

Judicial Factors (Scotland) Bill

Business and Regulatory Impact Assessment

December 2023

Judicial Factors (Scotland) Bill

Purpose and intended effect

Background

A judicial factor is an officer appointed by the court, and supervised by the Accountant of Court, for the purpose of holding, managing, administering and protecting the property of another wherever the need arises. A judicial factor can be appointed in many different situations. A common example today is those appointed at the instance of the Law Society of Scotland to firms of solicitors where there has been a breach of professional practice and the firm's liabilities exceed, or appear likely to exceed, its assets. Other examples include those appointed where a partnership is in dispute or where those running a charity appear to have been managing it inappropriately.

The office of judicial factor has a long history in Scots law and there is a continuing need for capable administrators to be appointed to manage the property of those who cannot, should not or will not manage it properly themselves. Although there is such a continuing need, the current law on judicial factors is now regarded by those who use it as outdated, with a cumbersome procedure, sometimes involving disproportionate expense, and no longer fit for purpose. This is principally due to the fact that since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to the details of the procedure. Furthermore, there seems to be a lack of clarity as to the extent of judicial factors' powers which results in judicial factors being reluctant to take certain actions, despite them being deemed to be desirable, without applying to court for additional powers first. Some powers of judicial factors are also to be found in legislation relating to trusts, which makes it difficult for third parties dealing with judicial factors, and the judicial factors themselves, to know what such officers are or are not entitled to do.

Objective

The Bill seeks to implement the recommendations contained in the Scottish Law Commission's Report on Judicial Factors (Scot Law Com No 233, 2013).¹

The objective is to update, simplify and clarify the law of Scotland relating to judicial factors so that it is fit for purpose and of benefit to all those involved, in any capacity, in judicial factories.

Rationale for Government intervention

This Bill is being put forward as the policy objective can be achieved only by legislation in the Scottish Parliament.

¹ The report can be accessed at the following link <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/judicial-factors/>

The law relating to judicial factories often provides a solution where no suitable alternative exists in Scots law. It is therefore essential that clarity, accessibility and efficiency should be brought to this vital but outmoded area of the law.

The law reform projects that the Scottish Law Commission (“the SLC”) undertakes are designed to contribute to the Scottish Government’s National Outcomes, by recommending reforms that will help to provide an improved and modernised legal framework within which these National Outcomes can be pursued. The recommendations on judicial factors will contribute to the National Outcome on fair work and business, by providing the necessary legislative framework to help make our economy more stable, productive and efficient. The recommendations relating to the Accountant of Court in her role as supervisor of judicial factors will contribute to the National Outcome that we have high quality, affordable and accessible public services that positively enhance our lives.²

Consultation

Prior to developing policy to take forward a consultation on this subject, the SLC met interested parties in order to obtain the benefit of their expertise in this area of the law. Meetings took place with various judicial factors, the Accountant of Court, the Law Society of Scotland, the Chief Executive of the (then) Scottish Courts Service, Head of the Justice Directorate of the Scottish Government, the Accountant in Bankruptcy, representatives of the Crown Office, the Civil Recovery Unit and the Office of the Scottish Charity Regulator, an advocate and a solicitor.

In December 2010, when the SLC published the Discussion Paper on Judicial Factors (“the Discussion Paper”)³, it was circulated to individuals and bodies which it had identified as having an interest in the project. The Discussion Paper was also available on the SLC’s website and publicised by a news release issued on the day of publication. Furthermore, letters were sent by the Depute Accountant of Court to approximately 60 judicial factors acting in the cases open at the time, drawing their attention to the consultation. The consultation was featured in Scottish Legal News and in the online version of the Journal of the Law Society of Scotland. The Discussion Paper sought views on 60 proposals and questions over a consultation period of just over sixteen weeks. Fourteen responses were received.

In drafting the Bill and the Report, the SLC carried out a round of further consultation and engagement with the key stakeholders, namely the Accountant of Court and the Law Society of Scotland for its interests in seeking the appointment of judicial factors to firms of solicitors in terms of the Solicitors (Scotland) Act 1980. Others with an interest in the project were consulted as well.

Within Government

The Accountant of Court is included here as the Accountant is appointed by the Scottish Courts and Tribunals Service (previously Scottish Court Service), a Non-

² More information on the Scottish Government’s National Performance Framework can be found at the following link <https://nationalperformance.gov.scot>.

³ The discussion paper is available at the following link <https://www.scotlawcom.gov.uk/files/4512/9744/4722/dp146.pdf>.

Ministerial Office and part of the Scottish Administration. As the official with responsibility for supervising judicial factors, the Accountant of Court has been consulted at all stages of the SLC's project. In addition to consultation by correspondence and at meetings, the Accountant has submitted a written response to the Discussion Paper. The Accountant's views have been taken into account in the formulation of the policy underlying the Bill.

The SLC consulted the Registers of Scotland, a Non-Ministerial Office and part of the Scottish Administration. The Keeper submitted a response to the Discussion Paper and subsequent correspondence was entered into about the interface of the recommendations with land registration and the recommendations about registration in the Register of Inhibitions.

The SLC met with the Office of the Scottish Charity Regulator, a Non-Ministerial Office and part of the Scottish Administration, to discuss existing arrangements for the appointment of judicial factors to charities as well as the proposed arrangements for such appointments under the then Charities and Trustee Investment (Scotland) Bill (now the Charities and Trustee Investment (Scotland) Act 2005). The views expressed assisted the development of general policy.

Meetings between the SLC and the Head of the Justice Directorate, the Accountant of Bankruptcy and the Chief Executive of the (then) Scottish Court Service were held to float the idea of a new Official Judicial Factor (in terms of the alternative approach rejected by the SLC as unsupported on consultation). The Scottish Courts and Tribunal Service was subsequently consulted about the recommendations on jurisdiction.

Public consultation

The Discussion Paper was open for general public consultation and was available on the website of the SLC as well as being available for purchase from the Stationary Office. Only one response to the consultation was received from a member of the general public. This may reflect the technical nature of the topic. Furthermore, having been intimated, again with the assistance of the Depute Accountant of Court, to those professionals acting in the current judicial factories, and also announced in Scottish Legal News, a draft of the Bill, and a series of questions on the possible costs and benefits of the recommendations, were made available for comment on the SLC's website. A consultant to a firm of solicitors submitted two comments on the draft Bill. An insolvency practitioner appointed to the panel of judicial factors available to the Law Society of Scotland provided some feedback on costs and benefits.

The Scottish Government consulted on the SLC's recommendations in its own public consultation published on its website. The consultation sought views on the SLC's draft Bill and some of the recommendations made by the Commission and views on related issues. The consultation ran from 28 August 2019 until 20 November 2019 and there were nine responses.

Business

The SLC engaged with a number of persons with business interests. The input of these interests, whose businesses had a variety of experience in dealing with the existing regime governing judicial factors, greatly assisted the formulation of the SLC's policy in relation to the practical aspects of judicial factories. All supported a modernisation of the current regime.

Options

- Option 1 – Do nothing

Under this option the Bill would not be introduced. The existing outmoded and cumbersome law on judicial factors, sometimes involving disproportionate expense, would continue. The benefits discussed under Option 2 would not be realised.

- Option 2 – Introduce the Bill

Under this option the recommendations outlined in the Report and implemented though the Bill would be introduced, resulting in an efficient, clear, fit for purpose regime governing judicial factors.

Sectors and groups affected

The Bill would impact upon the following:

- Those people or bodies in Scotland over whose property a judicial factor is appointed;
- Those who apply to the courts for the appointment of a judicial factor;
- Those appointed as a judicial factor (who tend to be accountants or solicitors); and,
- The Accountant of Court as supervisor of judicial factors (and the Scottish Courts and Tribunals Service as employer of the Accountant).

We have concluded that the Bill will not adversely impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race, or ethnicity.

Benefits

- Option 1

Option 1 would bring no benefits. Those affected would continue to have to deal with the existing law which dates back to the 19th century. The law is cumbersome and often unclear and the related processes can involve disproportionate expense. Those involved in judicial factories, including the judicial factors themselves, would continue to have difficulty in finding out the exact extent of a judicial factor's powers and duties.

- Option 2

For those over whose property a judicial factor is appointed and those who apply to the courts for such an appointment, the Bill would bring clarity as to the appropriate processes to be followed and as to the functions of judicial factors. The new regime

would be more user-friendly, resulting in all those coming into contact with having better understanding of it. The flexibility introduced by the Bill would also mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. The Scottish Government does not anticipate, however, any marked increase to the annual average of 7 applications, a majority of which will likely be applications by the Law Society of Scotland under the Solicitors (Scotland) Act 1980.⁴ In 2022, of the 64 judicial factories being supervised by the Accountant of Court, 20 involved an appointment made under the Solicitors (Scotland) Act 1980.

It is anticipated that in the majority of cases there would be a reduction in the duration of a judicial factory given the changes brought about by the Bill. For instance, the clarity as to the functions of judicial factors, the simplified processes, the encouragement of settlement in cases of dispute and the greater use of procedures for approval by the Accountant of Court of a scheme for distribution of the factory estate and termination, recall and discharge by the Accountant of Court, as opposed to by the courts, could help to reduce the length of time a judicial factor is appointed to manage property. These changes are also considered likely to bring cost savings. For more on the potential savings in costs which Option 2 would bring, please see below.

For those acting as judicial factors, the Bill would bring a simplified and clearer processes with clear duties and powers largely set out in the one statute rather than being interspersed with legislation on trusts. In place of the current scheme for commission which is regarded as outmoded and unreasonable by most judicial factors, the Bill would also introduce a more structured system of remuneration which may encourage practitioners to take on this kind of work. In the words of an experienced judicial factor: “A major benefit should be accessibility and an understanding of the law of judicial factors to both professionals involved and the subjects of the judicial factory.”

An experienced judicial factor said: “I would have thought that most of the recommendations should see a simplified process and hence a reduction in cost.” Another such factor commented: “In my view updating the law can only be beneficial and there should be a cost saving in almost every case. The exact cost saving will depend on the type of case but an updated Act should lead to a substantial saving in professional time and relevant costs even where a case does not proceed.” Examples of such cost saving are:

Clarity

Clarity regarding powers and duties would mean that the need for a judicial factor to apply to the court for additional powers should be greatly reduced, resulting in a saving to the estates concerned of the relative court costs. Similarly, there should no longer be much need for judicial factors to spend time consulting the Accountant of Court about whether or not they have a particular power. Clarity would also enable cases to proceed without delay as third parties would have easy access to a statement of the powers of a judicial factor. Judicial factors would also be clear as to

⁴ This average is taken over the years 2018 to 2022.

their role and responsibilities. A speedier process would result in savings as the period for which the factor could potentially be remunerated would be reduced.

Bonds of caution

The SLC recommendation is for a move from the current system where caution must be found in all cases to a system where the court has a discretion as to whether or not to order caution to be found. This discretion is to be exercised sparingly, with the court only requiring caution where it considers exceptional circumstances make it reasonable to do so, which would produce substantial savings. There are a number of cautionary providers operating within the market, each of whom may have their own prevailing rates for premiums. These cautionary providers offer their services based on their individual pricing structures, which can contribute to the range of costs observed for Bonds of Caution. In a sample of six cases in terms of the Solicitors (Scotland) Act 1980, the Law Society of Scotland calculated that the costs of the bond of caution varied from £60 to £3000.

Accounts

In a sample of five cases provided by the Law Society of Scotland, costs for the current requirement to prepare a detailed account of charge and discharge ranged from £700 to £3,500. Preparation of a simplified account in the same case, which the Bill would allow for, would result in a reduction due to the fact that the cross checks included in an account of charge and discharge would not be necessary. It is anticipated that, as a result of the simplified form of accounts, audit costs too would fall. In a sample of six cases in terms of the Solicitors (Scotland) Act 1980 the Law Society have calculated that audit costs ranged from £611 to approximately £1,223. There is a tiered system for determining the Accountant of Court's fees. For instance, based on an estate value of less than £30,000, the appropriate cost payable to the Accountant of Court to audit each account lodged, is £123; where the estate is above £500,000 the cost is £1,247.

Settlement

Currently, in cases such as those in partnership disputes and cases under the Solicitors (Scotland) Act 1980, incidental costs can arise because of the contentious nature of these appointments. The recommended introduction of a duty on the judicial factor to promote agreement on how to manage the estate by means including mediation or arbitration, and failing such agreement to formulate a scheme for the management or distribution of the estate, would assist in the reduction of costs by breaking through the stalemate created by the entrenched positions.

Termination

Currently, the average costs of bringing a judicial factor to an end range from approximately £1,000 - £25,000, taken from a sample of 6 cases provided by the Law Society of Scotland. The costs associated with discharge can vary significantly based on whether parties involved in the case raise objections and lodge defences. An extended use of procedures for approval by the Accountant of Court of a scheme for distribution of the factor estate and termination, recall and discharge by the Accountant of Court as provided for in the Bill would, in the words of one practitioner,

“reduce these costs substantially but more importantly would reduce delays and red tape at the culmination of a factory.” At present, a petition to the court requesting that the factory be brought to an end requires the Accountant to produce a report on the factory. Dealing directly with termination, recall and discharge would involve similar considerations by the Accountant. With court costs and law agents’ costs, however, an extended use of procedures for termination, recall and discharge by the Accountant would be likely to result in significant savings over a period of time.

Costs

- Option 1

The disproportionate expense attaching to some cases under Option 1 due to the cumbersome nature of the current procedure would remain. Due to uncertainties over powers and duties, there may be ongoing costs in relation to the need to resort to litigation to resolve matters.

- Option 2

From the information provided to the SLC at the time of the Report’s publication by those who have acted as judicial factors, the costs of having a petition for the appointment of a judicial factor drafted and presented to court vary from case to case depending on the nature of the judicial factory and can range from approximately £3,000 to £14,000 (taken from a sample of 7 cases provided by the Law Society of Scotland). It is not anticipated that these figures would alter as a result of the reforms introduced by the Bill but it is thought that wider knowledge of the general concurrent jurisdiction of the sheriff court and the Court of Session would assist in keeping these costs to the estate as low as possible.

Applications for the appointment of a judicial factor over a charity are normally made by the Office of the Scottish Charity Regulator (OSCR). These applications arise where there are concerns that there has been misconduct in the administration of a charity, where the property of the charity needs to be protected or where it is not being used for its charitable purposes. A judicial factor will normally be appointed to manage the affairs of the charity and take steps to safeguard its assets. In the last 5 years 3 judicial factors have been appointed on application by OSCR. In two of these applications for appointment, legal costs borne by OSCR, including court dues, VAT and Counsel’s fees were in the region of £6000; in the other costs were in excess of this due to more complex factual circumstances.

The existing system of commission is regarded by most judicial factors as outmoded and unacceptable as it does not (in their opinion) reflect the rates which they are able to charge for similar professional duties; in other words, rates of commission have been kept at artificially low rates. The reforms in the Bill would result in professional people acting as judicial factors being paid at appropriate professional rates. However, there are two matters which may nevertheless reduce overall costs.

First, the reforms would require work done at a lower level on the factor’s behalf to be charged at rates reflecting the lower level nature of that work. As much of the work of a judicial factor is of an administrative nature, the Scottish Government

therefore anticipates, overall, the possibility of a decrease in costs to the estate in this regard, or that the recommendation would be cost neutral.

Second, there is an element of prestige in being appointed by the court to act as a judicial factor - it is in a sense a public acknowledgment of the professional calibre of the person involved. It may therefore be that, as in cases where independent counsel are appointed to act on behalf of the Government, factors may be prepared to charge a lower rate. The Scottish Government would expect the Accountant of Court, who will be tasked with fixing the fees following appropriate consultation, to take that into account.

Fees would be payable from the estate in the event of the judicial factor deciding that it would be appropriate, in the circumstances of that particular judicial factory, to complete title to property forming the estate or any part of it. Fees for registration of a Notice of Title in either the General Register of Sasines or the Land Register are calculated on the value of the subjects (the latter of which provides a state-backed guarantee upon registration). Current fees range from £80 for subjects the value of which does not exceed £50,000, £660 for subjects the value of which does not exceed £500,000, to £8,250 for subjects the value of which exceeds £5,000,000. No fee is charged by Companies House for the registration of title to company shares.

Fees would be payable in respect of the requirement to register (and re-register) notices of appointment and certificates of termination of the judicial factory in the Register of Inhibitions. Under the current Fee Order, there would be a £25 registration fee on each occasion.

Incidental costs such as key personnel insurance, costs for basic banking facilities and costs of correspondence apply in all existing cases and tend not to be excessive. It is not anticipated that these costs would alter as a result of the reforms introduced by the Bill.

Scottish Firms Impact Test

It is not anticipated that the proposals would have any significant impact on any particular sector, market or industry. The average number of new judicial factories per year between 2018 and 2022 is seven.

As mentioned above, the SLC engaged with a number of business interests that had a variety of experience dealing with the existing regime governing judicial factors. This input greatly assisted the formulation of policy in relation to the practical aspects of judicial factories, and all supported a modernisation of the current regime.

Competition Assessment

It is not anticipated that the Bill will have an impact on competition within Scotland. The proposals within the Bill do not create a competitive advantage for any particular business or individual.

Consumer Assessment

It is not anticipated that the Bill will have an impact on consumers within Scotland. A judicial factor is appointed by the court to oversee property that is not being properly managed and is not generally a service sought by consumers.

Test run of business forms

The Bill prescribes no new business forms. There is therefore no requirement to carry out a test run.

Digital Impact Test

The Scottish Government does not consider that the Bill will give rise to any immediate or direct impact on technology or technological advances.

Legal Aid Impact Test

The Scottish Government does not anticipate any marked difference to the annual average applications for appointment of a judicial factor, a majority of which will be applications by the Law Society of Scotland under the Solicitors (Scotland) Act 1980. Further, given that the use of procedures for approval by the Accountant of Court of a scheme for distribution of the factory estate and termination, recall and discharge by the Accountant of Court is likely to be the norm, the proposals are not expected to have any impact on the legal aid fund. The Scottish Legal Aid Board do not anticipate that the Bill will adversely affect either the legal aid scheme or the legal aid fund.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement as such. Judicial factors would continue to be under the supervision of the Accountant of Court as they are under the current law. The Bill does not impose any sanctions.

Implementation and delivery plan

If passed by the Scottish Parliament, the substantive provisions of the Bill would come into force on such day as the Scottish Ministers may by regulations appoint. This would allow time for revision of the relevant rules of court.

It is also intended that some provisions in the Bill should extend to the whole of the United Kingdom in order that a judicial factor is able to exercise their functions in relation to the whole of the estate, regardless of where in the United Kingdom the property is situated, ensuring that the relevant property is appropriately managed. The Scottish Government has concluded that in order to achieve this effect it is appropriate that these provisions should be applied by an Order under section 104 of the Scotland Act 1998 and, accordingly, will discuss this matter with the UK Government.

Post-implementation review

Given the relatively small number of judicial factories each year, it is difficult to state a case for an urgent post-implementation review.

Further, in accordance with the Law Commissions Act 1965, section 3(1), the SLC has a duty to keep under review the laws with which it is concerned. The Scottish Government expects that the SLC will endeavour to stay informed of the Bill's reception if it becomes an Act.

Summary and recommendation

- Dismiss Option 1

Under this option, the existing outmoded and cumbersome law on judicial factors would continue. This is an unacceptable outcome.

- Recommend Option 2

It is recommended that Option 2, the introduction of the Judicial Factors (Scotland) Bill, be adopted for the various reasons outlined above.

Summary costs and benefits table

Option 1

Total benefit per annum (economic, environmental, social)

Nil.

Total cost per annum (economic, environmental, social)

The disproportionate expenses attaching to some cases under option 1 due to the cumbersome nature of the current procedure would remain. Costs of finding caution can be onerous. Outmoded accounting methods are expensive to comply with and to audit.

Due to uncertainties over powers and duties, there may be ongoing costs in order to resolve matters. This can cause judicial factories to be in place for longer than is necessary and thereby cost more in terms of matters such as remuneration of factors. The current lack of a structured system of remuneration of factors can lead to over-charging. A restricted ability to bring a judicial factory to an end without court intervention results in further court costs being incurred.

There would also be certain incidental costs.

Option 2

Total benefit per annum (economic, environmental, social)

This would provide a modernised, simplified and fit for purpose regime, resulting in all those coming into contact with it being better informed and able to handle matters more efficiently. There would be clarity as to appropriate processes to be followed and as to powers and duties of judicial factors. The solution of appointing a judicial factor could become more attractive in a wider range of circumstances. It is

anticipated that in the majority of cases there would be a reduction in the duration of a judicial factor.

The Bill would also introduce a more structured system of remuneration which may encourage practitioners to take on this kind of work. The provisions allowing for modern accounting methods to be used and increased use of procedures for bringing judicial factories to an end by the Accountant of Court rather than the court would bring substantial cost savings.

Clarity regarding powers and duties would mean that the need for a judicial factor to petition the court for other powers should be greatly reduced, resulting in a saving to the estates concerned of the relative court costs. Similarly, a speedier process would result in savings as the period for which a factor could potentially be remunerated would be reduced.

Clarity would also enable cases to proceed without delay as third parties would have easy access to a statement of the powers of a judicial factor. Judicial factors would also be clear as to their role and responsibilities so that there should no longer be much need for judicial factors to spend time consulting the Accountant of Court about whether or not they have a particular power.

A move from the current system where caution must be found in all cases to one where the court has a discretion to require caution to be found in exceptional circumstances only, would produce substantial savings. Simplified accounts would cost less to produce and audit.

The introduction of a duty to promote agreement between parties in cases where the factory estate is an object of a dispute would assist in the reduction of costs by breaking through the stalemate created by entrenched positions.

Total cost per annum (economic, environmental, social)

Court application costs would be unlikely to alter post-reform but wider knowledge of concurrent jurisdiction should assist in keeping these as low as possible. The reforms would result in judicial factors being paid at professional rates. However, requiring work done at a lower level to be charged at lower rates may reduce overall costs.

Registration dues would be payable in instances of completion of title and also for the registration of certain notices in the Register of Inhibitions.

Incidental costs would be much as under the current regime.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Siobhian Brown

Minister for Victims and Community Safety

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Civil Law and Legal System; Private Law

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