



Law Society
of Scotland

Consultation Response

Discussion Paper 173 - Heritable Securities: Default
and Post Default

April 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Property and Land Law and Banking, Company and Insolvency sub-committees welcome the opportunity to consider and respond to the Scottish Law Commission's consultation on *Discussion Paper 173 - Heritable Securities: Default and Post Default*¹. We have the following comments to put forward for consideration.

Consultation response

1. What information or data do consultees have on:

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

(b) the potential economic impact of any option for reform proposed in this Discussion Paper? (Paragraph 1.22)

We have no comments.

2. When exercising a standard security, should a security holder be subject to a duty to conform with reasonable standards of commercial practice? (Paragraph 2.29)

No. We consider this unnecessary as security holders are already subject to various requirements and it seems unlikely that creditors would act in a manner which might lead to devaluation of the security property as they will usually wish to maximise the value.

¹ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/>

3. Do consultees have any comments on our approach to redemption post-default as outlined above? (Paragraph 2.38)

We agree with the approach set out in the Discussion Paper.

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

We have no comment.

(b) If so, what should the effect of any such provision be? (Paragraph 2.44)

We have no comment.

5. Should new legislation restate the principle prior tempore, potior jure as it applies to security over heritable property? (Paragraph 3.24)

No, for the reasons mentioned in the Discussion Paper we consider that new legislation should not restate the principle.

6. (a) Should a subsequent standard security holder be able to restrict the priority of an earlier standard security by giving notice?

No, as this would have the effect of altering the prior security holder's rights without their prior consent.

(b) If so, should post-notice voluntary advances by the prior security holder be unsecured, or treated in some other way? (Paragraph 3.32)

7. Do consultees agree that:

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

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

(c) Registration of the agreement in the Land Register is required to vary the terms of the standard securities concerned? (Paragraph 3.36)

Yes, we agree with all of (a) to (c).

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

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

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

Do consultees agree? (Paragraph 4.47)

Yes, we agree with both (a) and (b).

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

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

(c) Should the specified circumstances be subject to variation by the parties to the security? (Paragraph 4.50)

No, we consider that it is appropriate not to specify anything further, given the existing right to vary standard conditions.

10. Do consultees agree with the proposal that:

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

Yes, we agree with the move to one type of notice (i.e. getting rid of the distinction between calling up and default notices). We welcome the proposed simplification.

(b) The security holder will not be entitled to exercise remedies unless and until the default notice expires? (Paragraph 5.11)

Yes, we agree.

11. Do consultees agree that the form of the default notice should be prescribed by legislation? (Paragraph 5.15)

On balance, we consider that there would be merit in the form of the default notice being prescribed by legislation. This will provide consistency in the regime and certainty for security holders that the required conditions have been met.

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

We consider this to be finely balanced for the reasons noted in the Discussion Paper, but we favour primary legislation so as to ensure the legislation is clear and accessible in one place. We consider that the current position with the law in this area is unsatisfactory.

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

In general terms, we consider these to be appropriate. However, in complicated corporate financings, where a standard security is one of many global securities being enforced, it is not likely to be appropriate to have to set out the requirements of (iii) – (vi) in the default notice. For example, if a financial covenant had been breached, which resulted in the global security package being enforced, it would be incongruous for enforcement of standard securities to need to allow defaults to be remedied within timeframes.

We therefore suggest that the information set out in (iii) – (vi) should only apply to individuals or be otherwise limited in scope.

(c) What further key information, if any, should be included? (Paragraph 5.18)

We suggest that (i) the party serving the default notice is identified and (ii) the reason that they are the entity serving default notice (e.g. this will address situations where there has been an assignation of security or person entitled under the security but there has been no change of name of the security holder).

13. Do consultees agree with the proposal that a default notice may be served by the security holder or its agent? (Paragraph 5.20)

Yes. We consider it would be useful to expressly include reference to service by Sheriff Officers in the legislation.

14. Do consultees agree with the following provisional proposals?

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

Yes, but we consider there need to be different forms depending on who is being sent the notice, as under the current law, in order to avoid confusion.

We suggest that care needs to be taken about the wording of the relevant provision so as not to create confusion between those parties that must be served with a default notice and those where it is 'optional' (recognising that the security holder will require to do so if they wish to preserve a right of recourse).

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

Yes, we agree.

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

We agree.

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

We agree in principle that the serving party be deemed entitled to serve on a majority of the parties identified as trustees in the security documents, however, anticipate that there could be practical difficulties with this, particularly if there has been a change of trustees of the trust that is not reflected by amendments to the security or in the case of *ex officio* trustees whether a security holder may not have access to the relevant information about the organisation. In addition, how is the security holder expected to know how many trustees there are and their contact details? An alternative option could be to require the security holder to effect service on the principal place of business for the body of trustees. Consideration will also be required to the effect of this rule in cases where there are only two trustees.

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

We agree.

(f) Where the address of the person upon whom service should be made is unknown, or it is unknown whether the person is alive, or the notice is returned with intimation that delivery was unsuccessful, service is to be made on the Extractor of the Court of Session. (Paragraph 5.29)

We agree, although consider that the circumstances in which the *RBS v Jamieson* problem is to be resolved could be addressed more clearly. It is our understanding from paragraph 5.28 onwards of the Discussion Paper is that if a “no answer” response is shown on Recorded Delivery service, but the notice is not returned to the sender, the creditor should instruct a sheriff officer letterbox delivery / enquiry as to debtor’s residence before being entitled to serve on the Extractor (if sheriff officers not satisfied about residence). There should be a clear route for creditors for their entitlement to serve on the Extractor in *RBS v Jamieson* circumstances.

15. Where a security holder has been made aware that a guardian or attorney is acting on behalf of an intended recipient of a default notice who is an adult with incapacity, should service be made solely on the guardian or attorney on that adult's behalf? (Paragraph 5.31)

No, we consider that the default notice should also be served on the intended recipient, in the event that they regain capacity.

If the proposal is adopted, we suggest that consideration is given as to how the requirement for a security holder to have "been made aware" is to be satisfied. Consideration could be given to having the requirement to serve on a guardian or attorney triggered when the details of the guardian or attorney have been notified to the security holder.

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

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

Yes.

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

Yes.

(c) Electronic transmission where the electronic form of the notice and the electronic address for service has been agreed in writing by all relevant parties in advance? (Paragraph 5.40)

Yes.

17. Which, if any, other methods of service should be competent for default notices? (Paragraph 5.41)

We suggest consideration be given to possible suitable methods of service in cases where a debtor cannot be located such as service by advertisement.

Service by process servers in England and Wales should also be permitted.

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

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

Yes.

(b) At a specified address? (Paragraph 5.43)

Yes, in theory, but we note concerns about the specified address being kept up to date.

We consider that it should be made clear where the boundary lies between parties agreeing in writing and one party notifying the other in writing (before service of a default notice) of a change to the address referred to in such an agreement. What is the position about the latter? It seems that would not be an agreement between the parties and therefore would not be valid.

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

(a) 14 days after service?

(b) One month after service?

(c) Two months after service?

(d) Some other period, and if so, what? (Paragraph 5.46)

We consider that one or two months after service might provide an appropriate balance between the parties' respective interests. It would be preferable to use a fixed number of days rather than months in order to avoid uncertainty which could arise with reference to months, for example, the interpretation of one month from 31 January.

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

(a) the debtor;

(b) the owner or registered tenant;

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

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

- (e) the civil partner of the debtor, owner or registered tenant where the security property is a “family home” in terms of the Civil Partnership Act 2004 s 135(1);**
- (e) any “entitled resident” of the security property as defined in the enhanced debtor protection provisions of any new standard securities legislation? (Paragraph 5.48)**

Yes, we consider that this would be sensible, although we would also suggest that the creditor require to notify anyone not on this list who was served with the default notice (on the basis of preserving their rights) of such variation or dispensation.

21. Should section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 be excluded from application to any new standard securities legislation, and if so, why? (Paragraph 5.54)

No, we consider section 21 should not be excluded from application as it is appropriate that some leeway be afforded for minor non-conformity with the prescribed statutory form. However, in the interests of simplicity and pulling the relevant law together in one place, the wording of the 2010 Act could be replicated in the new legislation.

Alternatively, a provision could provide that this section is to be interpreted in the same manner as section 21 of the 2010 Act. It might be helpful to give consideration to whether some examples of what “materially affects the effect of the form” or “misleading” are in the context of the default notice and prescribed requirements thereof can be listed in the new legislation in such a section.

22. Should a bespoke route of challenge to a default notice (similar to that found in section 22 of the 1970 Act) be provided for in any new legislation? (Paragraph 5.59)

Yes, if the only other alternative is to petition the Court of Session. A bespoke route of challenge would also be appropriate in the circumstances where the recipient only has a short period of time to challenge the default notice before the security holder can enforce it.

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

(b) Why? (Paragraph 5.64)

We consider 5 years is sensible for the reasons set out in the Discussion Paper. Whatever expiration period is determined (even if 5 years), it should be expressly provided for within the Bill rather than for example by a consequential amendment to the 1973 Act.

24. Should an expired default notice continue to provide a valid basis for the exercise of remedies where the default giving rise to the notice is subsequently purged? Why or Why not? (Paragraph 5.68)

No, the security holder should have to serve a new default notice (in the same way that a landlord would have to do for a pre-irritancy notice).

25. Do consultees agree that a court order should not be required to exercise a remedy under a standard security, except where legislation specifically so provides? (Paragraph 6.20)

Yes, we consider that this seems sensible. If a debtor wants to challenge the enforcement, they have civil law remedies, including the potential bespoke regime, to do so.

26. Should a security holder be able to apply to the court for relevant orders in relation to the exercise of remedies even where such an order is not required by legislation? (Paragraph 6.21)

We consider that it could be useful to have this as an option. We would suggest that “Relevant orders in relation to the exercise of remedies” should be defined (e.g. as orders under the relevant statutory provisions) to avoid any confusion about competency.

27. Should court proceedings in respect of the exercise of standard securities be raised by way of ordinary cause procedure, except in cases to which the enhanced debtor protection measures apply? (Paragraph 6.23)

In the sheriff court, yes. Where it is a commercial related security, the Pursuer could elect the Commercial Action procedure under Ordinary Cause.

We question if it is suggested that the Court of Session be excluded? We would favour jurisdiction of the Court of Session being retained, particularly as some parties may wish to have the option of high value commercial security enforcement cases being heard in this forum.

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

(b) If not, why not? (Paragraph 6.27)

We generally consider that the obligation should continue to be subject to the long 20-year prescription. We consider that it would be appropriate to expressly provide this in the new legislation.

29. Should the person criterion for application of the enhanced debtor protection measures be satisfied where both the debtor and the owner of the security property are natural persons (including where the debtor and owner are the same person)? If not, what difficulties do you identify with this proposal? (Paragraph 7.55)

Yes.

30. Where the debtor is a natural person and the owner of the security property is a juristic person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made? (Paragraph 7.55)

Yes, we consider that they should be modified so that

- a) the creditor does not have to make reasonable efforts to agree with the debtor proposals in respect of future payments to the creditor under the standard security and the fulfilment of any other obligation under the standard security in respect of which the debtor is in default (as required by section 24A(3) of the 1970 Act), and
- b) the creditor also no longer requires to encourage the debtor to contact the local authority in whose area the security subjects are situated (as required by section 24A(6) of the 1970 Act).

31. Where the debtor is a juristic person and the owner of the security property is a natural person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made? (Paragraph 7.55)

No.

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

Yes.

(b) If not, what difficulties do you identify with this proposal, and what would you propose as an alternative? (Paragraph 7.62)

N/A.

33. Should the term “dwellinghouse” be defined in new legislation, if the property criterion is that the security property “comprises or includes a dwellinghouse” as suggested above? (Paragraph 7.62)

No.

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

Yes.

(b) Should the legislation provide for any other exceptions, and if so, what? (Paragraph 7.62)

We have no comment.

35. Where a default notice is served in relation to a security property which meets the property criterion for application of the enhanced debtor protection measures, the security holder must give notification of the same to the occupier(s) of that property and to the local authority in which the property is located. Do consultees agree? (Paragraph 7.67)

Yes.

36. Are any amendments, additions or deletions to the PARs required? If so, what? (Paragraph 8.6)

No.

37. Should the “headline” requirements of the PARs continue to be provided for in primary legislation, with further detail in secondary legislation and guidance, as at present? (Paragraph 8.7)

Yes.

38. Other than those outlined in this Discussion Paper, what difficulties exist with the procedure for application for warrant under the 1970 Act, section 24(1B)? (Paragraph 8.10)

We have no comment.

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

Yes.

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

Yes.

(c) Are any other amendments, additions or deletions to the section 24(7) factors required? If so, what? (Paragraph 8.14)

We have no comment.

40. Should new legislation provide the court with guidance on how to balance the interests of the debtor, owner and entitled residents in considering factors equivalent to those currently listed at section 24(7)? If so, what guidance should be given? (Paragraph 8.15)

No, we consider that this will depend on the particular circumstances of each case.

41. Are any amendments, additions or deletions required to the definition of entitled resident set out in section 24C? If so, what? (Paragraph 8.18)

No.

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

- (i) they are not in occupation of the security property;**
- (ii) they consent to the exercise of remedies under the security;**
- (iii) their consent was given freely and without coercion of any kind?**

Yes.

(b) Should the debtor, the owner and any entitled resident also be required to confirm that the security property is unoccupied? (Paragraph 8.22)

No.

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

Yes.

(b) Should new legislation include any remedy not currently provided for, and if so, which remedy? (Paragraph 9.5)

No.

44. Should receivership be available as a remedy under any new legislation on standard securities? If so, what powers should be available to the receiver? (Paragraph 9.12)

No.

45. Should any restriction be placed on the security holder's choice between the remedies of sale and management of the security property? If so, what form of restriction is appropriate? (Paragraph 9.17)

No, we do not consider it appropriate to place such a restriction as there could be good reason why a security holder may choose to manage rather than sell a security property.

46. Do consultees agree that it should not be possible to vary the statutory provisions on exercise of remedies under a standard security? (Paragraph 9.23)

Yes, we agree.

47. Do consultees agree that remedies under a standard security should continue to be exercisable by or on behalf of the security holder? (Paragraph 9.24)

Yes, we agree.

48. What comments do consultees have as to the powers of postponed (or *pari passu*) security holders to exercise remedies without the consent of prior (or *pari passu*) security holders? (Paragraph 9.28)

We consider that postponed or *pari passu* security holders should be allowed to exercise remedies without prior consent on the basis that all security holders will be entitled to their appropriate share (see para 9.26) but without such option, postponed or *pari passu* security holders would be reliant upon action by the primary security holder.

49. (a) Should provision equivalent to section 27 of the 1970 Act on application of the proceeds of sale be made in any new legislation?

Yes.

(b) Should this provision be extended to cover the proceeds of any remedy exercised under a security? (Paragraph 9.31)

Yes.

50. Should new legislation on standard securities provide that a security holder may seek decree of ejection against any person in natural possession of the land or buildings in which the security is held where that person has no legal basis to occupy? (Paragraph 10.11)

Yes, although the new legislation should take account of the fact that a person in natural possession may have a legal basis for occupancy other than a lease or licence, for example, following the end of an Electronic Communications Code operator's lease.

51. Do consultees agree that the only basis for ejection under a standard security should be the relevant statutory provision? (Paragraph 10.13)

Yes.

52. When seeking to remove an assured or private residential tenant from the security property, should a security holder be required to obtain an order for possession under the relevant tenancy legislation? (Paragraph 10.21)

Yes.

53. (a) Should new legislation on standard securities provide guidance on how the security holder's duty of care in relation to moveables left in the security property may be discharged?

We consider that moveables should be treated as abandoned property under the Civic Government (Scotland) Act 1982.

(b) If so, what guidance would be appropriate? (Paragraph 10.26)

N/A

54.(a) In future legislation, should “taking possession” be defined to mean taking action to physically secure the land or buildings in which the security is held, including taking possession through a third party such as a tenant? If not, why not?

Yes.

(b) Should the legislation include a non-exhaustive list of actions which meet the definition of possession? If so, which actions should be included? (Paragraph 11.36)

Yes.

55. On entry into possession, should a security holder be able to exercise the rights of the owner or registered tenant in relation to the management and maintenance of the security property where:

(a) Management of the security property includes exercise of any rights required in connection with the aim of enforcing performance of the secured obligation;

Yes.

(b) Maintenance of the security property includes any reconstruction, alteration or improvement reasonably required for the purpose of maintaining its market value? (Paragraph 11.41)

Yes.

56. On entry into possession:

(a) Should a security holder assume the obligations of the owner or registered tenant in relation to the management and maintenance of the security property?

Yes.

(b) Should this include responsibility for outstanding costs previously incurred by the owner or registered tenant in relation to the management and maintenance of the security property? (Paragraph 11.46)

No, except as already provided for in the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004.

57. Do consultees agree that the security holder's right to collect rents and grant and administer leases under any new legislation should follow from entry into possession of the security property? (Paragraph 12.3)

Yes.

58. Should the security holder's remedy of collection of rents cover:

(a) Rents which fall due on or after the security holder's entitlement to rents arises?

(b) Rents which fell due prior to the security holder's entitlement arising, but have yet to be paid? (Paragraph 12.7)

Yes, both (a) and (b).

59. In any new legislation, should the power to grant a lease be available under a standard security only where the security property is ownership of land or buildings? (Paragraph 12.9)

No. It is appropriate that a security holder be permitted to grant a sub-lease where the security property is a registered lease and its terms permit sub-leases to be granted.**60. In relation to the grant of (sub-)leases by the security holder:**

(a) What comments do consultees have on the current use of this remedy in practice?

We have no comment.

(b) What duration of lease should the security holder be entitled to grant without warrant of the court?

We have no substantive comment although note that the seven-year period seems somewhat unusual and potentially out of step with market trends. A longer duration may be appropriate.

(c) Would the extension of the seven-year limit in relation to leases give rise to any debtor protection concerns? If so, what measures should be taken to address these concerns?

We consider that a continued need to obtain a court order for longer leases should protect debtors where necessary.

(d) What limits, if any, should be placed on the power of a security holder to grant a private residential tenancy? (Paragraph 12.15)

We consider that granting a private residential tenancy should be subject to obtaining warrant of the court.

61. We provisionally propose that, on entering into possession of the security property:

(a) A security holder should be entitled to exercise the rights of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property; and

(b) A security holder should assume the obligations of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property.

Do consultees agree? (Paragraph 12.18)

Yes.

62. Should a court order be required for the security holder to exercise the power of sale? (Paragraph 13.28)

No.

63. Should the selling security holder continue to have the choice to sell by private bargain or by public auction? If not, what reform would you propose here? (Paragraph 13.35)

Yes.

64. (a) Should the selling security holder be placed under a duty to take all reasonable steps to obtain (i) the best price reasonably obtainable, (ii) the market value of the security property or (iii) some other objective?

The best price reasonably obtainable, recognising that in some cases, this may be less than the market value.

(b) Should the legislation include a non-exhaustive list of factors (capable of amendment by secondary legislation) to be considered by the court in determining whether this duty has been discharged? If so, which factors should be included, and why? (Paragraph 13.39)

Yes. We suggest that the period of time during which the property was exposed for sale, the nature and extent of advertising undertaken and the employment (or not) of professional marketing agents should be included.

65. Where a purchaser acquires property from the security holder exercising its power of sale under the security, should legislation provide that:

(a) The transfer is valid notwithstanding the lack of capacity of the debtor, the owner, or any other party entitled to receipt of notice of enforcement proceedings under the security; and

(b) The title acquired is protected against any challenge arising from extinction of the secured obligation or from defects in the process by which the security holder's power of sale is established, so long as certain conditions are fulfilled? (Paragraph 13.47)

Yes.

66. Do consultees agree that the conditions referred to in part (b) above should be as follows:

(a) The purchaser paid value for the security property;

(b) The purchaser was in good faith prior to the conclusion of missives, with the following factors taken into account in determining whether this requirement has been met:

(i) The purchaser's actual or constructive knowledge that the secured obligation had been extinguished;

(ii) The purchaser's actual or constructive knowledge of defects in the process by which the security holder's power of sale was established;

(iii) Attempts made by the purchaser to satisfy themselves that the purchaser has discharged its best price duty;

(iv) Whether the purchaser is a close associate of the security holder? (Paragraph 13.47)

We broadly agree with these conditions although in reference to (b)(iii), we question the reference to the purchaser having discharged its best price duty since this is the duty of the security holder. We suggest "close associate" in (b)(iv) be defined.

67. Do consultees agree that any new legislation should provide that:

(a) The security holder's remedy of sale of the security property includes the power to grant a disposition transferring ownership of that property.

(b) Registration of a disposition granted under this power has the effect of disburdening the property sold of the standard security, and of any pari passu and postponed securities. (Paragraph 13.49)

Yes, we agree.

68. Is any reform required to the foreclosure process? If so, which reforms would be appropriate? (Paragraph 14.22)

Where the security property's value exceeds the amount owed, the creditor should have to account for the surplus to other creditors or the debtor. They should not be entitled to a windfall benefit.

69. (a) Should the debtor be liable to the security holder for expenses reasonably incurred in exercising the security?

Yes.

(b) Should the expenses of litigation be "reasonably incurred" only to the extent of any award by the court or agreement between the parties?

Yes.

(c) Is there an alternative approach to the debtor's liability for expenses that you would consider more appropriate, and if so, why? (Paragraph 15.13)

No.



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