. Subsection (2) makes subsection (1) subject to section 26(1)(c) and (d), with the effect that a registration may be partially effective as regards the claim or as regards co-assignors or co-assignees.

132. Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision, when read with section 27(5) of the Bill, is that the registration becomes effective (and, subject to the other requirements of section 3 being met, the claim transfers) on the date of the correction.

Section 26 – Seriously misleading inaccuracies in the assignments record

133. This section makes provision as to whether an entry in the assignments record is seriously misleading as a result of an inaccuracy or inaccuracies in it. This applies for determining whether a registration is an effective registration for the purposes of section 25 of the Bill. Section 27(3) of the Bill provides for the meaning of “inaccuracy” in the assignments record.

134. Subsection (1)(a) of section 26 provides that an inaccuracy will be seriously misleading if any of subsections (2) to (5) apply or if, despite none of them applying, the inaccuracy or inaccuracies are such that a reasonable person would be seriously misled by the entry. In other words, if any of the examples in subsections (2) to (5) apply then the inaccuracy will be seriously misleading (whether or not any person was actually misled), but those examples are not exhaustive and there may be other inaccuracies that are found by the courts to be seriously misleading. Whether an inaccuracy is seriously misleading or not is to be determined objectively.

135. Subsection (1)(b) provides that any inaccuracy is to be disregarded to the extent that it appears in the assignment document but is not replicated elsewhere in the entry. The effect is that the person searching the record does not have to look at the document to determine whether the details in the record are seriously misleading (although a copy of the assignment document must still be part of the entry in the assignments record and can, for instance, be used as evidence to show that the entry itself was inaccurate).

136. Subsections (1)(c) and (d) deal with an inaccuracy that relates only to part of a claim, or to one co-assignor or co-assignee. These provisions have the effect that an inaccuracy in the assignments record may be seriously misleading in that respect only, and therefore the registration of the assignment document will be partly effective.

137. Subsections (2) and (3) focus on whether an entry contains an inaccuracy that prevents it being disclosed by a properly formatted search. Such an inaccuracy will generally be regarded as being seriously misleading. The point at which the search should be able to disclose an entry is by reference to the person’s name at the date the application for registration was made (which, due to the automated nature of the register, will almost always be virtually the same time as the time at which the entry for the assignment was made up in the RoA). This is necessary given that the Bill does not require (as opposed to permit) the updating of an entry to correct a supervening inaccuracy such as a change of name by the assignor (for example, on marriage).

138. Subsection (2) has the effect that an entry is seriously misleading where the assignor (or co-assignor) is a person required by RoA rules to be identified in the assignments record by an identifying number (e.g. a company is likely to be required to be identified by their company number) and where, if a search of the record were to be carried out for that number using the search facility provided under section 31 of the Bill, it would not disclose the entry. Given that a company’s number should not change, this situation is only likely to arise where a typo has been

made in completing the initial application form, or where the data has been transferred to the register incorrectly. However, it does not matter if the company's name is wrong as the expectation is that it should be searched for by reference to its number (which will not change in the way that its name might).

139. Subsection (3) has the effect that an entry is seriously misleading where the assignor (or co-assignor) is not a person required by RoA rules to be identified in the assignments record by an identifying number and where, if a search of the record were to be carried out for the assignor's proper name at the date the application for registration was made, or their name at that date together with their month and year of birth, it would not disclose the entry. This might arise where, for example, there has been an error in completing the application form (or in transferring that data onto the register) and the assignee's and assignor's names have been swapped around, or where a typo has been made in providing the assignor's name or date of birth, etc. Under subsection (3), an error will be seriously misleading if it means that the search function would not find the entry. As such, if the search function is set up to allow close matches (e.g. to show entries with the surname "Thompson" when a search is made for "Thomson") then a typo in a register entry may not lead to the entry being considered seriously misleading, but if the search function provides exact matches only then a typo of this nature in the information in the register will lead to the entry being considered seriously misleading.

140. Under subsection (3), it is both the assignor's name and their month and year of birth which matter. This means that even if the search function is programmed to be more forgiving of errors in names if the month and year of birth are also included in the search (and are correct), the entry will still be seriously misleading if the name is wrong to the extent that a search by name alone would not disclose the entry, because it ought to be possible to find the entry by the name alone. However, it is also not enough for the name to be correct; if it is correct but the month/year of birth is wrong, this will also be seriously misleading.

141. Subsection (4) has the effect that an entry is seriously misleading where the name of the assignee (or co-assignee) at the date of application is incorrectly reflected in such a way that a reasonable person would be seriously misled. This might arise in much the same way that an error in the assignor's name might arise. Because it will not be possible to search by assignee under section 31 (unless RoA Rules alter the position), the position is not determined by reference to whether a search result would return the entry. The application of the reasonable person test means that minor errors such as typos might be disregarded, particularly if other information is correct, but the position will be viewed as a whole in the circumstances of each case. However, the test applies by reference to the assignee's name at the date of the application. If their name has since changed, there is no obligation on them to update the register to reflect that.

142. Subsection (5) has the effect that an entry is seriously misleading where there is a requirement (by virtue of section 20(1)(g)) for the entry to specify the type of claim assigned but the claim is described as being of the wrong type, or left blank. For example, if the type of claim is a claim to payment of royalties but by mistake it is instead entered as a claim to payment of rent or left unspecified, that would be seriously misleading.

143. Subsection (6) applies the rules in this section to circumstances where there are co-assignors and co-assignees.

144. Subsection (7) enables the Scottish Ministers to modify this section to make provision about what does, and what does not, make an entry seriously misleading and how that is to be determined.

145. Subsection (8) provides that the proper name of a person means the person's name in the form required by RoA Rules, which might also prescribe a hierarchy of document that could be used to evidence a proper name: for example, a passport, driving licence, or a birth certificate.

Corrections

Section 27 – Correction of the assignments record

146. Subsection (1) of this section provides that where a court determines that the assignments record is inaccurate, it must direct the Keeper to correct the record, and may give the Keeper any further direction it considers necessary. The Keeper would be expected to act on that direction (as to do otherwise would risk the Keeper being held in contempt of court). Section 116(1) of the Bill sets out that “court” means the Court of Session or the sheriff.

147. The Bill does not provide for an express right of appeal against, or a review of, a registration decision by the Keeper. However, an issue relating to the accuracy of the register might be raised in other proceedings, including in a judicial review of such a decision.

Example 1

An assignment document is reduced (i.e. annulled) by the court because it has been forged by one of the purported parties to the document. The court can direct the Keeper to correct the entry in the assignments record.

Example 2

An entry is created in the assignments record for an assignment document granted by P Ltd in favour of Q Ltd. But in the application form for registration of the assignment, Q Ltd erroneously states that Z Ltd is the assignor. Z Ltd could ask the court to correct the entry, although if the inaccuracy is manifest (as is likely) then it might prefer to seek a correction under section 27(2) of the Bill (or, if applicable, under any application route that might be introduced under section 30 of the Bill).

148. In contrast with subsection (2), the court does not require to determine under subsection (1) whether there is a manifest inaccuracy, or indeed whether what is needed to correct the inaccuracy is manifest. The function of the court as provided for by this subsection is to make a determination, and direct accordingly.

149. Subsection (2) provides that where the Keeper becomes aware of an obvious inaccuracy, the Keeper must correct the assignments record provided that what is needed to correct the inaccuracy is also obvious. If the correction needed is not obvious, then the Keeper must instead note the inaccuracy on the entry in question. This duty does not cover where the Keeper becomes aware of the inaccuracy by way of a direction given by the court, as that situation is already dealt with by subsection (1).

150. Subsection (3) sets out what is meant by an “inaccuracy”. It provides that there is an inaccuracy in the assignments record where the information that an entry is to comprise of is inaccurate or complete, an entry does not include a copy of the assignment document (or includes such a copy but the document is invalid), or an entry has been incorrectly removed from the record.

151. Subsection (4) sets out what a correction of the assignments record may involve.

152. Subsection (5) sets out that a correction is taken to be made at the date and time entered in the RoA for the correction. This is particularly important as regards section 25(3) of the Bill, under which an ineffective registration may be made effective by a correction, with the result that the claim will transfer (provided that the other requirements under section 3 are also met).

Section 28 – Correction of assignments record: procedure

153. Subsection (1) provides that where the Keeper corrects the assignments record by removing an entry, the Keeper must transfer the entry to the archive record. The Keeper must also note on the transferred entry whether the Keeper removed the entry because it was directed to by a court, or because the Keeper became aware of an obvious inaccuracy other than as a result of such a direction.

154. Subsection (2) provides that where the Keeper corrects the assignments record by restoring, removing or amending information included in an entry, the Keeper must note on the entry that it has been corrected. In the case of the replacement of a copy document, the Keeper must also transfer the replaced copy to the archive record.

155. In both instances, the Keeper must give details of the correction including the date and time of the removal or (as the case may be) the correction of the entry. The Keeper must also include in the archive record a copy of any document which discloses or contributes to disclosing the inaccuracy which is the subject of the correction.

156. Subsection (3) provides that once the record has been corrected the Keeper must, to the extent that it is reasonable and practicable to do so, notify every person required by RoA Rules and any other person who appears to the Keeper to be affected by it materially that a correction has been made. This is not an objective test and will be confined to facts within the Keeper’s knowledge.

157. Subsection (4) provides that the validity of a correction of the record will not be affected if the Keeper fails to include in the archive record a copy of any document which contributes to disclosing the correction or fails to notify any person of the correction.

Section 29 – Proceedings involving the accuracy of the assignments record

158. This section provides that the Keeper is entitled to appear and be heard in any civil proceedings where a question arises regarding the accuracy of the assignments record, or what is needed to correct it.

Section 30 – Power to make provision about applications for corrections

159. This section provides that the Scottish Ministers may by regulations modify Part 1 of the Bill to make provision for or about applications to the Keeper for the correction of an entry in the register. This would allow, for example, provision comparable to the corrections process for statutory pledges in Part 2 of the Bill to be introduced in respect of assignation documents (although supervening inaccuracies will not be relevant in the same way here as the RoA is not designed to show the ongoing position in relation to a claim). This section would also allow a fee to be imposed for such applications.

Searches and extracts

Section 31 – Searching the assignations record

160. The RoA is a public register (see section 18(1) of the Bill). Subsection (1) of this section provides that the Keeper must provide a search facility by which the assignations record may be searched.

161. Subsection (2) sets out that only such searches in the assignations record as are specified in this subsection, or as are specified under RoA Rules, are permitted. This restriction on searches has two effects:

- First, it reduces the risk of identity theft by ensuring that it will not be possible to search against date of birth, or against the month and year of birth alone. The Scottish Ministers will also be able (through RoA Rules) to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different months and years of birth that can be made in a particular time period.
- Second, it reduces the risk of unfair commercial practices by not permitting a search against the assignee (typically, a bank or finance company) which might enable a competitor to obtain a list of customers.

162. Subsection (3) provides that any person may search the assignations record on payment of any fee (or making an arrangement to pay).

163. Subsection (4) provides that no fee is payable for a search of the assignations record carried out by a not-for-profit money adviser who does not charge individuals for the services that they provide. Under subsection (5), the Scottish Ministers are given the power by regulations (subject to the negative procedure) to make further provision about what “not-for-profit money adviser” means for these purposes.

164. The Bill does not make provision for the Keeper to provide a search mechanism for the archive record, nor for a person to be entitled to use that mechanism. The Scottish Ministers may, however, make provision to that effect in RoA Rules made under section 37(1)(c) of the Bill. It is also open to any person to obtain from the Keeper an extract of an entry in either the assignations record or archive record under section 33 of the Bill.

165. Section 25 of the Bill has the effect that it must be possible to carry out searches for the purposes of the “seriously misleading” test. It will therefore be for the Scottish Ministers to make such RoA Rules as are needed under this section for those purposes. RoA Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

Section 32 – Admissibility and evidential status of search results

166. This section provides that a copy of a search result, relating to a search carried out by means of a search facility provided by the Keeper, may be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary. A search result may be in printed or electronic form.

167. This section should be read with section 33, which provides that an extract from the RoA will provide evidence of the contents of the relevant entry at the date the extract is issued. It cannot be rebutted by other evidence (though liability is imposed on the Keeper for errors in extracts under section 35(1)(d) of the Bill). It should also be noted that RoA Rules may prescribe under section 37(1)(f) that certain information on the register (for example, a precise date of birth) is not to be included in search results.

Section 33 – Extracts and their evidential status

168. This section enables any person to obtain from the Keeper an extract of any entry or part of an entry in the RoA, on payment of any fee (or making an arrangement to pay). An extract is (irrebuttable) evidence of the contents of an entry at the time the extract is issued, and can be used for the purpose of proving a fact in any court or tribunal proceedings. Liability is imposed on the Keeper for errors in extracts under section 35(1)(d) of the Bill. It should also be noted that the ability to obtain an extract is subject to the ability under section 37(1)(f) for RoA Rules to prescribe that certain information on the register (for example, a precise date of birth) is not to be included in an extract.

Request for information

Section 34 – Assignee’s duty to respond to request for information

169. This section provides for an entitled person (as defined) to be able to request information about an assignation from the person identified as the assignee in the assignations record. The request does not require to be in writing, but the response does.

170. Subsection (1) sets out that the information that may be requested is, first, whether a particular claim is assigned by the assignation document and, second, whether a condition to which the assignation is subject has been satisfied. The right to request these types of information is of particular importance where a claim is assigned before it is held by the assignor (a “future” claim) or in the case of a conditional assignation.

171. Subject to subsection (8) (which enables the Scottish Ministers to modify this section so as to specify further entitled persons), by virtue of subsections (2) and (3), an entitled person is:

- (a) a person who may have a right to execute diligence against the claim (including, in the case of a charge for payment, where that right will only arise once the days of charge expire without payment),
- (b) a person who has the consent of the registered assignor to make the request.

172. Subsection (4) gives the person named as assignee in the assignments record 21 days to respond. An exception to the obligation to respond applies where—

- it is clear that the registration of the assignment document is ineffective in relation to the claim being enquired about,
- if the request relates to whether the claim is assigned by the assignment document, it is clear from the entry that the claim is not assigned by the document, or
- the information has been given to the person within the last three months and it has not changed.

173. Subsection (5) allows the reasonable costs of responding to the request to be charged to the person making the request.

174. If the person of whom the request is made wishes to, they can apply to the court for either an exemption from complying (in whole or in part) or an extension. Subsection (6) gives the court power to grant either of these things. For example, depending on the circumstances, 21 days may be too short a period to assemble the necessary information.

175. If the entitled person does not receive a response, they can apply to the court in respect of that failure. Subsection (7) enables the court to order the person named as the assignee to comply with the request for information within 14 days or such other period as the court specifies. Failure to comply with such an order would risk the person being held to be contempt of court.

176. The effect of this section is that persons with a legitimate interest in a claim that may be the subject of an assignment document will be able to obtain information that might not otherwise be available by searching the RoA.

Example

D Ltd is a plumbing business. It assigns its “future” customer invoices to B Ltd, to be identified on schedules to be sent to B Ltd. Subsequently D Ltd becomes insolvent. Its liquidator requires to see whether certain invoices have been assigned and makes an information request under this section.

177. Where incorrect information is supplied under this section, there may be consequences under section 36.

Entitlement to compensation

Section 35 – Liability of Keeper

178. This section provides for the Keeper to compensate any person who has suffered a loss in consequence of a matter specified in subsection (1). Liability under subsection (1) is strict, in that the person does not have to show that the Keeper is at fault (as opposed to, say, arising from an unavoidable malfunction of the Keeper’s automated systems). However, subsection (2) limits the losses that can be recovered by excluding certain types of claim.

179. Subsection (3) provides more information about what is meant in subsection (1)(a) by “an inaccuracy which is attributable to the making up, maintenance or operation of the register”. It provides that an inaccuracy in information included in an entry in the assignments record when the entry is made up or corrected is not covered by subsection (1)(a) to the extent that the Keeper has been misled into making the inaccuracy and reasonably believed the information to be accurate. Subsection (4) provides that circumstances in which the Keeper is entitled to reasonably believe information to be accurate include if it is provided in connection with an application to which the entry relates, or by the court. As such, if the Keeper faithfully replicates the information provided in an application form and that information proves to be incorrect, that is not an inaccuracy for which the Keeper is liable, though the person who submitted the application may be liable under section 36. Subsection (4) is not exhaustive of the circumstances in which the Keeper is entitled to reasonably believe that information is accurate.

Section 36 – Liability of certain other persons

180. This section provides for certain persons to be liable, on fault being shown, for losses suffered by another person in consequence of a matter specified in subsection (1).

181. Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry in the assignments record. It applies where the person who made the application which led to the entry did not exercise reasonable care, or where the person notified the Keeper of an apparent inaccuracy without taking reasonable care.

Example

Bruce maliciously registers a forged assignment bearing to be granted by Claire in an effort to affect her credit rating. Claire has a claim against Bruce if she suffers loss.

182. Subsection (1)(b) applies where, as a result of a failure to take reasonable care, there is an inaccuracy in responding to an information request under section 34 of the Bill.

Example

Information is supplied by Brian that a certain claim is not carried by an assignment from Andrew to Brian. But Brian does not take reasonable care, and the information is wrong. The person who receives the information then takes an assignment of the claim from Andrew, which will be invalid because it has already been transferred to Brian. That person will have a claim against Brian.

183. Subsection (1)(c) applies where a person has failed, without reasonable cause, to provide information under section 34 of the Bill.

Example

Alan has granted an assignation document of certain claims to Bob. The Selkirk Bank is considering whether or not to lend money to Alan, and seeks information from Bob (with the consent of Alan) about which claims are assigned. Bob does not comply with the request, and the bank obtains a court order. Bob still does not comply, and the bank decides not to make the loan. Alan has a claim against Bob for loss suffered due to being unable to obtain a loan from the bank.

184. Subsection (2) imposes the same restrictions on liability as those set out in section 35(2) of the Bill.

Rules

Section 37 – RoA Rules

185. This section sets out that the Scottish Ministers may, by regulations, make rules (RoA Rules) providing for the operation of the RoA. They must consult the Keeper before doing so.

186. The power to make RoA Rules includes the power to authorise the redaction of information or signatures from an entry in the RoA (paragraphs (d) and (e) of subsection (2)), as well as the power in subsection (2)(f) to make certain information unavailable to searchers (which might include an individual’s date of birth). Subsection (1)(c) would also permit the rules to specify the specificity with which the search mechanism for the register is to operate – for example, whether it returns close results or only exact matches. If a correction application route is introduced under section 30, the rules could also make provision about the procedure in relation to such applications.

Chapter 3 – Miscellaneous and interpretation of Part 1

Section 38A – Repeal of Transmission of Moveable Property (Scotland) Act 1862

187. The Transmission of Moveable Property (Scotland) Act 1862 makes provision for intimation of claims. It is superseded by the Bill. It is therefore repealed by this section.

Section 39 – Interpretation of Part 1

188. This section defines key terms used in this Part of the Bill. It should be read alongside section 116 which defines some terms for the purposes of the whole Bill, as well as schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

189. In particular, subsection (1) defines a “claim” as the right to the performance of an obligation (including the fulfilment of negative obligations), but excluding for that purpose both non-monetary rights relating to land and negotiable instruments. It also makes it clear that the references in the Bill to a “right in security” mean a right in security over property. The meaning of the expression is therefore limited to “true” securities where the secured creditor has a

subordinate real right in the asset. A right in security includes a floating charge, but does not include a right to execute diligence in satisfaction of sums due under a court order (or equivalent).

Part 2 – Security over Moveable Property

Chapter 1 - Pledge

Pledge, secured obligation and encumbered property

Section 40 – Pledge

190. A pledge is a type of right in security over moveable property.

191. This section sets out the main methods by which a pledge is created over corporeal and incorporeal moveable property respectively. However, subsection (5) confirms that any existing law on creating a possessory pledge over a negotiable instrument remains undisturbed.

192. Corporeal moveable property is property that has physical form, other than land or buildings (which are known as heritable property). It includes whisky, paintings, furniture, and motor vehicles. The Bill defines corporeal moveable property, but only to confirm that it does not include money for the purposes of the Bill (see section 111(1) which defines “money” by reference to section 175 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, with the effect that, broadly speaking, it means cash and banking instruments (such as cheques and postal orders, among other things)).

193. Incorporeal moveable property is property that does not have physical form, such as intellectual property or financial instruments.

194. A pledge over corporeal moveable property can continue to be created as a possessory pledge but will now also be able to be created as a statutory pledge through the mechanism of registration. A possessory pledge will normally be created by delivery of the property to the secured creditor (for which see section 42 of the Bill). The exception to that is where the property is not the provider’s when delivered; then the pledge is created when the property becomes the provider’s.

195. A pledge over incorporeal moveable property, or over property which is a mixture of corporeal and incorporeal property, must be created by registration in the new Register of Statutory Pledges.

196. Section 111 of the Bill has the effect that a reference to registering a statutory pledge or an amendment to it (however expressed) is a reference to registration by the Keeper in the Register of Statutory Pledges under sections 85 and 87 of the Bill.

Section 41 – Secured obligation and encumbered property

197. Subsection (1)(a) sets out that the obligation secured by a pledge (the “secured obligation”) can cover both present and future obligations. This is also the case with a standard security over

land or buildings (see section 9(8)(c) of the Conveyancing and Feudal Reform (Scotland) Act 1970 in respect of obligations that can be secured on such heritable property). The effect is that it is competent to grant a pledge securing all sums due and to become due to the creditor.

198. Subsection (1)(a) also provides that a pledge can secure third party debt. As such, the obligation need not be one owed to the secured creditor. This would be the case where, for example, the secured creditor is a security trustee. It also need not be an obligation owed by the provider.

Example

George has an overdraft with the Iron Bank, and the Bank is willing to accept a pledge as security for the debt. But George does not have moveable property of any value, so his friend Holly agrees to pledge her car. Holly is thus a third party providing security for the loan by the Bank to George.

199. Subsection (1)(b) provides that ancillary obligations are also secured by a pledge. The typical ancillary obligation is interest on a debt, but the pledge will cover other obligations such as any obligation to pay the creditor damages for a loss they have suffered (which is considered important where non-monetary obligations are secured). A pledge might also secure costs arising from the extra-judicial recovery of interest or damages, such as interest due for the late payment of debts for the purposes of Directive 2000/35/EC on combating late payment in commercial transactions.

200. Subsection (2) gives statutory effect to a general rule of law. Unless agreed otherwise, the secured creditor is entitled to the natural fruits of the encumbered property (such as the young of animals), but not entitled to the civil fruits (such as dividends on shares, or rent payments). However, it should be noted that this default rule is only about what property is encumbered under the pledge. It does not affect the secured creditor's right under the Bill's enforcement provisions to enforce the security by leasing or licensing the encumbered property and then apply the rents or royalty payments to the debt.

201. Subsection (3) provides that the encumbered property must be transferable. This reflects general security law, as a security over a non-transferable right has no practical value (as the property could not be sold to satisfy the secured obligation). However, sometimes – notably in the case of certain intellectual property licences – the property is transferable subject to restrictions, and it will be possible to take security over such property.

Possessory pledge

Section 42 – Delivery

202. This section reforms and codifies the law on delivery of property to a secured creditor for the purpose of creating a possessory pledge.

203. Subsection (1) sets out four options for effecting delivery, at which time the pledge will be created (provided that the property is owned by the provider at the time of delivery). It makes clear, contrary to the decision in *Hamilton v Western Bank* (1856) 19 D 152, that delivery for the purpose of creating a pledge of corporeal moveable property is not restricted to physical delivery.

204. Subsection (1)(a) provides for physical delivery, either to the secured creditor or to their representative.

Example

Peter might decide to offer a watch as security for a loan from Renata, and will create the pledge by handing her the watch for that purpose.

205. Subsection (1)(b) provides for delivery by means of giving control of the premises in which the encumbered property is kept.

Example

Sean might decide to offer his yacht as security for a loan from Teddy, and will create the pledge by giving Teddy the only key to the boathouse in which it is stored.

206. Subsection (1)(c) provides for constructive delivery by means of an instruction to another person who is holding the property.

Example

Ulrike has stored whisky in a warehouse owned by Val. Ulrike decides to offer the whisky as security for a loan by Zebedee. Delivery is effected, and the pledge created, if Ulrike instructs Val to hold the whisky on behalf of Zebedee.

207. Subsection (1)(d) provides for symbolic delivery by means of delivery of a bill of lading for the property, such as cargo aboard a ship as represented by the bill of lading. A bill is a document of title, and will where necessary require to be endorsed in favour of the secured creditor.

208. Subsection (2) provides that delivery is not required if the property is already in the direct possession or custody of the prospective secured creditor. It is deemed to have been delivered as required.

Example

Joan has borrowed Karen's bicycle. Karen agrees that the bicycle can be pledged as regards a debt owed by her to Joan. The pledge is created when the agreement is made.

209. Subsection (4) confirms that section 2 of the Factors Act 1889 (which allows mercantile agents to pledge goods by means of handing over documents of title) continues to apply. A mercantile agent, as defined in section 1 of that Act, is an agent having in the customary course of business authority to sell goods, to consign goods for the purpose of sale, to buy goods, or to raise money on the security of goods.

Statutory pledge

Section 43 – Constitutive document

210. This section is the first of a number of sections that make provision for a statutory pledge. This type of pledge does not require delivery of the encumbered property, and is therefore a non-possessory pledge.

211. Subsection (1) provides that a statutory pledge must have a constitutive document, so that it is not competent to grant an oral non-possessory pledge. There is no equivalent rule for a possessory pledge as a security of that type is created by delivery of the encumbered property.

212. Subsection (2)(a) requires that the constitutive document is subscribed by the provider using a physical signature (“executed”) or signed electronically (“authenticated”). Section 116(1) of the Bill defines “executed” and “authenticated” for that purpose.

213. Subsection (2)(b) sets out that the document must also identify the encumbered property. As a result of subsection (4), this may be done by reference to an identifiable class of property (for example, “my computers”), or by reference to a description in another document.

214. Where property is identified by reference to a class of property, the Bill’s information rights will be particularly relevant. An entitled person, as defined in section 105(2) of the Bill, is able to obtain from the secured creditor further information about the encumbered property by making a request to that effect under that section.

215. Subsection (2)(c) requires the secured obligation to be identified.

216. Subsection (5) makes it clear that a statutory pledge may be granted over property not owned by the provider at the time the property is identified in the document. This subsection should be read with section 45 of the Bill which has the effect that the pledge is not created until (and if) the property becomes the provider’s property.

217. Subsection (6) makes it clear that the rules about identifying encumbered property and secured obligations can be satisfied by cross-referring to another document.

Section 43A – Competence of individual acting as provider of a statutory pledge

218. This section generally (with some exceptions) prevents individuals – as opposed to corporate bodies – from granting a statutory pledge. Under subsections (1) and (2)(a), the situations where an individual is entitled to grant a statutory pledge are as follows—

- the individual is acting in the course of their business and the asset is used (or to be used) wholly or mainly for the purposes of that business,
- the individual is acting in the course of the activities of a charity of which they are a charity trustee and the asset is an asset of the charity, or
- the individual is acting in the course of the activities of an unincorporated association of which they are a member and the asset is owned on behalf of, or jointly with the other members of, that unincorporated association.

219. In addition, subsection (2)(b) provides that any corporeal property to be pledged must have a monetary value exceeding £3,000 immediately before the granting of the document under which it is to become encumbered property (though there is a power for the Scottish Ministers to adjust this sum by regulations – see subsection (3)(a)). Subsection (2A) provides that this figure is to be read as if it had been annually updated in line with the retail prices index. The effect is that it will

not be possible for an individual acting in the course of a business to grant a statutory pledge over low-value but essential items which are used primarily but not exclusively for business purposes (for example, a washing machine which is used for a laundry business but also occasionally for home purposes).

220. The Scottish Ministers also have a specific regulation-making power to exclude particular types of property from being pledged by those categories of individuals who are allowed to grant a statutory pledge (see subsection (3)(b)). For example, this could be used to exclude the pledging of a motor vehicle (or, using the power in section 114 to provide for different purposes, to exclude the pledging of a motor vehicle unless it is being pledged to secure its purchase).

Section 44 – Competence of creating statutory pledge over certain kinds of property

221. Subsection (1) sets out the types of moveable property in respect of which it is not competent to grant a statutory pledge. A statutory pledge is not competent in respect of property that is subject to the alternative security regimes specified in that subsection:

- for aircraft and for certain ships (and shares in ships) it is possible to create an aircraft or ship mortgage, and
- for aircraft objects it is possible to create an international interest under the Cape Town Convention as implemented - following ratification by the United Kingdom on 27 July 2015 - by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).

222. The Cape Town Convention is an international treaty intended to standardise security transactions involving certain types of moveable property, and it creates (in particular) international standards for security interests, and various legal remedies for default in financing agreements (including repossession).

223. Subsection (2) limits the scope of a statutory pledge over incorporeal moveable property to the types of property listed in that subsection. However, subsection (3) gives the Scottish Ministers a regulation-making power to expand the list.

Section 45 – Creation of statutory pledge by registration: general

224. This section has the effect that a statutory pledge is created by—

- registration of the constitutive document in the Register of Statutory Pledges (see section 111 of the Bill for the meaning of references to “registering” or similar expressions),
- the property being the provider’s property, and
- the property being identifiable as property that is subject to the pledge.

225. The pledge is only created when each of the requirements is met, regardless of which occurs first. It follows for example that a pledge is not created at the time of registration if the property is not the provider’s at that time.

Example

Adam grants a pledge in June to the Haddington Bank over motor vehicles he has recently acquired, to be listed in a schedule to be given to the Bank. The Bank registers the pledge in the RSP in July. Adam sends the schedule to the Bank in August. The statutory pledge is created in August when all three conditions in subsection (2) are met.

226. Subsection (3) provides that subsection (2)(b) is subject to section 89 of the Bill, with the effect that registration only counts if it is effective. It is ineffective if the entry in the statutory pledges record does not include a copy of the constitutive document, the document is invalid, or the entry has a seriously misleading inaccuracy.

227. Subsection (4) further qualifies the effect of this section by making it subject to section 47 of the Bill. The effect of this is that a pledge over property yet to be acquired may be ineffective if the property is acquired after the provider becomes insolvent.

Section 46 – Creation of statutory pledge over added property

228. This section provides for the creation of the security over property added to a statutory pledge.

229. It has the same effect for property added to a pledge by an amendment document as section 45 has for property identified in the constitutive document. See paragraphs 224 and 225 of these Notes.

230. Subsection (3) sets out that subsection (2)(b) is subject to section 90 of the Bill (dealing with ineffective registration). It has comparable effect to section 45(3) in that registration only counts if it is effective. However, in this case it is matters relating to the amendment which are relevant. As such, registration is ineffective if the entry in the statutory pledges record does not include a copy of the amendment document, the amendment document is invalid, or, as a result of the amendment, the entry has an inaccuracy which is seriously misleading.

231. Subsection (4) sets out that this section is subject to section 47 of the Bill (dealing with insolvency). It has the same effect as section 45(4) of the Bill (see paragraph 227 of these Notes).

Section 47 – Creation of statutory pledge: insolvency

232. Sections 43(3)(b) and 56(4)(b) of the Bill set out that the property to be encumbered as described in the constitutive document of a statutory pledge, or an amendment document, may be property to be acquired by the provider of the pledge. This section provides for the effect of the intervening insolvency of the provider.

233. Subsection (2) provides that a statutory pledge will not be created over property acquired at a time when the provider is insolvent (as defined in subsection (3)). The effect is that the property in question is treated as an asset of the provider for the purposes of the insolvency. It may for example be sold or realised for the benefit of the creditors as a whole.

234. Subsection (4) confers a power on the Scottish Ministers to modify subsection (3) by regulations. That power could for example be used to add a further type of insolvency to the list in subsection (3).

Property encumbered by statutory pledge: effect of transfer by provider

Section 49 – Property encumbered by statutory pledge: transfer by provider

235. The creation of a statutory pledge will in all cases involve the registration of the pledge in the Register of Statutory Pledges. The result is that the provider of the pledge will usually keep possession of the encumbered property.

236. Subsection (1) therefore gives statutory effect to a general principle of the law of rights in security by providing that the statutory pledge will normally continue to encumber the property if it is transferred. However, there are some exceptions to this—

- where it is transferred with the explicit written consent of the secured creditor to the particular transfer in a way that meets the conditions of subsection (2),
- where a third party acting in good faith acquires the property unencumbered under one of the Bill’s protections for innocent acquirers under section 51 to 53, or
- where, in accordance with a provision of the Bill, the pledge is otherwise extinguished by the provider’s transfer to a third party.

237. The final of these – the pledge being otherwise extinguished by the transfer – covers it being extinguished under the following sections: section 50 (where the secured creditor has acquiesced in trying to circumvent the rules on statutory pledges); section 91 (where there is a supervening inaccuracy in the register) or section 106 (where property is erroneously stated not to be encumbered).

238. As far as the exception relating to obtaining the secured creditor’s explicit written consent to the transfer is concerned, the secured creditor will not be able to agree in advance that the provider is free to deal with the encumbered property as they wish. That would enable the pledge to operate in the same manner as a floating charge. As such—

- Subsection (2) sets out that the consent of the secured creditor must be in writing, and must relate to the particular transfer. Thus the consent cannot be to a transfer to any unnamed person, or to a class of persons. It must be a consent to a transfer first to a specific person, and second to that person taking the property unencumbered by the pledge. Subsection (2) also requires that the consent must be given not more than 14 days before the transfer.
- Subsection (3) sets out that the decision on whether or not to give consent must be at the discretion of the secured creditor. Thus a contractual provision under which the secured creditor must consent to any or all disposals would be ineffective.

239. Where the secured creditor acquiesces in the transfer but outwith the express consent regime provided for by this section, section 50 will apply and will result in the pledge being extinguished.

240. Subsection (4) gives the Scottish Ministers power to amend the consent provisions. This would for example enable Ministers to take account of possible future developments under English law, in relation for example to the fixed/floating characterisation of charges in an insolvency.

241. This section does not apply to possessory (common law) pledge, as the fact that the secured creditor holds the property limits the provider's ability to deal freely with the property.

Section 50 – Extinction of statutory pledge where dealings inconsistent with a fixed security

242. This section is an anti-avoidance provision. A statutory pledge could become tantamount to a floating charge if the secured creditor acquiesces in the provider dealing with property without following the narrow process for express written consent provided for in section 49. If this does happen, the effect of this section is to extinguish the statutory pledge.

Section 51 – Acquisition in good faith from seller acting in ordinary course of business

243. Sections 51 to 53 provide for circumstances in which a person who acquires corporeal property in good faith will acquire the property unencumbered by the statutory pledge, despite the consent mentioned in section 49(2) of the Bill not having been obtained.

244. It is not likely to be efficient to grant a statutory pledge over stock-in-trade given that the secured creditor must expressly consent under section 49 of the Bill to each intended transfer unless they want the security to be extinguished under section 50. Even so, encumbered property may become part of the inventory of a business. For example, Alistair might grant a statutory pledge over his piano to a bank, and then subsequently sell the instrument to a music shop. The effect of subsection (1) is that a good faith purchaser from the shop will be protected.

245. Encumbered property transferred without the consent of the secured creditor will be acquired unencumbered by a statutory pledge if two requirements are met—

- First, the transferor must have been acting in the ordinary course of that person's business. For example, a motor dealer which only sells vehicles would not on the face of it be acting in the ordinary course of business if it sold its office furniture.
- Second, the acquirer must be in good faith at the time of the acquisition. The acquirer will not be protected if they know that the property is subject to a statutory pledge.

246. Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered.

247. Where the requirements of this section are not met (for example, because the property is acquired from a business acting other than in the usual course of its business), the person who acquires the property may benefit from other measures, in particular if it is acquired in good faith for personal or related purposes (see section 52 of the Bill), or the property is a motor vehicle (see section 53 of the Bill).

Section 52 – Acquisition in good faith for personal, domestic or household purposes

248. This section protects an individual who acquires corporeal property for private or related purposes.

249. Subsection (1) sets out that an individual who acquires encumbered property without the consent of the secured creditor having been obtained will acquire the property unencumbered if certain conditions are met:

- (a) the property must be wholly or mainly acquired for personal, domestic or household purposes (business purchasers are not protected),
- (b) the person must give value for the property acquired, which will normally mean adequate monetary value (i.e. payment of a purchase price) but also covers by means, say, of exchanging other property, and
- (c) the acquirer must be in good faith.

250. Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered. It follows that the individual does not need to search the Register of Statutory Pledges before acquiring the property.

251. Subsection (3) allows the Scottish Ministers to introduce a further rule into subsection (1) that the value of the property at the time of acquisition must not exceed a specified amount, and then to vary that amount from time to time.

Section 53 – Acquisition in good faith of motor vehicles

252. This section protects any person who acquires a motor vehicle that is encumbered property. It is similar in effect to the measures in section 27 of the Hire-Purchase Act 1964 in respect of motor vehicles hired under a hire-purchase contract, or purchased under a conditional sale agreement.

Example

D Ltd supplies a motor vehicle to Barry under a hire-purchase agreement with a three-year duration. Barry will not become the owner until he makes the final payment at the end of the three years. But after six months Barry sells the vehicle to Charlotte, who believes that Barry is the owner. Under section 27 of the 1964 Act, Charlotte will become owner of the vehicle if she is in good faith and is a private purchaser.

253. This section achieves the same result where Barry is the owner of the vehicle but grants a statutory pledge over it. Charlotte would take the vehicle unencumbered by the pledge if she is a good faith private purchaser from Barry.

254. Subsection (1) sets out four conditions which must be met if the property is to be acquired unencumbered, despite the consent of the secured creditor to the transfer not having been obtained:

- (a) The first condition is that there is a sale agreement (which could be a conditional sale agreement) or a hire-purchase agreement in respect of a motor vehicle.

- (b) The second condition is that the motor vehicle must be encumbered property under a statutory pledge.
- (c) The third condition is that the hirer or purchaser of the encumbered property cannot be carrying on a business described in section 29(2) of the 1964 Act, namely a business which consists wholly or partly of:
 - purchasing motor vehicles for the purpose of offering or exposing them for sale, or
 - providing finance for purchasing motor vehicles for the purpose of hiring them under hire-purchase agreements or selling them under conditional sale agreements.
- (d) The fourth condition is that the purchaser or acquirer must be in good faith. However, subsection (6) makes it clear that the purchaser or acquirer is not to be regarded as not being in good faith only because the pledge is registered. This means that they are not expected to check the register.

255. Where all of these conditions are met, subsection (2) provides that the property will be acquired unencumbered. Subsection (3) protects the purchaser or hirer by preventing enforcement of the statutory pledge prior to the property being transferred in implementation of an earlier hire or sale agreement.

256. Where a motor dealer transfers a vehicle in a way that results in it becoming unencumbered by the pledge, subsection (4) entitles the secured creditor to a limited right of recovery against the motor dealer rather than having to pursue the now unsecured debt against the provider. Subsection (5) provides that if this right is relied upon and the secured creditor receives a payment directly from the motor dealer, the provider's liability to the secured creditor is reduced accordingly, but instead the motor dealership can pursue the provider for the amount paid out.

Example

John grants a statutory pledge over his car to the Ayr bank. He then sells the car to a motor dealer without the consent of the Bank. The motor dealer is not protected by subsection (2) because it is a motor dealing business and so should have made a search in the Register of Statutory Pledges against John and/or the car. But if the motor dealer then sells the car to a private purchaser who is protected then the Bank is entitled to be compensated by the motor dealer. The motor dealer can in turn try to recover this money from John, whose debt to the Bank has been reduced.

257. The term "motor vehicle" is defined in section 29 of the 1964 Act as "any mechanically propelled vehicle intended or adapted for use on roads", and that definition is adopted in subsection (7) for the purposes of this section. The definitions of "conditional sale agreement" and "hire-purchase agreement" are also given by reference to the 1964 Act.

258. Subsection (8) provides for the Scottish Ministers to be able to exclude by regulations certain classes of vehicle from the application of this section. Those regulations can also (but do not have to) exclude vehicles from other purchase protections.

Example

The Driver and Vehicle Licensing Agency requires UK registered vehicles to have a vehicle identification number (VIN). If RSP Rules make it compulsory for an entry in the RSP to include the VIN, making it easier to check whether a particular vehicle is subject to a pledge, then Ministers might consider that the protection should not apply (say) to commercial vehicles. They would then be able to either disapply just the protection in this section in relation to such vehicles or, if desired, to disapply the protection in other sections too so that the VIN is checked even when buying from a business seller.

Rights relating to matrimonial or family home where relevant to a statutory pledge

Section 54 – Occupancy and other rights in family home following grant of statutory pledge

259. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives spouses who are not named in the title deeds or on the lease etc. (“non-entitled spouses”) occupancy rights in their matrimonial home, and in some circumstances the right to use furniture and plenishings in the home. Section 22 of the 1981 Act defines “matrimonial home” to include a caravan or houseboat. It defines “furniture and plenishings” to mean any article in the home that is owned or the subject of a hire-purchase arrangement and which is reasonably necessary to enable the home to be used as a family residence. Either of these types of moveable corporeal property could be encumbered property for the purposes of a statutory pledge.

260. The Civil Partnership Act 2004 makes the equivalent provision for civil partners as the 1981 Act does for spouses. In both cases, the measures in those Acts apply where one spouse or partner is entitled (or permitted by a third party) to occupy the home, and the other is not, provided that the property is not one which has been made available specifically for one spouse or partner to reside in separately from the other.

261. Section 2 of the 1981 Act and section 102 of the 2004 Act confer ancillary and consequential rights on non-entitled spouses and partners. Subsection (2) of section 54 extends this to include the right to make any payment due by the entitled spouse or partner in respect of a secured obligation relating to the family home, so that the non-entitled spouse or partner can continue to exercise occupancy rights without the secured creditor attempting to call in the security.

262. Under section 3 of the 1981 Act and section 103 of the 2004 Act, the non-entitled spouse or partner may apply to the court for possession or use of furniture and plenishings. Subject to certain provisos, such an order is not to prejudice the rights of a third party who has rights to performance of an obligation under an agreement such as a hire-purchase agreement. Subsection (3) of section 54 extends this so that such an order is also not to prejudice the rights of a secured creditor. Subsections (4) and (5) simply insert definitions for the purpose of subsection (3).

263. Section 6 of the 1981 Act and section 106 of the 2004 Act provide that the continued exercise of the rights conferred on a non-entitled spouse or partner by those Acts will (subject to certain exceptions) not be prejudiced by a dealing of the entitled spouse or partner relating to the home. The effect of subsection (6) is that a dealing will for that purpose include the grant of a statutory pledge over a moveable home, such as a caravan or houseboat.

264. Section 8 of the 1981 Act and section 108 of the 2004 Act provide that the rights of a third party with an interest in the home as a creditor under a secured loan will not be prejudiced by reason only of the rights of a non-entitled spouse or partner under those Acts, and allow the creditor to apply to the court for the occupying non-entitled spouse or partner to be required to make the payments that are due under the loan. However, this only applies where the creditor is in good faith and in each case had obtained either:

- (a) a declaration from the entitled spouse or partner that there were no occupancy rights at the time the security was granted, or
- (b) a renunciation of occupancy rights, or a consent to the granting of the security, by the non-entitled spouse or partner.

265. The effect of subsections (7) to (9) is to provide for how the application of those rules to the grant of a statutory pledge over a moveable home is to operate. Specifically, they make provision about what “the time of granting a security” means in the case of a statutory pledge. This is relevant because the explanation set out in the paragraph immediately above only applies to secured loans granted after 30 December 1985. While it should be self-evident that a statutory pledge could not have been granted before that date, defining the time of granting is consistent with the approach taken in those Acts in relation to heritable securities.

Assignment, amendment, restriction or extinction of statutory pledge

Section 55 – Assignment of statutory pledge

266. Subsection (1) confirms that a statutory pledge may be assigned (unless the parties agree otherwise). A pledge is a security rather than a claim, so Part 1 of the Bill does not apply to the assignment of a pledge. However, subsection (2) provides that assignment must be by means of a document duly executed or authenticated by the secured creditor.

267. The effect is that it is not competent to register an assignment of a pledge in the new Register of Assignations. The pledge will therefore only transfer if the other requirements of the general law on assignment of rights are met, including, where required, delivery of the document to the assignee. It would, however, be possible to correct the RSP to show the assignee as the secured creditor (see sections 94 to 97 of the Bill).

268. Subsection (3) makes it clear that the default position is that a statutory pledge which is being enforced can be assigned by the secured creditor, and that the assignee can continue with the enforcement rather than having to recommence the enforcement procedure or re-serve any notice.

Section 56 – Amendment of statutory pledge

269. This section provides for the amendment of a statutory pledge by an amendment document.

270. Subsection (1) provides that a statutory pledge may only be amended by an amendment document executed or authenticated by the secured creditor and the provider. This is subject to two exceptions. Firstly, this is subject to section 57(a): as such, the restriction of a pledge to only part of the encumbered property, or its complete discharge, may be effected by means of a written

statement by the secured creditor. Secondly, subsection (2) provides that an amendment document that only adds property to the encumbered property need not be executed by the secured creditor (because it is treated much the same as the granting of a pledge under a constitutive document).

271. Added property must be identified in the amendment document (subsection (3)) and this must be done in the usual way whereby items may be identified by reference to a class (subsection (4A)). As is the case for the constitutive document for a statutory pledge, added property may be property to be acquired by the provider (subsection (4B)).

272. Subsections (5) and (6) have the effect that an amendment document that relates to the addition of property to the encumbered property, or to variation that increases the extent of the secured obligation where that is determinable from the statutory pledges record, is amended only on registration of the amendment document. For these purposes, “registration” means effective registration (as to which, see section 90 of the Bill).

273. Subsection (7) clarifies that the requirement to identify property in an amendment document can be satisfied by cross-referring to another document.

Section 57 – Restriction or discharge of statutory pledge

274. This section provides for the secured creditor to be able to either restrict or discharge a statutory pledge by way of a written statement. This can be registered as a correction, if desired, but does not need to be. See paragraphs 369 and 433 of these Notes for further details.

Ranking of pledges etc.

Section 58 – Ranking

275. This section provides for the priority of payment of secured obligations in a competition between creditors. It applies to both possessory (common law) pledges and statutory pledges, as well as rights in security other than a pledge.

276. Subsection (1) sets out the general rule that a pledge will rank against another security according to when the right is created, and reflects the fundamental principle of property law *prior tempore potior jure* (earlier by time, stronger by right).

Example

Patrick grants a statutory pledge over his painting to Quentin on day one. On day two, Quentin registers the pledge in the Register of Statutory Pledges and this is the final step in creating the pledge. On day three Patrick creates a possessory pledge over the same painting by delivering it to Robert. The statutory pledge ranks before the possessory pledge because the former was created first.

277. Subsection (2) deals with the case of competing statutory pledges where the property was not the provider’s at the time of the pledge being granted. In such cases, registration may not be the final step which creates the pledge – the final piece of the puzzle may be the property becoming the provider’s (see paragraph 225 of these Notes). A system which ranked pledges only according

to when they are created would result in them being ranked equally despite one being registered before the other. As such, subsection (2) provides that the key factor in this instance is to be which pledge was registered earlier. For these purposes, only effective registration counts. This provision would apply equally to a statutory pledge created by means of a constitutive document and to one created by means of an amendment document.

278. Subsection (3) regulates the ranking of pledges and of rights in security arising by operation of law (such as the right of a repairer to retain property submitted for repair as security for payment of the bill) so that the right in security has priority. This mirrors the rule between such rights in security and floating charges, as set out in section 464(2) of the Companies Act 1985.

279. Subsection (4) gives a pledge priority for the entirety of the sums secured, both current and future. It follows that there is no procedure under which a party can limit the priority of the secured creditor in a higher ranking pledge by serving a notice to that effect on the creditor (as is the case for standard securities over land under section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970)). The effect is that a party seeking a higher ranking security than is otherwise available for sums not yet due under an earlier pledge will have to negotiate a ranking agreement with the creditor in that pledge.

280. Subsections (5) and (6) provide for it to be possible to have a ranking agreement in respect of a pledge and another security right (including another pledge), but it needs to be in writing. Any such agreement will only have contractual effect, and cannot be registered in the Register of Statutory Pledges.

Section 59 – Amendment of Companies Act 1985 and of Insolvency Act 1986

281. This section amends the Companies Act 1985 and the Insolvency Act 1986 to give effect for statutory pledges to the general rule that a real right in security (broadly, a ‘fixed charge’ for insolvency purposes) will, if created prior to the attachment of a floating charge, rank above the floating charge. It does so in each case by amending the relevant definitions of “fixed security” in those Acts, with the effect that a fixed security includes a statutory pledge.

Section 60 – Effect of diligence on pledge

282. This section governs the priority of a pledge as regards a diligence executed against the encumbered property. Diligence is the term for various processes of debt enforcement in Scottish law and includes things such as arrestment or attachment of a debtor’s moveable property (both of which are effectively seizure mechanisms). The basic rule is *prior tempore potior jure* (earlier by time, stronger by right). If the diligence is executed first then it has priority, and if the statutory pledge is created first then it prevails.

283. Subsection (2) provides for a special rule relating to further voluntary advances made by the secured creditor after diligence has been executed. It has the effect that an advance made under a pledge after the diligence is executed does not have priority over the sum attached by the diligence unless there is a prior contractual obligation or undertaking to make the advance.

Example

Acme Ltd grants a statutory pledge over machinery for all sums due and become due to the Oban Bank, and the Bank advances £20,000 in reliance on the pledge. Louise, an unsecured creditor of Acme Ltd, then attaches the machinery for a £5,000 debt. The next day the Bank advances another £8,000 to Acme Ltd. The Bank's priority over Louise in respect of the value of the pledged property is limited to the initial £20,000, unless it was contractually bound to lend the further £8,000.

Enforcement of pledge

Section 61 – The expression “pledge” in sections 62 to 75

284. Sections 62 to 75 set out a statutory framework for the enforcement of both possessory and statutory pledges.

285. This section provides that the expression “pledge” for the purposes of those sections does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974. The effect is that a 1974 Act pledge (described in that Act as a ‘pawn’) falls to be enforced under the enforcement regime in respect of loans by pawnbrokers in that Act.

Section 62 – Enforcement of pledge: general

286. This section sets out, as a general rule, that a pledge can only be enforced using the methods provided for by the Bill.

Example

Barry lends David £1,000, and in exchange David grants a statutory pledge over a vintage car worth £100,000. The Bill does not permit the forfeiture of encumbered property, and it is therefore unlawful for Barry to require in the event of a default that the car is forfeited to him so that he receives a windfall worth £99,000.

287. Subsections (2) and (3) have the effect that a pledge may be enforced in any lawful manner where the secured obligation is defaulted upon, or in such circumstances as are agreed in writing by the provider and the secured creditor. For example, the parties might agree in writing that the pledge will be enforced only if a certain number of days have elapsed without the default being remedied.

288. Subsection (4) requires the secured creditor to conform to reasonable standards of commercial practice. Similar provision can be found in regulation 24 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). What is unreasonable for the purposes of subsection (4) will differ from case to case, but might include taking an excessively long period to complete an enforcement procedure.

289. Subsection (4) does not, however, specify to whom the duty to conform to reasonable standards is owed, and so the general law will apply. The duty might for example be owed to any of the provider, the debtor (if different), another creditor, or an office-holder such as the liquidator of a limited company. See also the analogous duties in sections 66(2), 68(2) and 69(2) on the enforcing creditor to obtain the best reasonably attainable value where encumbered property is sold, let or licensed.

290. Subsection (5) provides that the ability to enforce a pledge is subject to section 53(3) (the prohibition on enforcing a pledge against a motor vehicle before it is transferred to a purchaser or hirer), section 63 (the requirement to serve a pledge enforcement notice) and section 64 (the requirement for a court order in certain cases).

Section 63 – Pledge enforcement notice

291. Subsection (1) provides for a pledge enforcement notice to be served on the provider and other specified interested persons (if any). This must be done before any enforcement action can be taken by the secured creditor. A notice would, for example, require to be served on any person occupying a motorhome or houseboat encumbered by a statutory pledge. However, subsection (2) provides some exceptions for cases where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons with a right to receive a notice.

292. The form of the notice will be set out in regulations made by the Scottish Ministers (see section 116 for the meaning of “prescribed”). Ministers are able to prescribe different forms of notice for different categories of provider or occupier (see section 111(1)(b) which allows the regulation-making power to be exercised in a way that makes different provision for different purposes). For example, a form for individual providers who are able to grant a pledge under section 43A might contain information on how to obtain legal advice and the information that the creditor will need to obtain a court order before the pledge can be enforced. If the form used is not quite the same as the prescribed form, it may still satisfy the requirement to serve the notice but it is likely that any divergence would have to be trivial.

293. Subsection (3) makes it clear that the requirement to serve a pledge enforcement notice is subject to section 88 of the Consumer Credit Act 1974, which requires a 14-day default notice (as defined in section 87 of that Act) to be served before the enforcement of any right in security which is subject to that Act. As such, if the 1974 Act applies then a default notice under that Act will have to be served 14 days before the pledge enforcement notice can be served.

294. The Scottish Ministers are also able by regulations under subsection (4) to require that, in addition, a pledge enforcement notice must be given to specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency). Exceptions to this may also be provided for (for example, where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of the person).

Section 64 – Whether court order required for enforcement

295. Subsection (1) confirms that a court order is only required for enforcement in the circumstances set out.

296. Under subsection (2), a court order is required before a pledge is enforced against an individual where the individual is a sole trader and the enforcement is against business assets.

297. Subsection (3) deals with property subject to a statutory pledge which is the sole or main residence of an individual, although that will be unusual as a pledge can only be granted over moveable property. It may, however, be relevant on occasion in relation to, say, a caravan or a

houseboat. A court order is required unless there is a written agreement to enforcement, after the pledge becomes enforceable, between the person in residence, the provider (if a different person) and the secured creditor. If such an order is sought, it cannot be granted unless it is reasonable to do so (subsection (4)) and subsection (5) sets out some of the factors which may require to be considered by the court.

Section 65 – Secured creditor’s right to take possession of, or steps in relation to, corporeal property

298. This section provides for the enforcement of a statutory pledge by the secured creditor following service of a pledge enforcement notice and, where appropriate, following the obtaining of a court order. It enables the secured creditor to take possession of the encumbered property from, typically, the provider.

299. As well as the taking of possession being enabled under subsection (2)(a), subsection (2)(b) enables the creditor to take any reasonable steps necessary to ensure that the property is not disposed of or used in any unauthorised way. This is aimed at larger assets such as machinery where it might be more convenient to sell them on site. The secured creditor may simply want to immobilise the asset, so that it cannot be removed before any planned sale.

300. Possession may only be lawfully taken using one of three methods. First, it may be taken where consent has been obtained from certain persons. Second, it may be taken by an authorised person under subsection (7), such as a sheriff officer. This may or may not require the consent of the court depending on who holds the property. Third, it may be taken by the secured creditor personally if authorised by the court.

301. Subsection (3) deals with the situation where the property is in the possession of an equal or higher ranking secured creditor, or a creditor who has executed higher or equivalently ranking diligence against the property. In such cases, that person is the person whose consent is relevant if opting for the first method of taking possession. For example, it may be that the higher ranking creditor does not wish to enforce its security and so is willing to give consent.

302. Subsection (4) deals with the situation where the property is in the possession of anyone else. This will usually be the provider, but could be a third party. In such cases, the provider’s consent is required if opting for the first method of taking possession. Where the property is held by a third party then that person’s consent is needed as well.

303. Subsection (6) enables the secured creditor, acting through an authorised person, to remove any individual from the encumbered property. This might be necessary where the encumbered property is, for example, a motorhome or houseboat.

304. Subsection (7) defines “authorised person” for the purposes of this section, but this is subject to subsection (8) which enables the Scottish Ministers to, by regulations, specify other persons as authorised persons.

Section 66 – Secured creditor’s right to sell

305. This section sets out the standard remedy for the secured creditor following service of a pledge enforcement notice (and where appropriate the obtaining of a court order): a right to sell the property at the best reasonably attainable price (subsections (1) and (2)). The secured creditor will need to be able to convey the encumbered property to the purchaser, and may first require to take possession of the property under section 65 of the Bill.

306. The secured creditor may also purchase the encumbered property themselves, but only in the limited circumstances set out in subsection (3).

307. Subsection (4) requires that the secured creditor holds the proceeds of sale in trust until they are distributed under section 75 of the Bill. It is similar in effect to section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970, which provides for the proceeds of sale under a standard security over land. A standard security is another form of subordinate real right in security.

Section 67 – Sale: unencumbered acquisition

308. This section provides for the effect of a sale of the encumbered property under section 66 on the rights of:

- (a) any creditor under another security that encumbers the property, and
- (b) any unsecured creditor who has attached or arrested the property in connection with enforcing a court order for payment (diligence).

309. It provides that the purchaser acquires the property free of the pledge that is being enforced, and of any rights in security or diligence which rank equally with or after the pledge.

310. It provides a separate rule for higher ranking rights in security or diligence. These continue to encumber the property unless the relevant creditor consented to the sale.

Section 68 – Secured creditor’s right to let

311. This section has the effect that where it is lawful to sell encumbered property under section 66 of the Bill, it is also lawful to lease the property provided it is done for the best reasonably obtainable income. Just as with a sale, the income is to be held in trust until distributed under section 75.

312. Subsections (4) and (5) provide for the parties to be able to agree in writing at any time to exclude leasing as a remedy available to the secured creditor on enforcement. For example, the provider may wish to have sale as the sole remedy on the basis that this would pay off the secured debt more quickly (and the creditor may also favour speed).

Section 69 – Secured creditor’s right to grant license over intellectual property

313. A licence of intellectual property is effectively a lease of that type of property (although it is not necessarily exclusive), and this section has therefore a similar purpose and effect for such

property as section 68 does for property that can be leased – see paragraphs 311 and 312 of these Notes. However, the right to grant a licence over intellectual property only applies to the extent that the provider themselves would be entitled to do so.

Section 70 – Secured creditor’s right to protect and manage the property

314. This section provides for a secured creditor who is entitled to sell encumbered property under section 66 to be able to take additional measures to protect *etcetera* the property as specified in the section, and to preserve its value. These rights operate in addition to the rights under section 65(2)(b) to take reasonable steps to ensure that property is not disposed of or used in an unauthorised way (which might also be characterised as a right to protect the property and therefore be covered by subsection (1)).

Section 71 – Secured creditor’s right to appropriate

315. Sections 71 to 74 of the Bill provide for a secured creditor who has served a pledge enforcement notice to be able, in specified circumstances, to appropriate the encumbered property themselves as the means of enforcement of the pledge. This is not the same as forfeiture of the property, which is not permitted. Forfeiture is where ownership of an asset is simply forfeited altogether, regardless of its value, meaning in this context that if the value of the item exceeded the debt then the surplus would not be returned to the debtor. In contrast, appropriation allows ownership to transfer to the creditor (subject to all interested parties agreeing) but, to the extent that the value of the item exceeds the debt and costs of enforcement, the creditor is required to return the surplus to the debtor.

316. This section provides in subsection (1) for the general right to appropriate. A creditor who appropriates property becomes the owner of the property.

317. Subsection (2) excludes appropriation in specified cases. In particular, it prohibits the appropriation of:

- corporeal property that is not possessed by the creditor (for practical reasons), and
- property where the value is greater than the amount remaining due under the secured obligation (including reasonable expenses) without reimbursing the excess.

318. There is the potential for abuse of a right to appropriate encumbered property, as the value of the property could greatly exceed the sum due to the secured creditor. Subsection (2)(c) therefore safeguards the interests of the provider of the pledge by providing for the secured creditor to be able to appropriate property with a value greater than the sum due to the creditor, but only if the creditor holds a sum representing the excess value in trust pending distribution under section 75 of the Bill.

319. Sections 72 and 73 provide for, respectively, appropriation with, and without, a prior agreement to the use of appropriation by the secured creditor as a remedy on enforcement.

Section 72 – Appropriation with prior agreement

320. Subsections (1) and (2) allow the provider and the secured creditor to agree in writing, in advance of any enforcement of the secured obligation, that the creditor may appropriate the encumbered property (subject to certain conditions).

321. An agreement to appropriate may only have effect as respects property in respect of which the agreement sets out a method of easily determining a reasonable market price (see subsection (3)). That might include, for example, an agreement in relation to appropriation of used cars which states that an average of the prices listed in a specified used car guide is to be used to determine the value on appropriation.

322. Under subsection (4), appropriation occurs only at the market value, as determined in accordance with that agreement, on the date of appropriation. If the value of the item is more than the secured debt, section 71(2)(c) will apply and the balance must be held in trust and applied in accordance with the provisions of the Bill.

323. Subsection (5) requires notice of the intended appropriation to be given to the parties it will affect. The list is self-explanatory, though it should be noted that it may be expanded by regulations under subsection (9)(a)(i). There are also exemptions under subsection (6) where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons. These can be expanded by regulations under subsection (9)(a)(ii) where a similar exemption is appropriate in respect of someone added to the list by regulations under subsection (9)(a)(i).

324. Subsection (7) sets out that the notice of intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount expected to be obtained by the appropriation. It is recognised that in cases where the asset is insufficient to meet the full value of the debt, the exact amount to be obtained by the appropriation may not be known in advance since the asset's value is to be based on the date of appropriation. The notice must also give the parties notice of their right to object (where applicable) and explain the consequences of such an objection being received within the relevant time limit.

325. Subsection (8) gives a number of the parties on whom the notice is served a right to veto the appropriation, provided that their objection is received by the secured creditor within 14 days beginning with the day of receipt of the notice of the intended appropriation. However, the provider and the debtor are excluded from having a right of veto because the section is concerned with cases where the provider has expressly entered into a prior agreement allowing appropriation. Where the appropriation is vetoed, the secured creditor must inform the other recipients of the notice of the intended appropriation that it is no longer going ahead.

326. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides for a number of assumptions as to when documents will be received if they are sent in certain ways. While these presumptions can be rebutted by evidence to the contrary, they are likely to be relevant to a party objecting when calculating if it is likely that the objection will be received in sufficient time.

327. Subsection (9)(b) allows the Scottish Ministers by regulations to modify this section so as to replace the requirements as to what the notice must contain with a requirement to instead use a form laid out by Ministers in regulations. It also allows them to modify any such form from time to time.

Section 73 – Appropriation without prior agreement

328. This section is similar to section 72 but deals with the situation where there is no prior agreement to appropriation. Given that there is no agreement, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property, as is the debtor (who will often, but not always, also be the provider).

329. Under subsection (2), any appropriation must be for an amount which bears a reasonable relationship to the market value of the property on the date of the appropriation. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000. However, where the value is greater, this is not a complete bar to appropriation: instead, the balance must be held in trust as envisaged by section 71(2)(c).

330. Subsection (3) requires notice of the intended appropriation to be given to the parties it will affect. The list, the exemptions in subsection (4), and the powers in subsection (7)(a) to expand each of those, are the same as in section 72 (see paragraph 323 of these Notes).

331. Subsection (5) sets out the requirements in relation to the notice. These are the same as section 72 (see paragraph 324 of these Notes) with the only difference being that, as noted above, every recipient of the notice has a right to object under this section given that there is no prior agreement. Subsection (7)(b) provides the same ability as in section 72(9)(b) for the Scottish Ministers to provide that a prescribed form is to be used instead (see paragraph 327 of these Notes).

332. Subsection (6) applies the rules about the right of veto. This operates in the same way as in section 72 (see paragraphs 325 and 326 of these Notes) other than that, as noted above, every recipient of the notice can exercise the veto under this section.

Section 74 – Appropriation: unencumbered acquisition

333. This section provides that any other right in security over, or diligence in respect of, the encumbered property is extinguished by an appropriation by virtue of section 71 of the Bill. This covers both appropriations with and without prior agreement.

334. Any other secured creditor or a creditor who has executed diligence will have been given notice of the intended appropriation under section 72 or 73 of the Bill (unless the creditor did not know – or could not reasonably be expected to know – of the security or diligence). A creditor who is given notice has the right to object and the ability to veto the appropriation. Failure to do so will result in their security or diligence being extinguished.

Section 75 – Application of proceeds from enforcement of pledge

335. This section provides for the distribution of any proceeds received by the secured creditor as a result of enforcing a possessory or statutory pledge.

336. Subsection (1) provides that the secured creditor must first pay the expenses of the enforcement, and then pay the sums due to secured creditors or creditors who have executed diligence (with subsection (2) providing that payments are to be made in accordance with the priority of their claims). Any residue is paid to the provider (see in that respect paragraph (b) of the definition of “provider” in section 111(1) of the Bill).

337. Payments are to be abated in equal proportions where full payment is not possible (see subsection (4)).

Example

The encumbered property is sold for £100,000. There are two equal ranking rights in security. Jack is owed £200,000. Jill is owed £50,000. Jack is paid £80,000 and Jill £20,000, which is 40% of what is due to each of them.

338. Subsection (3), however, provides that no payment is to be made to creditors with a higher ranking security or diligence than the pledge being enforced unless they have consented to the enforcement. If they have not consented then their right still subsists, and that will affect the marketability of the encumbered property (see section 67(3) in that respect). It might mean, for example, that is only practicable for the secured creditor to lease the encumbered property.

339. Subsections (5) and (6) provide for the situation, likely to be uncommon, where it is unclear who is to be paid. The effect is that the secured creditor must consign an amount in court for the benefit of the person who appears to have the best right to the payment.

340. Subsections (7) and (8) provide for statements to be given to relevant parties as to how the proceeds as a whole have been distributed. Under subsection (10), the Scottish Ministers have a power to expand this list to include specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency).

341. Subsection (9) applies the rule about statements to let or licenced property. In those cases, it will not just be a one-off statement that is required. As such, the rule is that a statement must be given every month, beginning with the month after the first enforcement proceeds are received.

Section 76 – Mandatory application for removal of an entry from the statutory pledges record

342. This section imposes a duty on the secured creditor of a statutory pledge to apply under section 94 of the Bill for the correction of the RSP where the pledge is extinguished by any of the enforcement of the pledge, enforcement of any other secured right, or the use of diligence.

Example

Adam grants a statutory pledge for a debt of £10,000 to Eve over machinery. Adam then grants a second-ranking statutory pledge to Cain for a debt of £5,000 over the same machinery. Adam subsequently defaults on his secured obligation to Cain.

Eve consents to Cain enforcing the second pledge subject to Eve, as higher ranking creditor, being paid from the proceeds. The plant and machinery is sold for £20,000. Cain divides the proceeds so that Eve is paid £10,000, Cain keeps £5,000, and the remaining £5,000 is paid to Adam.

Eve and Cain are both subject to a duty to remove their pledges from the statutory pledges record.

Liability for loss due to enforcement

Section 77 – Liability for loss suffered by virtue of enforcement

343. This section imposes liability on the secured creditor for failing in any duty imposed by the Bill on the creditor in relation to the enforcement of a possessory or statutory pledge.

344. Subsection (2) restricts liability in the specified cases, but does not exclude liability for non-patrimonial loss. The effect is that there may be circumstances where compensation for pain and suffering (solatium) could be claimed (for example, by the provider following the taking of possession of a houseboat which constituted the family home in an unlawful manner).

Service of documents for purposes of this Chapter

Section 78 – Service of documents for purposes of this Chapter

345. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out some rules about service of documents which can be relied upon when authorised or required to send something in or under an Act of the Scottish Parliament, unless the Act or the context requires otherwise.

346. Section 78 of the Bill provides that the provider and the secured creditor can agree that service may or must be in accordance with this section instead, provided that they do so in writing. Thus, for example, the parties might provide that an enforcement notice may only be sent by registered delivery. An agreement under this section could be (for example) included in the constitutive document for the statutory pledge.

347. Subsection (4) has the effect that where service cannot be effected in accordance with the agreement then the default rules in the 2010 Act will apply. The provisions in that Act about how things may be sent are not stated to be exhaustive, but the deeming rules about when things will be taken to be received apply only where a method specified in that section is used.

Chapter 2 – Register of Statutory Pledges

Register of Statutory Pledges

Section 79 – The Register of Statutory Pledges

348. Subsection (1) establishes the new register in which statutory pledges are to be registered. The register is to be known as the Register of Statutory Pledges (“RSP”).

349. Subsection (2) provides that the register is to be under the management of the Keeper of the Registers of Scotland. Various provisions in this Chapter also require payment of a fee to the Keeper for certain things. The Keeper has powers under section 110 of the Land Registration etc. (Scotland) Act 2012 to set the level of fees payable in relation to any register under the Keeper's management and control. As such, the effect of subsection (2) is also that these powers apply automatically to the RSP.

350. Subsection (3) states that, subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the register is kept. That would include the RSP being kept in a wholly electronic form.

351. The RSP, as with the other registers under the Keeper's control, is a public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the RSP from interference, unauthorised access, or damage (for example by hacking).

352. See also section 109 of the Bill, which provides for the Scottish Ministers by regulations to be able to make rules ("RSP Rules") as to the keeping of the RSP and related matters.

Structure and contents of the register

Section 80 – The parts of the register

353. This section provides that the Keeper must make up and maintain, as parts of the register, the statutory pledges record and the archive record (see sections 81 and 82).

Section 81 – The statutory pledges record

354. This section sets out the information which must be included in an entry in the statutory pledges record, and provides that the statutory pledges record is the totality of such entries. The information which must be included is largely self-explanatory.

355. The details of the secured creditor will be included in an entry in the statutory pledges record, but a search against the secured creditor is not permitted under section 102 of the Bill (unless the Scottish Ministers specify in RSP Rules made under section 109 of the Bill that such a search is permitted). It will, however, be possible for an entitled person (within the meaning given in section 105 of the Bill) to request certain information about the pledge from the secured creditor.

356. A provider or secured creditor may be a legal person with an identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these identifying numbers are to be included in the entry in the statutory pledges record: see section 109(2)(a)(ii) of the Bill.

357. This section provides that an entry in the statutory pledges record must include a copy of the constitutive document of the statutory pledge. The Scottish Ministers may, however, specify in RSP Rules that information in the record, including information in the constitutive document, will not be disclosed in a search of the RSP in order to protect confidential information of the

parties (see section 109(2)(f)). Rules can also be made about information which can be redacted in the copy of the document which is submitted (see section 109(2)(d) and (e)).

Section 82 – The archive record

358. This section sets out that the archive record consists of—

- first, all entries and copy documents which have been transferred to that record from the statutory pledges record as a result of the correction of the statutory pledges record or as a result of a statutory pledge being extinguished by virtue of regulations made by the Scottish Ministers under section 93,
- second, copies of any document which discloses, or contributes to disclosing an inaccuracy in respect of which a correction has been made,
- third, any other documents as the Keeper considers it appropriate to include and,
- fourth, any other information required to be entered in the record by RSP Rules.

359. Entries will not automatically move from the statutory pledges record to the archive record when a pledge is discharged. However, an application for a correction can be made in such cases if desired (the term “inaccuracy” is defined in section 99(2)(a)(ii) to include the record becoming inaccurate because of supervening events, which would include the pledge having been discharged). See paragraphs 369 and 433 of these Notes for further details. While it will normally be a choice whether to seek a correction, it is compulsory where the pledge is extinguished by enforcement (see section 76 and paragraph 342 of these Notes).

360. In addition, as noted above, it is possible for a duration period for a pledge to be introduced under section 93, in which case entries that were not renewed would be extinguished and moved to the archive record (see paragraphs 399 to 401 of these Notes).

Registration process

Section 83 – Order in which applications are to be dealt with

361. This section provides that the Keeper must deal with applications for registration of a statutory pledge, and applications for registration of an amendment to a statutory pledge, in the order in which they are received. The effect is to protect the priority of registration of, or amendments to, statutory pledges (and therefore the ranking rights in security as regards the encumbered property).

Section 84 – Application for registration of statutory pledge

362. Subsection (1) enables the secured creditor, and only the secured creditor (or the secured creditor’s agent – see section 116(2)), to apply to the Keeper for registration of a statutory pledge in the RSP.

363. Subsection (2) sets out that the Keeper must accept the application if it is submitted with a copy of the constitutive document, contains all the information the Keeper requires to make up an entry, conforms to RSP Rules, and the fee due to the Keeper is – or will be – paid. Rules can be

made about information which can be redacted in the copy of the constitutive document which is submitted (see section 109(2)(d) and (e)).

364. Subsection (3) provides that the Keeper must reject an application if any of the requirements mentioned in subsection (2) are not satisfied.

Section 85 – Registration of statutory pledge

365. Subsection (1) provides that the Keeper must, on accepting an application, make up and maintain the appropriate entry in the RSP, which includes allocating a registration number (as defined in section 116(1) of the Bill).

366. Subsection (2) provides that the statutory pledge is taken to be registered on the date and at the time originally entered for it. In other words, even if the registration of a statutory pledge is ineffective and becomes effective only once it is corrected (see section 89(3)), the date and time of registration of the statutory pledge will still be the date and time of the initial (i.e. ineffective) registration. However, it is the time of effective registration that is critical for matters such as creation or ranking (see sections 45 and 58).

Section 86 – Application for registration of amendment

367. This section makes the same provision in respect of an application for registration of an amendment of a statutory pledge as section 84 of the Bill makes in respect of the application for registration of the pledge itself (the only change being that the relevant document is an amendment document rather than a constitutive document). See paragraphs 362 to 364 of these Notes.

368. An amendment to a statutory pledge may only be registered under this section where it is an amendment to add property to the encumbered property, or to increase the extent of the secured obligation. As set out in more detail at section 56(5) and (6), in general terms such amendments take effect only when registered effectively.

369. Although these are the only changes which can be registered as “amendments”, a pledge may be assigned in accordance with section 55 or restricted or discharged off-register by way of a written statement under section 57 of the Bill. Other events may also lead to the pledge being extinguished off-register – for example, due to the encumbered property being destroyed, due to the property being acquired unencumbered under one of the Bill’s good faith acquisition rules, due to the pledge being enforced, or due to the operation of the anti-avoidance rule under section 50. The RSP may be corrected for any such change by an application for a correction, if desired (see sections 94 to 97). The Keeper also has an obligation to correct the RSP in certain circumstances under section 98 upon becoming aware of a manifest inaccuracy in the RSP (and see section 99(1) of the Bill for the meaning of “inaccuracy”).

Section 87 – Registration of amendment

370. Subsection (1) provides that the Keeper must, on accepting an application, revise the entry for the statutory pledge to which the application relates.

371. Subsection (2) has the same effect with regard to the timing of the registration of the amendment as section 85(2) has with regard to the pledge itself. See paragraph 366 of these Notes (but for cross-reference purposes, the relevant sections here are 90(3), 46 and 58).

Section 88 – Verification statement as to registration of statutory pledge or amendment

372. Subsection (1) provides that the Keeper must, after registering a statutory pledge or amending it, send a statement to the secured creditor (i.e. the applicant) and the provider verifying what has been done – but only if the application contains email addresses for them. If an email address has not been included for either the secured creditor or the provider then there is no obligation on the Keeper to send that person a statement. Subsection (2) makes provision about the content of the statement.

373. As the application will have been made by the secured creditor, it can be assumed that they will provide their correct email address. However, the correct email address may not be given for the provider. In circumstances where the provider does not receive a verification statement from the Keeper (for example, because no email address was provided by the secured creditor or the email address provided was incorrect), the provider may, under subsection (3), request a copy of the verification statement from the secured creditor. Under subsection (4), the secured creditor must supply the copy within 21 days.

Effective registration

Section 89 – Effective registration of statutory pledge

374. Subsection (1) sets out three cases in which a purported registration of a statutory pledge in the statutory pledges record is ineffective, with the result that the statutory pledge is not created—

- The first case is that the entry does not include a copy of the constitutive document.
- The second case is that the entry contains an inaccuracy which, as at the time of registration is “seriously misleading” (for which see section 92(1)).
- The third case is that the constitutive document is invalid, for example because it is a forgery.

375. As such, it is crucial that the constitutive document is included in the entry (and is valid). If anything else is missing from the entry, the registration will still be effective unless the entry is considered seriously misleading by reason of the omission (i.e. the second case cited above applies, under which missing or incorrect text can lead to the entry being considered seriously misleading).

376. The effect of determining whether or not an entry is seriously misleading as at the time of registration is that a supervening inaccuracy will not render ineffective the creation of the pledge which took place by reason of the registration (although see section 91 of the Bill as to other consequences).

377. Subsection (2) makes subsection (1) subject to section 92(1)(c) and (d), with the effect that a registration may be partially effective as regards the encumbered property or as regards co-providers or co-secured creditors.

378. Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision, when read with section 99(3) of the Bill, is that the registration becomes effective (and the pledge is created) on the date of the correction.

Section 90 – Effective registration of amendment to statutory pledge

379. This section makes the same provision for the registration of an amendment of a statutory pledge as section 89 of the Bill makes for the registration of the pledge. See paragraphs 374 to 378 of these Notes.

380. See also section 86 (in relation to when an amendment, as opposed to a correction, may be registered) and section 56(5) and (6) (in relation to when such amendments take effect).

Section 91 – Supervening inaccuracies: protection of third parties

381. This section protects a person who for value, in good faith and exercising reasonable care acquires encumbered property, or a right in encumbered property, in circumstances where there was previously an effective registration under which the pledge was created but, at the time of acquisition:

- (a) the entry has been incorrectly removed from the record,
- (b) in a case where the acquired property does not have an identifying number which must be used, the entry has become seriously misleading in respect of the acquired property, or
- (c) in a case where the acquired property does have an identifying number which must be used, a search of the record for that number would not produce the entry.

382. This provision could therefore cover register malfunctions under which entries were incorrectly removed or search results were not producing the correct results. It could also apply where, for example, the provider marries after the pledge is registered and changes their name.

383. The effect of this section is that the pledge will be extinguished as regards the acquired property.

Example

In year 1, Rachel Smith grants a statutory pledge to Mark over her piano. Mark registers the pledge and the piano becomes encumbered property. In year 2, Rachel marries and changes her name to Rachel Jones. In year 3, Rachel sells the piano to Luke without obtaining Mark's permission under section 49. However, Luke is in good faith, and does not know that Rachel Jones was once known as Rachel Smith. A search against Rachel Jones will not reveal the pledge, and so he will acquire the piano unencumbered by the pledge.

In contrast, if Rachel had chosen not to change her name upon marrying, a search against her would continue to reveal the pledge. There would be no supervening inaccuracy so this section would not be relevant because there would be no error to mislead Luke. However, if Luke did not search the register, he might still benefit from protection under section 51 (if Rachel is a sole trader whose business is selling musical instruments) or section 52 (if he is buying the piano in good faith for personal purposes and the value is below any cap introduced under that section).

384. The protection offered by section 91 makes different provision in respect of encumbered property that is required by RSP Rules to be identified by an identifying number, such as a vehicle identity number (VIN). Any person intending to acquire such an asset could readily obtain information about the pledge by searching the statutory pledges record against the VIN. The expectation is that where the use of such numbers is mandated, they should be the primary means of searching as they ought to be the most reliable. As such a number would not change, it would not be the subject of a supervening inaccuracy unless the register malfunctioned (and any initial inaccuracy would be seriously misleading under section 92, meaning that no pledge was created over it).

385. There are a number of things a person could do to satisfy the section's requirements to be in good faith and to take reasonable care. However, if they have failed to carry out a search of the register in respect of their purchase then they will not meet this test. The inaccuracy will have been irrelevant to their decision to purchase if they did not consult the register. This does not mean, though, that consulting the register will always be enough on its own. If the person has reason to be suspicious of the information on the register, they might be expected to make further enquiries.

Section 92 – Seriously misleading inaccuracies in the statutory pledges record

386. This section makes provision as to whether an entry in the statutory pledges record is seriously misleading as a result of an inaccuracy or inaccuracies in it. This applies for determining whether a registration is an effective registration for the purposes of sections 89, 90 and 91 of the Bill. Section 99(1) of the Bill provides for the meaning of “inaccuracy” in the statutory pledges record.

387. Subsection (1)(a) of section 92 provides that an inaccuracy will be seriously misleading if any of subsections (2) to (6) apply or if, despite none of them applying, the inaccuracy or inaccuracies are such that a reasonable person would be seriously misled by the entry. In other words, if any of the examples in subsections (2) to (6) apply then the inaccuracy will be seriously misleading (whether or not any person was actually misled), but those examples are not exhaustive and there may be other inaccuracies that are found by the courts to be seriously misleading. Whether such an inaccuracy is seriously misleading or not is to be determined objectively.

388. Subsection (1)(b) provides that any inaccuracy is to be disregarded to the extent that it appears in the constitutive or amendment document but is not replicated elsewhere in the entry. The effect is that the person searching the record does not have to look at the document to determine whether the details in the record are seriously misleading (although a copy of the constitutive document – and, if applicable, any amendment document – must still be part of the entry in the statutory pledges record and can, for instance, be used as evidence to show that the entry itself was inaccurate).

389. Subsections (1)(c) and (d) deal with an inaccuracy that relates only to part of the encumbered property, or to one co-provider or co-secured creditor. These provisions have the effect that an inaccuracy in the statutory pledges record may be seriously misleading in that respect only, and therefore the registration of the statutory pledge, or amendment to the statutory pledge, will be partly effective.

390. Subsections (2) and (3) focus on whether an entry contains an inaccuracy that prevents it being disclosed by a properly formatted search. Such an inaccuracy will generally be regarded as being seriously misleading.

391. Subsection (2) has the effect that an entry is seriously misleading where the provider (or co-provider) is a person required by RSP rules to be identified in the statutory pledges record by an identifying number (e.g. a company is likely to be required to be identified by their company number) and where, if a search of the record were to be carried out for that number using the search facility provided under section 102 of the Bill, it would not disclose the entry. However, it does not matter if the company's name is wrong as the expectation is that it should be searched for by reference to its number (which will not change in the way that its name might).

392. Subsection (3) has the effect that an entry is seriously misleading where the provider (or co-provider) is not a person required by RSP rules to be identified in the statutory pledges record by an identifying number and where, if a search of the record were to be carried out for the provider's proper name, or their name together with their month and year of birth it would not disclose the entry. This means that even if the search function is programmed to be more forgiving of errors in names if the month and year of birth are also included in the search (and are correct), the entry will still be seriously misleading because it ought to be possible to find the entry by the name alone. However, it is not enough for the name to be correct; if it is correct but the month/year of birth is wrong, this will also be seriously misleading.

393. Subsection (4) has the effect that an entry is seriously misleading for the purposes of an initial registration (whether of a pledge or an amendment) where the name of the secured creditor (or co-secured creditor) at the date of application is incorrectly reflected in such a way that a reasonable person would be seriously misled. Because it will not be possible to search by secured creditor under section 102 (unless RSP Rules alter the position), the position is not determined by reference to whether a search result would return the entry. The application of the reasonable person test means that minor errors such as typos might be disregarded, particularly if other information is correct, but the position will be viewed as a whole in the circumstances of each case. In light of the fact that it is permissible for assignments to take place off-register and given that for the purpose of section 91 what will be of interest to a purchaser is simply whether the property is secured, not who benefits from the security, this provision is limited so as to not cover supervening inaccuracies.

394. Subsection (5) applies where the encumbered property is or includes property required by RSP rules to be identified in the statutory pledges record by an identifying number and where, if a search of the record were to be carried out for that number, it would not disclose the entry.

395. Subsection (6) applies where there is a requirement, by virtue of section 81(1)(g), for an entry in the statutory pledges record to specify the type of property encumbered and where the

entry does not describes the claim as being of a type that it is or fails to allocate a type to the property.

396. Subsection (7) applies the rules in this section to circumstances where there are co-providers and co-secured creditors.

397. Subsection (8) enables the Scottish Ministers to modify this section to make provision about what does, and what does not, make an entry seriously misleading and how that is to be determined.

398. Subsection (9) provides that the proper name of a person means the person's name in the form by RSP Rules, which might also prescribe a hierarchy of document that could be used to evidence a proper name: for example, a passport, driving licence, or a birth certificate.

Duration

Section 93 – Power of Scottish Ministers as regards duration of statutory pledge

399. This section provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able (by regulations) to specify a period at the end of which an entry in the statutory pledges record will be deleted and the statutory pledge extinguished. This power could be used, for example, in the event that a large number of pledges continue to appear in the record many years after registration but are believed to have been extinguished or restricted off-register.

400. However, the power would also allow for the creation of an application route which would allow the secured creditor to renew the pledge, to avoid its removal if the entry continues to be relevant. The concept of renewal would include renewal on more than one occasion.

401. The section relates only to removal of entries from the statutory pledges record. Nothing would be removed from the archive record under this section. The archive record would be affected only insofar as the any entries removed from the statutory pledges record would be placed on the archive record (see section 82(a)(i) which requires the archive record to include all entries and copy documents transferred from the statutory pledges record by virtue of this section).

Corrections

Section 94 – Application by secured creditor for correction of statutory pledges record

402. There are many ways in which the register could become inaccurate – see paragraphs 369 and 433 of these Notes for discussion of some of them.

403. Subsection (1) enables a relevant person to apply to the Keeper for correction of an entry for a statutory pledge in the statutory pledges record. A “relevant person” means, in broad terms, the secured creditor (see subsection (4)).

404. The secured creditor does not for that purpose need to be identified as such in the entry in the statutory pledges record. There are a number of reasons why the creditor might not be so identified, including an error at the time of registration, a change of name, or an assignation of the pledge (see section 55 of the Bill). So, for example, an assignee as a successor in title to the right of the secured creditor (see section 111(1) of the Bill) may apply for correction. Alternatively, subsection (4)(b) has the effect that the assignor of a pledge (i.e. the previous secured creditor) can also apply for a correction.

405. The Keeper must accept an application that meets the requirements of paragraphs (a) and (b) of subsection (2), and, under subsection (3), must reject one that does not.

Section 95 – Correction of record in response to application under section 94

406. This section deals with what happens once an application for a correction is accepted under section 94.

407. Subsection (1) provides that the Keeper must, on accepting an application, correct the entry. See also section 100(2) and (3), which sets out the procedure that the Keeper must follow depending upon the nature of the correction (but, for example, in every case the Keeper must note in the register that a correction has been made). However, subsection 100(4) does not apply here, as notification requirements are dealt with by means of the issue of verification statement.

408. Under subsection (2), the Keeper must issue both the applicant and provider with a verification statement, but only if their email addresses have been provided in the application. Subsection (3) makes provision about the content of the verification statement. Under subsections (4) and (5), there is an ability for the provider to obtain a copy of the verification statement from the applicant (i.e. the secured creditor) if the statement is not received by provider but is received by the secured creditor. Given that the secured creditor will be the one submitting the application, it is to be expected that they will supply their own email address correctly and will therefore receive the statement, but if they make a mistake in supplying the provider's email address then this will allow the provider a means of obtaining a copy.

Section 96 – Demand that application for correction be made under section 94

409. This section enables a person with a specified interest in the accuracy of the statutory pledges record, and who maintains that the record is inaccurate, to be able to:

- (a) demand that the person showing on the register as being the secured creditor in respect of a pledge apply to the Keeper for a correction of the record under section 94 of the Bill, and
- (b) if no such application is made, apply for the correction themselves.

410. Subsection (1), read with subsections (2) and (3), has the effect that a person identified in the record as the provider or a co-provider can make a demand on the registered secured creditor if the person making the demand asserts either that they are not in fact a provider despite being identified as such, or that property identified as being the subject of the pledge is not in fact encumbered property. In addition, a person with a right in property which is identified as the

encumbered property can make a demand on the registered secured creditor if the person making the demand believes that the property is not in fact encumbered property.

411. In both cases, it may be that the record was once accurate but has become inaccurate due to supervening events (e.g. the pledge has been restricted or discharged off-register), or it may be that the entry in the record has had incorrect information in it from the moment it was created.

Example 1

An entry states that a statutory pledge has been created over the car with VIN 12345. In fact, the statutory pledge was created over the car with VIN 12335. The owner of the car with VIN 12345 can demand a correction.

Example 2

An entry states that a statutory pledge has been created over a car with VIN 12335. This was accurate as at the date of registration, but the secured creditor has subsequently been discharged off-register. The provider can demand correction.

412. Subsection (4) sets out how a demand can be made. It must be in the form prescribed by the Scottish Ministers in regulations. In addition, it must specify a period within which an application is sought, and that period must be at least 21 days from the date of receipt.

413. Subsection (5) provides that no fee can be charged by the person registered as the secured creditor for complying with a demand.

414. In the event that the demand is not complied with within the period specified, the person becomes entitled to make an application themselves under subsection (6).

415. The person identified as the secured creditor in the entry in the statutory pledges record may no longer be the creditor because the pledge has been assigned. However, if they were once the secured creditor but subsequently assigned their interest, they would remain entitled to request a correction by virtue of section 94(4)(b). Alternatively, they could ask the new secured creditor to apply for a correction (by virtue of section 94(4)(a)) both in respect of the identity of the secured creditor and in respect of the change requested by the provider. The assignation document under which the identity of the secured creditor changed may well also make provision as to what the previous secured creditor is obliged to do in these circumstances.

Section 97 – Response to application for correction under section 96(6)

416. This section makes provision about what happens where an application is made to the Keeper for a correction under section 96(6) (i.e. following a failure by the registered secured creditor to comply with a demand under section 96(1)).

417. The Keeper must accept an application that meets the requirements of paragraphs (a) and (b) of subsection (1), and, under subsection (2), must reject one that does not.

418. On accepting an application, subsection (3) requires the Keeper to serve a notice on the registered secured creditor intimating that the record will be corrected on a specified date (at least

21 days from the date of the notice) unless action is taken by them. The Keeper must also note on the entry the details of the pending application, acknowledge receipt of the application and, in the event that the person showing on the entry as the provider is not the applicant, notify that person that notice of intention to correct the register has been served on the registered secured creditor.

419. Under subsection (4), the registered secured creditor may apply to the court before the date specified by the Keeper, opposing the making of the correction. They must notify the Keeper if they make any such application (so that the Keeper knows not to proceed with making the correction when the deadline passes).

420. Subsection (4A) provides that where the registered creditor is not the secured creditor, the registered creditor must (to the extent that it is reasonable and practicable to do so) promptly notify the secured creditor of receipt of a notice from the Keeper under subsection (3). Subsection (4) will also apply to the secured creditor as it applies to the registered creditor – meaning that the secured creditor may apply to the court objecting to the making of the correction.

421. Where an application is made to the court, subsection (5) provides for the court to determine matters. However, subsection (6) recognises that if the Keeper was not told about the court action then the correction may already legitimately have been made. As such, no direction is to be made unless the court is satisfied that, before the date the Keeper had said was the intended date for making the correction, the Keeper received notice from the registered secured creditor of the court application. In establishing the date on which the Keeper received any such notice, the (rebuttable) presumptions as to service provided for in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 may be relied upon. The Keeper can, if desired, enter the court process (see section 101 of the Bill).

422. If the Keeper does not receive any notification of a court application before the date that the Keeper had said was the intended date for making the correction, the Keeper is required to make the correction on that date arriving (subsection (7)).

423. See also section 100, which sets out the procedure that the Keeper must follow, depending upon the nature of the correction being made (though in every case, the Keeper must note in the register that a correction has been made). That section also provides for notification to be given to interested parties of the entry having been corrected.

Section 98 – Correction of the statutory pledges record at instance of the court or the Keeper

424. This section deals with corrections which do not emanate from an application for a correction.

425. Subsection (1) ensures that the courts can (where appropriate) direct the Keeper to correct an entry in the RSP. The Keeper would be required to comply with any direction, as to do otherwise would risk the Keeper being found to be contempt of court.

426. Court proceedings might arise in a number of ways. The Bill does not provide for an express right of appeal against, or review of, any decision by the Keeper. However, an issue relating to the accuracy of the register might be raised in other proceedings, such as a judicial

review of a decision by the Keeper, or proceedings in which it is alleged that a constitutive document is a forgery. The Keeper can, if desired, enter the court process (see section 101 of the Bill).

Example 1

A constitutive document is reduced by the court because it has been forged by one of the apparent parties. The court can direct the Keeper to correct the entry in the statutory pledges record.

Example 2

An entry has been created in the statutory pledges record for a security by Andrew in favour of Bruce. But in the application form for registration of the assignation, Bruce erroneously states that Carol is the creditor. Carol could seek removal of the entry by the court (as an alternative to a demand for a correction).

427. Subsection (2) of this section sets out circumstances in which the Keeper will (under subsection (3)) be required to take action upon becoming aware of a manifest inaccuracy in the statutory pledges record. Subsection (3) will not apply where—

- that awareness comes from a court direction (as the matter will be dealt with under subsection (1))
- that awareness comes from an application having been made (as the matter will be dealt with under the application process), or
- the Keeper considers that the appropriate way of addressing the inaccuracy is to make an application (as the matter would then be dealt with under the application process) – but only where the inaccuracy is not the Keeper’s fault.

428. As such, if the inaccuracy is something that has been introduced by the Keeper then it is not open to the Keeper to redirect parties to the application route. However, an inaccuracy would not be attributable to the Keeper simply because the Keeper has taken information from an application and entered it on the register.

429. Where the Keeper becomes aware of such an inaccuracy, other than in the cases set out above, subsection (3) requires the Keeper to correct the manifest inaccuracy where what is needed to correct the inaccuracy is also manifest and to note any inaccuracy that cannot be corrected.

430. See also section 100, which sets out the procedure that the Keeper must follow, depending upon the nature of the correction being made (though in every case, the Keeper must note in the register that a correction has been made). That section also provides for notification to be given to interested parties of the entry having been corrected.

Section 99 – Meaning of “inaccuracy” and how a correction is made

431. This section sets out the meaning of “inaccuracy”, as well as providing more information about corrections.

432. There is an “inaccuracy” in the statutory pledges record whenever the record mistakes the true position (in law or in fact) in relation to a pledge.

433. Where there is an inaccuracy, a correction can be sought. Subsection (2)(a) clarifies that a need for a correction may arise because the record has always been wrong, or because supervening facts have meant that it has become wrong. For example, legally there is no requirement to register restrictions or discharges of statutory pledges. These can take effect without any requirement as to registration. However, if a pledge is discharged, it would then be the case that the record misstated the position as regards that pledge, so a correction could be sought if desired. There are a number of other reasons why the record could become incorrect, including the pledge being extinguished by the encumbered property being destroyed or as a result of one of the good faith protections in the Bill.

434. Subsection (2)(b) sets out what the correction of the statutory pledges record may involve (which will depend on the nature of the correction).

435. Subsection (3) makes provision about the date and time of a correction. This is particularly important as regards sections 89 and 90 of the Bill, under which an ineffective registration may be made effective by correction (thereby creating the pledge).

Section 100 – Correction of statutory pledges record: procedure

436. This section applies where the Keeper corrects the statutory pledges record by virtue of any of the provisions of the Bill under which it can be corrected.

437. Subsection (2) provides that where the Keeper corrects the statutory pledges record by removing an entry, the Keeper must transfer the entry to the archive record. The Keeper must also note on the transferred entry the section by virtue of which the transfer is made.

438. Subsection (3) provides that where the Keeper corrects the statutory pledges record by restoring, removing or amending information included in an entry, the Keeper must note on the entry that it has been corrected. In the case of the replacement of a copy document, the Keeper must also transfer the replaced copy to the archive record.

439. In both instances, the Keeper must give details of the correction including the date and time of the removal or (as the case may be) the correction of the entry. The Keeper must also include in the archive record a copy of any document which discloses or contributes to disclosing the inaccuracy which is the subject of the correction.

440. Subsection (4) provides that once the record has been corrected the Keeper must, to the extent that it is reasonable and practicable to do so, notify every person required by RSP rules and any other person who appears to the Keeper to be affected by it materially that a correction has been made. This is not an objective test and will be confined to facts within the Keeper’s knowledge. This section does not apply to corrections under section 95(1), as in such cases a verification statement will instead have been issued.

441. Subsection (5) provides that the validity of a correction of the record will not be affected if the Keeper fails to include in the archive record a copy of any document which contributes to disclosing the correction or fails to notify any person of the correction.

Section 101 – Proceedings involving the accuracy of the statutory pledges record

442. This section provides that the Keeper is entitled to appear and be heard in any civil proceedings where a question arises regarding the accuracy of the statutory pledges record, or what is needed to correct it.

Searches and extracts

Section 102 – Searching the statutory pledges record

443. The RSP is a public register (see section 79(1) of the Bill). Subsection (1) of this section provides that the Keeper must provide a search facility by which the statutory pledges record may be searched.

444. Subsection (2) sets out that only such searches in the statutory pledges record as are specified in this subsection, or as are specified under RSP Rules, are permitted. This restriction on searches has two effects:

- First, it reduces the risk of identity theft by ensuring that it will not be possible to search against date of birth, or against the month and year of birth alone. The Scottish Ministers will also be able (through RSP Rules) to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different months and years of birth that can be made in a particular time period.
- Second, it reduces the risk of unfair commercial practices by not permitting a search against the secured creditor (typically, a bank or finance company) which might enable a competitor to obtain a list of customers.

445. Subsection (3) provides that any person may search the statutory pledges record on payment of any fee (or making an arrangement to pay).

446. Subsection (4) provides that no fee is payable for a search of the statutory pledges record carried out by a not-for-profit money adviser who does not charge individuals for the services that they provide. Under subsection (5), the Scottish Ministers are given the power by regulations (subject to the negative procedure) to make further provision about what “not-for-profit money adviser” means for these purposes.

447. The Bill does not make provision for the Keeper to provide a search mechanism for the archive record, nor for a person to be entitled to use that mechanism. The Scottish Ministers may, however, make provision to that effect in RSP Rules made under section 109(1)(c) of the Bill. It is also open to any person to obtain from the Keeper an extract of an entry in either the statutory pledges record or archive record under section 104 of the Bill.

448. Sections 89 to 91 of the Bill have the effect that it must be possible to carry out searches for the purposes of the “seriously misleading” test. It will therefore be for the Scottish Ministers to make such RSP Rules as are needed under this section for those purposes. RSP Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

Section 103 – Admissibility and evidential status of search results

449. This section provides that a copy of a search result, relating to a search carried out by means of a search facility provided by the Keeper, may be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary. A search result may be in printed or electronic form.

450. This section should be read with section 104, which provides that an extract from the RSP will provide evidence of the contents of the relevant entry at the date the extract is issued. It cannot be rebutted by other evidence (though liability is imposed on the Keeper for errors in extracts under section 107(1)(d) of the Bill). It should also be noted that RSP Rules may prescribe under section 109(1)(f) that certain information on the register (for example, a precise date of birth) is not to be included in search results.

Section 104 – Extracts and their evidential status

451. This section enables any person to obtain from the Keeper an extract of any entry or part of an entry in the RSP, on payment of any fee (or making an arrangement to pay). An extract is (irrebuttable) evidence of the contents of an entry at the time the extract is issued, and can be used for the purpose of proving a fact in any court or tribunal proceedings. Liability is imposed on the Keeper for errors in extracts under section 107(1)(d) of the Bill. It should also be noted that the ability to obtain an extract is subject to the ability under section 109(1)(f) for RSP Rules to prescribe that certain information on the register (for example, a precise date of birth) is not to be included in an extract.

Request for information

Section 105 – Secured creditor’s duty to respond to request for information

452. This section provides for an entitled person (as defined) to be able to request information about a statutory pledge from the person identified as the secured creditor in the statutory pledges record.

453. Subsection (1) sets out that the information to be provided in response to a request will vary depending on the facts. If the person is the secured creditor, they can be asked to specify, whether property specified in the request is encumbered property. If the person is no longer the secured creditor, or has never been the secured creditor, they must provide information to that effect and, if relevant, details of the person to whom they assigned the pledge and any further known details of subsequent assignees. The request does not require to be in writing, but the response does.

454. Subject to subsection (8) (which enables the Scottish Ministers to modify this section so as to specify further entitled persons), by virtue of subsection (2), an entitled person is:

- (a) a person who has a right in the specified property,
- (b) a person who has a right to execute diligence against the property (including, in the case of a charge for payment, where that right will only arise once the days of charge expire without payment), or
- (c) a person who has the consent of the registered provider to make the request.

455. Subsection (3) gives the person named as secured creditor in the statutory pledges record 21 days to respond. An exception to the obligation to respond applies where—

- it is clear that the registration is ineffective in relation to the statutory pledge being enquired about,
- it is clear from the entry that the property is not encumbered, or
- the information has been given to the person within the last three months and it has not changed.

Example

Adam grants a statutory pledge over his Rolls Royce. A search in the RSP against Adam reveals only the entry for that pledge. A request to the person named as secured creditor as to whether the pledge covers Adam's yacht is exempt, as it will be clear from the register that it does not.

456. Subsection (4) allows the reasonable costs of responding to the request to be charged to the person making the request.

457. If the person of whom the request is made wishes to, they can apply to the court for either an exemption from complying (in whole or in part) or an extension. Subsection (5) gives the court power to grant either of these things. For example, depending on the circumstances, 21 days may be too short a period to assemble the necessary information.

458. If the entitled person does not receive a response, they can apply to the court in respect of that failure. Subsection (6) enables the court to order the registered creditor to comply with the request for information within 14 days or such other period as the court specifies. Failure to comply with such an order would risk the person being held to be contempt of court.

459. Subsection (7) allows for the information request mechanism to be applied against anyone whose name is provided to the entitled person by the registered secured creditor as being the person to whom they assigned the pledge or, where applicable and known, any subsequent assignees. Such persons can be treated as being the registered creditor for the purposes of a further request under this section.

460. Where incorrect information is supplied under this section, there may be consequences under either section 106 or section 108.

Section 106 – Acquisition of property confirmed by creditor not to be encumbered property

461. This section sets out a special rule to protect purchasers of encumbered property. It should be read with section 105.

462. If a person making a request under section 105 is advised wrongly by the person to whom the request was made that the particular property is not subject to the pledge and the person then acquires the property (or a right in it) in good faith within 3 months, then the pledge is extinguished in relation to the property (or right) acquired.

Entitlement to compensation

Section 107 – Liability of Keeper

463. This section provides for the Keeper to compensate any person who has suffered a loss in consequence of a matter specified in subsection (1). Liability under subsection (1) is strict, in that the person does not have to show that the Keeper is at fault (as opposed to, say, arising from an unavoidable malfunction of the Keeper’s automated systems). However, subsection (2) limits the losses that can be recovered by excluding certain types of claim.

464. Subsection (3) provides more information about what is meant in subsection (1)(a) by “an inaccuracy which is attributable to the making up, maintenance or operation of the register”. It provides that an inaccuracy in information included in an entry in the statutory pledges record when the entry is made up, revised for an amendment document or corrected is not covered by subsection (1)(a) to the extent that the Keeper has been misled into making the inaccuracy and reasonably believed the information to be accurate. Subsection (4) provides that circumstances in which the Keeper is entitled to reasonably believe information to be accurate include if it is provided in connection with an application to which the entry relates, or by the court. As such, if the Keeper faithfully replicates the information provided in an application form and that information proves to be incorrect, that is not an inaccuracy for which the Keeper is liable, though the person who submitted the application may be liable under section 108. Subsection (4) is not exhaustive of the circumstances in which the Keeper is entitled to reasonably believe that information is accurate.

Section 108 – Liability of certain other persons

465. This section provides for certain persons to be liable, on fault being shown, for losses suffered by another person in consequence of a matter specified in subsection (1).

466. Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry. It applies where the person who made the application which led to the entry did not exercise reasonable care or where the person notified the Keeper of an apparent inaccuracy without taking reasonable care.

Example

Alan maliciously registers a forged constitutive document bearing to be granted by Bruce over property owned by Claire. Claire has a claim against Alan for any loss.

467. Subsection (1)(b) applies, where as a result of a failure to take reasonable care, there is an inaccuracy in responding to an information request under section 105 of the Bill. It should be read with section 106 of the Bill, which provides for certain pledges to be extinguished where property is acquired within 3 months after faulty information is given to an entitled person.

Example

Information is supplied to Ailsa by Brendan that certain property is not pledged. Brendan does not take reasonable care, and the information is wrong. Ailsa takes a pledge over the property in reliance on that information. She expects that the pledge will be a first-ranked security, but it is in fact subject to the existing pledge. Ailsa will have a claim against Brendan.

468. Subsection (1)(c) applies where a person has failed, without reasonable cause, to provide information under section 105 of the Bill.

469. Subsection (2) imposes the same restrictions on liability as those set out in section 107(2) of the Bill.

Rules

Section 109 – RSP Rules

470. This section sets out that the Scottish Ministers may, by regulations, make rules (RSP Rules) providing for the operation of the Register of Statutory Pledges. They must consult the Keeper before doing so.

471. The power to make RSP Rules includes the powers to authorise the redaction of information or signatures from an entry in the RSP (paragraphs (d) and (e) of subsection (2)), as well as the power in subsection (2)(f) to make certain information unavailable to searchers (which might include an individual's date of birth). Subsection (1)(c) would also permit the rules to specify the specificity with which the search mechanism for the register is to operate – for example, whether it returns close results or only exact matches.

Chapter 3 – Miscellaneous and interpretation of Part 2

Section 110 – Competence of creating an agricultural charge

472. This section prevents the creation of a new agricultural charge, which is a rarely used form of security right.

473. The agricultural charge was introduced by the Agricultural Credits (Scotland) Act 1929. It can only be granted by agricultural co-operatives in favour of banks. The effect is similar to a floating charge – though while a floating charge can cover property of every type, the agricultural charge is limited to “stocks of merchandise”. In addition, agricultural charges appear to now only be capable of enforcement by placing the debtor into insolvency (since sequestration for rent, which is provided for in the 1929 Act, no longer exists as a process). They have therefore fallen out of use. In practice, co-operatives grant floating charges rather than agricultural charges.

Section 111 – Interpretation of Part 2

474. This section defines key terms used in this Part. It should be read alongside section 116 which defines some terms for the purposes of the whole Bill, as well as schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

475. In particular, subsection (1) defines a “right in security” so that, unless the context requires otherwise, it includes a floating charge but does not include a right to use diligence – diligence being the Scots law term for the several methods of enforcing a debt due under a court order (or equivalent). The effect is that an effectively executed diligence is not to be treated as a security right for the purposes of the Part. The expression “right in security” can be used in various legal senses, including being limited to “true” securities where the secured creditor has a subordinate real right in the asset. For floating charges, however, there is no such real right prior to attachment (crystallisation) of the charge as a result of the insolvency of the legal person who granted the charge.

476. It should also be noted that the terms “provider” and “secured creditor” can include or, as the case may be, consist of successors in title. For example, if the secured creditor assigns their right as creditor to another person, it would be their successor in title who would be required to serve various notices if they wished to take enforcement action.

Part 3 – Miscellaneous and General

Computer system

Section 112 – Automated computer system

477. This section authorises the Keeper to operate the registers provided for under this Bill by means of an automated computer system. The effect is to facilitate the operation of an all-electronic register.

Registration of electronic documents

Section 112A – Competence of registration of electronic documents

478. This section deals with how the Bill interacts with section 9G of the Requirements of Writing (Scotland) Act 1995. Subsection (1)(d) of that section provides that in general it is not competent to record or register an electronic document in a register under the management and control of the Keeper of the Registers of Scotland unless certain conditions are met. One of those conditions is that the electronic signature is of such form and of such type as is prescribed by the Scottish Ministers in regulations.

479. As the current regulations prescribe more stringent requirements than the Bill’s definition of “authenticated”, this section of the Bill provides that those conditions do not have to be met in respect of registration in the Register of Assignations or the Register of Statutory Pledges.

Good faith

Section 113 – Good faith

480. This is a general provision relating to good faith provisions in the Bill (see sections 10 – 13, 51 – 53, 91 and 106). The effect is that, where an issue arises as to whether or a person is in good faith for the purposes of a provision in the Bill, then it is for the person asserting a lack of good faith to prove that the other person was not in good faith.

Review of the Act

Section 113A – Review of the Act

481. This section requires a review of the operation of the Act to be undertaken by the Scottish Ministers, and a report to be prepared on that review. The review must be undertaken after three years have elapsed from the day of Royal Assent. The review must, in particular, consider the operation of the provision relating to statutory pledges made by the Bill on sole traders and small businesses. The report must be published and laid before the Scottish Parliament as soon as practicable after the end of the three year review period.

General

Section 114 – Regulations

482. Subsection (1) of this section makes provision about the powers that attach to any power to make regulations under the Bill. In particular, different provision can be made for different purposes. This would allow, for example, different types of pledge enforcement notice to be prescribed for different types of encumbered property or different types of debtor.

483. Subsections (2) to (4) make provision about the level of parliamentary scrutiny to which regulations under the Bill are subject. For details of the negative and affirmative procedure, see, respectively, sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

484. Subsection (5) provides that this section does not apply to commencement regulations.

Section 115 – Ancillary provision

485. This section provides for a general regulation-making power that enables the Scottish Ministers to make provision for consequential and other incidental matters in order to give full effect to the Bill.

486. The power in this section allows the Scottish Ministers to amend any enactment, including the Bill. For the meaning of “enactment” see schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

487. Regulations under this section will be subject to the affirmative procedure where they modify primary legislation (see section 114(3) of the Bill). Otherwise, they will be subject to the negative procedure.

Section 116 – Interpretation of Act

488. This is the main interpretation provision in the Bill. However, sections 39 and 111 provide for the interpretation of terms used only in Part 1 or Part 2 respectively. See also section 113 of the Bill which provides for the effect of a reference in the Bill to a requirement for any person to be in good faith.

489. In addition, it should be noted that some terms, such as “document”, “writing” and “person”, will be construed in accordance with schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 unless the context requires otherwise. In particular, it should be noted that the term “writing” will include emailed documents.

490. The meaning of “execution” of a document refers to the Requirements of Writing (Scotland) Act 1995. But it is also possible for the Scottish Ministers to make alternative provision in relation to both this and “authentication” (see subsection (1B)).

Section 117 – Commencement

491. The provisions in the Bill will, except as provided for here, come into force on the day or days appointed by the Scottish Ministers in regulations made for that purpose under this section. Regulations under this section will be laid before the Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 118 – Short title

492. This section provides for the short title of the resulting Act to be the Moveable Transactions (Scotland) Act 2022.

This document relates to the Moveable Transactions (Scotland) Bill as amended at Stage 2 (SP Bill 15A)

MOVEABLE TRANSACTIONS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

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