



Response by the Faculty of Advocates

to the

Judicial Factors (Scotland) Bill Committee Consultation

Question 1

We note that the Bill as introduced largely reflects the SLC's Draft Bill from 2013. We note that the SLC's 2013 Draft Bill did not in all respects fully reflect the Faculty's responses to the 2011 Discussion Paper. The Faculty acknowledges the utility of updating the law in relation to judicial factors in Scotland in statutory form. The Faculty will confine its responses to the drafting of the Bill as introduced.

Question 2

In relation to sections 1(1), 1(2) and 1(3) we note that there is a requirement to intimate the application to every person with an interest in the case of an application under section 1 (1). We do not understand why there is no requirement to intimate the application to every person with an interest in the case of an appointment in the course of proceedings (section 1(3)). It would seem desirable that there be a requirement to intimate in the case of both an application under section 1(1) and an appointment under 1(3).

We would also suggest that there should be a provision for the court to have a discretion to dispense with the need to intimate in certain situations (for example where the whereabouts of a person are unknown and cannot with reasonable enquiry be ascertained).

Section 1(5) does not address the question of the privative jurisdiction of Sheriff Court under the Courts Reform (Scotland) Act 2014. To clarify matters it may be that it should be specified that in relation to the appointment of judicial factors the Court of Session retains jurisdiction regardless of value of the estate.

Section 4(1) does not currently include as a criterion the consent of the person to be appointed (albeit that section 4(2) appears to assume that this is required). We suggest that this be explicitly added as a fourth criterion.

Section 4(2) currently provides that acceptance of the office by a person domiciled outside Scotland prorogates the jurisdiction of the Scottish courts. We would suggest that this requires further specificity and that it should provide that it (i) prorogates jurisdiction to the court of appointment; and (ii) that prorogation of jurisdiction is only in respect of matters arising in relation to the judicial factory.

Section 6(1)(b): While we can understand the choice of the Register of Inhibitions from the perspective of a conveyancer seeking to purchase heritable property it is not a register that is easily searched by members of the public. They have to do so by making a request to Registers of Scotland and paying a fee. If the principal purposes of maintaining a register are to allow the public to see what judicial factories exist and to what they pertain, and to identify the appropriate service address, then it would seem sensible to have a dedicated Register of Judicial Factories which is easily searchable.



Sections 6(2)-(3) require a factor to register an address for service of documents and to repeat that registration every five years, but does not currently provide a mechanism for updating the service address during that period.

Section 7(3) currently appears to catch everything a solicitor might hold in a fiduciary capacity including family trusts, charities etc. The court is given power to specify otherwise, but only at the time of appointment. However, the court may not have a full picture of the solicitor's affairs at the time of appointment. We suggest that there should be some mechanism for removing such items from a factory subsequently. Consideration should be given to situations where, for example, the solicitor could be just one of several trustees. Where a judicial factor on the estate of a solicitor has become vested in trust estates and some of those trust estates have capable trustees, it may be sensible for the judicial factor to divest himself in favour of those trustees, and a simple express mechanism for so doing should be provided akin to a trustee resigning. We question why there should be a requirement to bring in property that is not held in the solicitor's professional capacity.

Section 9(5) provides for the Accountant of Court to authorise a departure from the prescribed rates of remuneration for a particular interim judicial factor. We do not understand the thinking behind conferring such a discretion in the case of interim judicial factors but not in the case of permanent ones, and suggest that it should be available in both cases. In some circumstances it may be appropriate to set (or set a mechanism for adjusting) the judicial factor's remuneration by reference to his success, for example by reference to the size of the estate (a) ingathered or (b) at the time of final distribution.

Question 3

It would appear that there is a clash between sections 7(1), 8(3), and 10(6), in that section 10(6) would confer powers on a judicial factor who had been ordered to find caution and had not yet done so. We would suggest that if caution is to be ordered then it would be appropriate to postpone appointment (and vesting) until caution is found.

Section 11(2) gives the court power to vary the judicial factor's functions. At present we note that it is only the judicial factor who can apply and we suggest that anyone with an interest in the estate should have the power to make an application under section 11(2).

Section 12 appears to be somewhat draconian as currently drafted. There seems to be no provision for situations in which a person who is required to provide information can appeal to the appointing court against the requirement on the basis that the provision of such information would, for example, breach confidentiality; or where the cost of providing the information would be onerous. Furthermore, it is not clear what should happen if the person maintains that they do not have the information sought. We would suggest that there should be an opportunity to appeal to the appointing court (mirroring the situation with a liquidator). The section also currently lacks any sanction for non-compliance.

Section 14 (2): We wonder (i) about the basis on which the Accountant of Court would have the knowledge to allow him to approve the inventory and create a "definitive statement"; and (ii) the consequences of that approval. See next paragraph.

Section 14(4) provides for the inventory of the factory estate, once approved, to be a "definitive statement of the factory estate as at the appointment date". This provision is derived from section 3 of the Judicial Factors Act 1849, which states that the approved inventory "shall form a ground of charge against the factor". This suggests that the purpose of the inventory is to fix the starting point for the factor's subsequent accounts. The proposed new wording, taken literally, would suggest that the inventory is to have a much broader effect. We doubt whether that was intended, but if it



was, it raises questions as to the consequences of an asset being wrongly excluded from the inventory or wrongly included on it. We appreciate that section 14(5) allows the Accountant discretion as to how to treat items that have been wrongly included or excluded – but it may be that the use of the word “definitive” in section 14(4) could create problems.

Section 18: We would suggest that this should include an express power to compromise, as otherwise there is a risk that the judicial factor may feel compelled to fight. Schedule 1 para 2 would also require to have this power added.

Section 19(3) currently appears to suggest that the judicial factor can compel parties to go to mediation or arbitration. We assume the intention was simply to make clear that, if the parties wish to go to mediation or arbitration, then it is within the factor’s role to conduct the process or to appoint a mediator or arbitrator.

Question 4

Section 23 requires any award of expenses in litigation against a judicial factor to be made against the factory estate. While this should undoubtedly be the norm, it would preclude an award of expenses personally against the factor, no matter how bad his conduct had been. Although section 23 is subject to section 24, that section only provides for personal awards of expenses against the judicial factor in relation to damages claims brought against him in respect of his acts or omissions. It would not apply where the factor had conducted other litigation in a way that breached his duties or was otherwise wholly unreasonable, and would leave the other party to the litigation with a remedy against the estate alone for whatever it might be worth. We would suggest that the court does require a discretion to find a judicial factor personally liable for expenses beyond the circumstances that are envisioned in section 24.

While we agree with the provisions of Section 25 we wonder whether it would be better for it to take the form of an amendment to the Prescription and Limitation (Scotland) Act 1973, so that the substantive provision will be found in the same statute as other legislation on the topic of prescription.

Question 5

In relation to section 29 (6) we echo our concern regarding Section 6 as to whether the Register of Inhibitions should be the principal register of record for judicial factories.

Section 29 provides for the termination of judicial factories upon distribution of the estate, but factories do not necessarily end with a distribution. The Act allows for this possibility, but does not contain any provision re-vesting the estate in the person originally entitled to it (or their successor). As the estate is expressly vested in the judicial factor upon appointment by section 7, it seems desirable that there should be a clear statement that it re-vests in the person otherwise entitled to it in the event of the factory terminating without a distribution.

Question 6

We agree that it makes sense to have an administrative level below the court but that is within the Court of Session structure.

Question 7

We have no comments.



Question 8

We believe these are the appropriate terms to retain. We note that the Accountant of Court performs many roles other than their supervisory role in relation to judicial factors.

Question 9

We believe that it would be appropriate to have a provision that gives a judicial factor the power to seek directions from the appointing court (as, for example, is available to insolvency practitioners).

Question 10

We have no comments.