OFFICIAL REPORT
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Delegated Powers and Law Reform Committee

Tuesday 23 April 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 April 2024

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DELEGATED POWERS AND LAW REFORM COMMITTEE

13th Meeting 2024, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Foysol Choudhury (Lothian) (Lab)
*Tim Eagle (Highlands and Islands) (Con)
*Oliver Mundell (Dumfriesshire) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Morna Grandison (Law Society of Scotland)
Sandy Lamb (Lindsays)
Gavin MacColl KC (Faculty of Advocates)
Dr Alisdair MacPherson (University of Aberdeen)
Professor Gareth Morgan (Charity Law Association)
Ken Pattullo (Begbies Traynor)

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 23 April 2024

[The Convener opened the meeting at 09:34]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 13th meeting in 2024 of the Delegated Powers and Law Reform Committee. I remind everyone to please switch off or silence their mobile phones and other electronic devices.

Under agenda item 1, is the committee content to take items 5, 6 and 7 in private?

Members *indicated agreement.*

Judicial Factors (Scotland) Bill: Stage 1

09:34

The Convener: Under agenda item 2, we will take evidence on the Judicial Factors (Scotland) Bill at stage 1. I welcome our first panel. Morna Grandison is director of interventions at the Law Society of Scotland, Gavin MacColl KC is from the Faculty of Advocates, Dr Alisdair MacPherson is senior lecturer in commercial law at the University of Aberdeen, and Professor Gareth Morgan is from the Charity Law Association.

Thank you for joining us. I remind you not to worry about turning on the microphones, as that will be done automatically for you. When you would like to comment in response to a question, please raise your hand or indicate to the clerks. There is no need to answer every question; you can simply indicate that a question is not for you to respond to. However, please feel free to follow up on any question in writing after the meeting, if you wish.

Before we get into the specifics, will you tell us briefly and in general terms what you think about the bill?

Gavin MacColl KC (Faculty of Advocates): As I hope comes across in the Faculty of Advocates submission, we broadly support the bill, which appears to contain many helpful and useful ideas. The comments that the Faculty of Advocates has made are largely things that we hope will help to make things better from a technical perspective.

Morna Grandison (Law Society of Scotland): I welcome the opportunity to address the committee's questions, both as a representative of the Law Society of Scotland and as a practitioner who has taken on a series of appointments. The Law Society of Scotland is fully supportive of the Scottish Government's decision to implement the Scottish Law Commission's report and introduce the bill. The present judicial factors acts are outmoded and in need of substantial modernisation, and this is a great opportunity to introduce legislation that will be a useful tool for diverse groups in our society to resolve complex issues that affect their property and their lives. The Judicial Factors (Scotland) Bill is a modernising bill that could benefit from some further refinement of its drafting to ensure that it is future proofed and that it is not too prescriptive to meet users' needs.

Dr Alisdair MacPherson (University of Aberdeen): Good morning. I am grateful for the invitation to speak to you. Along with my University of Aberdeen colleagues Professor Donna McKenzie Skene and Dr Euan West, I very much

welcome the Judicial Factors (Scotland) Bill. The Scottish Law Commission and the Scottish Government deserve a lot of credit for the work that they have done on the bill and I am pleased that the committee has been given the opportunity to consider its terms.

I echo what has been said. The bill seeks to modernise the law, which is relatively outdated in various respects. Although judicial factors are not particularly common, they fulfil a very important function. We just have to look at the range of activities that they cover in the areas of law for which they are relevant to identify that. I very much welcome the bill. It is a question of trying to make it as effective as possible and ensuring that all stakeholders are heard in the process.

Professor Gareth Morgan (Charity Law Association): I am here on behalf of the Charity Law Association, so I will comment on aspects of the bill only in so far as they relate to charities. We welcome the bill. We agree that the previous arrangements are pretty outdated and we think that the bill represents a helpful way forward. We have a general comment, which comes up in various areas, about the need for more interaction between the bill and the Charities and Trustee Investment (Scotland) Act 2005.

The Convener: Thank you. The next questions will be asked by Tim Eagle.

Tim Eagle (Highlands and Islands) (Con): Good morning. I have a question for the Law Society about the procedures for the appointment of judicial factors in cases of missing people. The Law Society's submission to the committee sets out that it is disappointed that reforms are not being taken forward in that area, as it initially raised the issue in 2019, and that

"the current procedure is too cumbersome, prescriptive and restrictive."

In his evidence last week, Mr Patrick Layden of the Scottish Law Commission proposed that improvements could be made through the way that the act is advertised, the guidance that is given to citizens advice bureaux and court procedure. Would the things that he suggested achieve the reforms that you seek?

Morna Grandison: I think that the Law Society would welcome clarification from the Scottish Government of how the bill will improve the process for families of missing people, but I agree with Patrick Layden's comment in his evidence to the committee that part of the issue is to debunk the process in this area and ensure that it is not terrifying for families. We therefore need good advertising in citizens advice bureaux and the various law clinics on how to deal with those matters. The Accountant of Court's website plays an important role in detailing how the process works and how families can use it to best help them in these very difficult situations.

Tim Eagle: Moving on, I want to ask the Charity Law Association about its concern that the bill as drafted pays "little regard" to the role of judicial factors in the charity sector. Are there specific changes that you would like to be made in the bill?

Professor Morgan: Our main concern is simply about a risk of confusion. Section 34 of the Charities and Trustee Investment (Scotland) Act 2005 gives a power to the Office of the Scottish Charity Regulator to petition the Court of Session to appoint a judicial factor to a charity. It is worth saying that, although the evidence that you have had is that JF appointments are not that common—there may be about seven a year—if one or two of them are charity cases, such cases may be as many as 20 per cent of all the appointments, so it is important to get this right.

Much of the bill seems relatively silent about the issue. The fact that there is no specific reference at all to the 2005 act is quite curious. In our written submission, we draw a parallel with the role in England and Wales, whereby the Charity Commission can appoint what is called an interim manager to a charity, which is a very similar role to that of a JF in Scotland. There is a whole section of the Charities Act 2011, which goes on for more than a page, about how an interim manager is appointed and the powers that they have. We feel that being silent on so many of the issues is a real recipe for confusion.

In Patrick Layden's evidence to the committee last week, he suggested about four places in the bill where some sort of cross-reference could helpfully be added. Although I have not had time to consult my colleagues on the Charity Law Association's working party, I think that those suggestions are very constructive. It is particularly important that, when a JF is appointed to a charity, they are there to exercise supervision of the charity in accordance with its charitable purposes and objects and they have the normal duties of a charity trustee. In particular, there is no specific statement about the JF's duty to report back to OSCR. The JF has responsibility to the Accountant of Court but, in practice, in a charity case, one would think that the supervision of OSCR would be rather more important.

There is also the question of consulting with beneficiaries. By law, a charity exists for the public benefit, and therefore there will always be a wide class of beneficiaries. You usually cannot consult very easily with individual beneficiaries but, again, the supervision of OSCR is pretty important to that process.

The Convener: Does anyone else want to comment on that?

Dr MacPherson: Those points seem eminently reasonable to me. I noticed from a few of the responses that there seem to be questions about how the bill fits with other pieces of legislation or areas of law relating to judicial factors, so that seems a reasonable suggestion to me.

The Convener: Thank you. Bill Kidd has the next question.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you very much, guests. My question might be on an issue of contention. Under section 4, the main qualification that is required for someone to be appointed as a judicial factor is that the court considers the person to be "suitable" for the role. It is the court's decision. In response to the committee's call for views, some respondents, such as Missing People, supported that approach. Others, however, wanted the bill to be more prescriptive. For example, Propertymark wanted professional qualifications to be specified in some circumstances. The committee heard that the Scottish Law Commission's position is that the court is best placed to decide who is suitable for the role of judicial factor in a particular case. Does anyone on the panel disagree that that is the way forward? Should there be something different in the bill that limits the court's discretion, rather than leaving it as it stands?

09:45

Gavin MacColl: The faculty does not have any particular dog in the fight in terms of appointment. Traditionally, it has not been a role that people have come to members of the Faculty of Advocates to fulfil. I hope—and, indeed, I believe—that people can trust the discretion of the court. I also observe that, when one is prescriptive about qualifications, for example, unforeseen situations almost inevitably emerge whereby that prescription becomes problematic. If the sheriff or the judge who is appointing is simply trusted to use her or his good discretion in the matter, that should be a sufficient check on what is needed.

Professor Morgan: I completely agree with Mr MacColl on that, particularly in relation to charity cases. There might be a relatively small charity where there are, nevertheless, pretty serious issues and OSCR may need to seek the appointment of a judicial factor. It would be quite limiting to prescribe certain professions for such cases.

I draw a parallel with the role of independent examiner of a charity. There are clear provisions under the Charities Accounts (Scotland) Regulations 2006 that a charity with an income of up to £0.5 million can have independent examination of its accounts rather than a full audit. The criteria that are specified in those regulations for who can be an independent examiner would seem to be quite appropriate in relation to choosing a judicial factor for charities of that size.

Morna Grandison: It is important to point out that we are trying to achieve an enabling act that is not too prescriptive, in order to allow the widest possible range of people to be appointed as a judicial factor, depending on the circumstances in which the appointment comes about.

The court will take all the circumstances into account in relation to why a judicial factor is needed and it will work out the best person to appoint. For instance, an individual who is experienced in farm management would probably be the appropriate appointee for a partnership dispute in a farm. A lawyer or an accountant who is sitting in Edinburgh is unlikely to be the most appropriate appointee in those circumstances, unless there is a specific accounting or legal issue. It is the same for trusts and estates; a trust and estate practitioner may be the most appropriate person for a case involving the management of a deceased person's estate. It is about the legislation keeping things as agile as possible.

Bill Kidd: On that basis, once the court has made the decision on who the judicial factor should be, after looking into the background of the case and what it is about, what happens if someone disagrees? Is it possible for anyone to challenge that decision?

Morna Grandison: That has happened. The petitioners are invited to put forward an alternative individual if there is opposition from the parties that have been served with the petition, or they can nominate someone. Again, the matter rests with the court.

Bill Kidd: The case has to progress so, once the elements of contention have been considered, the court will make its final decision, basically.

Morna Grandison: Yes.

Bill Kidd: That seems perfectly sensible—somebody has to do it, do they not?

We understand that, when the court appoints a judicial factor in relation to a solicitor or a firm of solicitors under the Solicitors (Scotland) Act 1980, it is typically the Law Society's in-house judicial factor who is appointed. In other words, it is the society's director of interventions—that is you, Ms Grandison. However, the Faculty of Procurators of Caithness has suggested that the current system does not always work and that the judicial factor in such cases should always be wholly independent of the Law Society.

Ms Grandison, I think that you should answer this question first, and then anyone else on the panel who wants to comment is welcome to do so. Does the Law Society—or anyone else who wants

to comment—believe that the current approach, with an in-house factor, is the correct one?

Morna Grandison: The simple answer is yes. It is important that the legislation is future proofed as much as possible, and we should avoid a situation where the bill becomes too prescriptive. What is operational practice in the Law Society today might not be so in 20 or 30 years' time.

With regard to section 41 appointments under the Solicitors (Scotland) Act 1980, the society can ask the court to make the appointment and it can nominate a suitable officer. My name goes on most of those petitions. Those appointments are one of the most important public protections available to the Law Society as it fulfils its regulatory role. The petition is served on the parties with an interest, and those individuals are at liberty to object to the appointment or nominate another officer to take the appointment on.

Ultimately, as I said, the court will decide on those matters, so the proper checks and balances are in place. The presence of the in-house team at the Law Society allows for the building of a team of experts who can deal with the public who are affected by the circumstances that brought about the appointment. Along with many other matters, that was considered by the Scottish Law Commission, which did not consider that there was any mischief that needed to be addressed.

Bill Kidd: Basically, it is about the necessity of the regulatory role, and people can depend on the fact that that will take place.

Gavin MacColl: My understanding is that, if, in a particular set of circumstances, somebody could point to a particular reason why the appointment was inappropriate, that could be drawn to the court's attention and steps could be taken to have somebody who was outwith the function of the Law Society appointed as the judicial factor. From my perspective, that provides a useful check and a protection for people who have legitimate concerns about what could come about.

I will make another observation from the point of view of the different branch of the profession that I am a member of. These matters come before the Court of Session, so advocates see those things happening. We do not see them frequently, because there are not frequent applications, but we are aware of them. I do not think that there is a perception among any part of the legal profession—among the Faculty of Advocates or the judiciary, as far as I am aware—that the approach causes any difficulty of a practical or substantive nature. Indeed, the general perception seems to be that it works perfectly well.

Bill Kidd: Is there a general perception that, actually, it gives comfort to people who are in those circumstances?

Gavin MacColl: Absolutely. I would have thought that it is a good thing for people to know that, on the rare occasions when there are difficulties with firms of solicitors, there is somebody with the skill and expertise to step in and do something about that.

The Convener: The bill is very technical, as is much of the legislation that this committee looks at, and the vast majority of the population might not engage with what happens here. However, now and again, there will be an incident that makes the legislation quite real for many people. One such incident was the collapse of the law firm, McClure Solicitors, and the various issues that have arisen from that. I have taken a great deal of interest in that because the company was based in my constituency. To help the committee to connect the bill to real-life examples, can the Law Society explain why a judicial factor was not appointed to deal with the issues arising from the collapse of McClure's?

Morna Grandison: With regret, unfortunately, I cannot discuss a specific case. The committee will understand the reasons for that. However, I am happy to explain some background about the circumstances in which the Law Society would take a petition for the appointment of a judicial factor.

Under its own legislation, the Solicitors (Scotland) Act 1980, the Law Society has specific powers to ask the court to appoint a judicial factor. The 1980 act lays down the conditions under which an application in relation to section 41 would be appropriate. If those tests are not met, the court will not appoint a judicial factor. The Law Society, as with any other party, has the power to request the appointment of a judicial factor at common law. However, under the present legislation, in order to appoint one, the court would need to be persuaded that no alternative suitable remedy was available in law.

Additionally, the courts would be very reluctant to appoint a judicial factor where there was already in place another court officer, such as an administrator or a liquidator. In some situations, the court might consider that a liquidator or an administrator would be the most appropriate court officer to be appointed.

It is also important to point out that, regardless of which court officer is appointed to a case, the issues all remain the same. The court officer who is duly appointed by the court—whether that is a judicial factor, an administrator or a liquidator—must dispose of the practice and find a solution for the problems. In the case of a legal firm, it would be a disposal to another regulated firm that is regulated by the Law Society of Scotland.

The Convener: Thank you for that. I appreciate the challenge that you have in dealing with the firm, but what you have said is now on the record.

I have been approached by many solicitors from across the country who have expressed their concern and anger at what has happened, because they feel that it has had an adverse effect on the wider sector. Clearly, fees will go up in order to pay for what has happened, but there is also a feeling that the Law Society has not fully explained the process as to why a judicial factor was not appointed at that particular point. However, what you have said is on the record and might or might not appease some of the folk who have expressed their concerns and thoughts to me.

Going back to the 1980 act, the Law Society of Scotland said in its response to both the 2019 Scottish Government consultation and the committee's call for views that it would like additional powers to deal with "incorporated practices", and that those powers could be achieved by way of an amendment to the bill. For the benefit of the record, what is the issue arising here, and what powers would the Law Society of Scotland like in order to address it?

Morna Grandison: In the society's response to the judicial factors consultation of 2019, we identified a lacuna in the Solicitors (Scotland) Act 1980, which prevented the safeguarding of client funds in certain circumstances, where an incorporated practice was involved. The Law Society is presently working with the Scottish Government to resolve that lacuna in the new Regulation of Legal Services (Scotland) Bill. However, it is envisaged that part 1 section 3 of the Judicial Factors (Scotland) Bill is now widely enough drawn that, when the bill is enacted, it will allow the Law Society to apply to the courts to safeguard client funds and property, should that be required in those types of cases. We hope that that can be amended in the primary legislation in the Regulation of Legal Services (Scotland) Bill.

Professor Morgan: It is worth adding that the issue about the legal form has often been a big issue in charity cases. Fortunately, the Charities and Trustee Investment (Scotland) Act 2005 states that OSCR may petition the Court of Session to appoint a judicial factor to "a charity"—it just says that, rather than specifying particular legal structures. Therefore, in the charity cases, it appears that there is no problem about the legal structure.

The Convener: That is helpful—thank you.

10:00

Foysol Choudhury (Lothian) (Lab): Good morning, panel. In response to the committee's call for views, the centre for Scots law at the University of Aberdeen and R3 said that they thought the threshold for requiring caution, in section 5, is set too high. Does the centre for Scots law want to explain its reasoning, or does anyone else on the panel wish to comment on the policy merits of the proposed threshold?

Dr MacPherson: I am happy to comment. I understand why there is a move away from requiring caution as a matter of course and in every instance or in the majority of instances. We think, however, that the threshold has been set at a rather high level in the bill. The phrase "exceptional circumstances" might not capture the policy intention here. I know that the Accountant of Court previously suggested that there might be professionals whose insurance policies would not cover misuse of funds in the form of embezzlement, for example. Also, it is unclear whether, even outside the scope of professionals, the appointment of someone who is not a professional would meet the exceptional circumstances test.

The issue could be addressed in a simple way by taking out the phrase "exceptional circumstances" and replacing it with "the circumstances" or by making it "reasonable" for caution to be required. Alternatively, another word such as "prudent" could be used, or you could combine "prudent" with "reasonable", for example. "Proportionate" is another possibility. It would be helpful for there to be greater scope for requiring caution in some instances.

Another point that we made is about what precisely would constitute caution. Ordinarily, we are talking about bonds of caution, but there might be other forms of guarantee or indemnity that could meet the test, or there could be consigning of funds or other property with the court. It might be a question of outlining some of the other possibilities or providing that the Accountant of Court or the court itself can determine the appropriate caution in a given instance.

Gavin MacColl: I will make two observations. The first is a legal one and the second is a practical one. First, from the legal perspective, I agree that the phrase "exceptional circumstances" should be seen as a very high test indeed. In essence, it means what it says. In my view, courts are likely to be very reluctant to see it as applying to anything other than very much an outwith-the-norm situation. The policy decision that is taken may well be that that is appropriate, but it should be taken on an eyes-open basis.

The second observation, which is the practical one, is that my understanding—this relates to different situations in which caution is found but, normally, it is in the context of security-for-costs orders in court—is that pure bonds of caution,

which Dr MacPherson has just touched on, are now very difficult to source. Simply put, as I understand it, insurance companies are reluctant to offer them up. Therefore, looking at the sort of security involved and maybe at a broader concept of security might serve a useful practical function.

The Convener: I have a supplementary question on that point. Have you seen a marked change in the situation in the past 10, 15 or 20 years?

Gavin MacColl: Yes. In practice in the Court of Session—which is my usual stomping ground, if I can put it that way—nowadays, where orders for security of costs are made, it would be very unusual for those to be fulfilled by way of a proper bond of caution, which, in other words, is a contract with an insurance company that would have all the hallmarks of such a thing. It is now much more common that either moneys are paid into the court or another form of arrangement is reached to provide the security.

I appreciate that that is in a slightly different context from the one that we are talking about here, but it is indicative of what I understand to be a wider issue within the insurance market.

The Convener: Is there a particular reason that this has happened?

Gavin MacColl: My understanding is that, simply put, the insurance market does not really understand what these products are. They are seen as unusual and, I suspect, as being peculiar to a Scottish market and a Scottish form of legal cost security. Consequently, the insurance companies do not feel that they want to offer that up commercially. That is my understanding of the situation, albeit that, as counsel, I am dealing with the issue at one stage removed; solicitors may have a more direct view of whether that understanding is correct.

Morna Grandison: It is important to point out that the bonds of caution that I carry simply cover me in the event that I steal the money that I am managing. That is for the security of the estate and the Accountant of Court, which, in making a finding against me that I have taken the money, will ask the cautioners to reimburse the estate. The cautioners then have an ability to come after me and my assets for any of the money that has been so taken. That, in the context of the Judicial Factors (Scotland) Bill, is a “cautionary bond”.

The bill has drawn on a risk-based approach to the issue. It would be for the Accountant of Court to address how many claims have been made against cautionary bonds in the lifetime of the Solicitors (Scotland) Act 1980, which is about 50 years. I have been working in this field for 40 of those years and I am aware of a couple of instances in which claims against bonds of caution were made. Again, the committee could get information from the Accountant of Court about the reality of that.

The bill has taken a relatively pragmatic approach to covering issues around whether the marketplace is appropriate to respond to this. However, again, I do not disagree with changing the word “exceptional” and putting it back to the court; in the circumstances of the case, the court will maybe have information that helps it to analyse the risk.

Foysol Choudhury: Section 6 of the bill creates a new requirement that notice of the appointment of a judicial factor must be registered in an existing public register called the register of inhibitions. Is that a good policy approach or can any of the panel see difficulties with it? Are there any viable alternative approaches? Also, is it your understanding of the bill that an inhibition is created via registration in the context of section 6?

Dr MacPherson: There are a few things here. I know that the Faculty of Advocates made a comment about the extent to which the register of inhibitions can truly be considered public because of the difficulties in accessing it for members of the public and the costs that might be involved in that. I concur with that. It is not public in the same way as, for instance, the Companies House register, where a person can simply go online and quickly search for details in relation to a company. However, I will let Gavin MacColl pick up on that issue in a bit more detail.

It is a question of what, precisely, the intention is. Foysol Choudhury made a comment about viable alternatives, and that is the real difficulty. We could perhaps devise a special register, but there would be costs involved in that and certain difficulties in establishing it. At present, there does not seem to be a suitable alternative available. This may therefore simply be the best under the circumstances, even though it does not quite meet all the policy intentions.

The effect of registering such a notice in the register of inhibitions is not entirely certain here—it could be interpreted as having the effect of an inhibition. Essentially, an inhibition is a form of diligence related to debt enforcement and basically places a limitation on a debtor with regard to dealing with their heritable property—that is, land, buildings attached to land and so on—but it is not clear whether the bill’s intention is simply for the registration to provide publicity in a broad sense or to carry the effect of an inhibition.

The Bankruptcy (Scotland) Act 2016 contains an equivalent provision in relation to the register of inhibitions, specifying that the registration of a warrant to cite, in relation to a sequestration, has the effect of an inhibition. If the bill’s intention is for

the registration of an appointment to have the effect of an inhibition, it might be worth while for the bill to contain a similar provision to that of the 2016 act.

Gavin MacColl: I would echo those comments, because it is an important point. Has the register of inhibitions been chosen, because registration should have effect as an inhibition—in other words, a restraint on somebody who is not the judicial factor making use of the property—or is it just that the register is perceived as a rattle bag-style register that will just have to cope with this, because there is no other obvious place for it to fit in?

That second point was the wellspring for the faculty's observation on this point, which is this: if the idea behind the legislation is, as I perceive it to be, the commendable one of making things more open and accessible to the public, then putting the registration into a register that is not the most readily publicly-accessible place seems, to the faculty, to be a slightly odd decision.

The other observation that the faculty would make—putting aside the question whether the intention is to give rise to an inhibition proper—is that registers are there to allow people to find out that a judicial factor has been appointed in a particular situation, because that will inform their interaction with the estate within the factory. On considering the matter, the faculty took the view that, given the role that has been given to the Accountant of Court, a more obvious move would be for the Accountant of Court simply to maintain a register. After all, a register is a list and, to be blunt, it does not have to be any more complicated than that for it to serve the function of giving the public notice. Therefore, I would simply suggest, as the faculty has suggested, that the committee might wish to consider that. Would registration in the register of inhibitions actually serve the purpose that is intended?

Professor Morgan: Perhaps I can make a tiny addition from the charities' perspective, although I must confess that I had never heard of the register of inhibitions until I read this bill.

Of course, in a charity case, what people will be interested in looking at is the Scottish charity register. As long as the appointment is published there, as OSCR would normally do under its inquiry powers, that would seem to be sufficient. My colleagues might want to argue that, for the sake of consistency with other judicial factor appointments, it should still appear in the register of inhibitions, but, in practice, the charity register would be the most relevant place for most people.

The Convener: On that point, then, would it be worth while for it to be registered in both registers?

Professor Morgan: Yes. I would have thought that, when a judicial factor was appointed for a charity, you would want that to be registered with OSCR. I think that that normally happens, anyway, because as part of its power to publish inquiry reports, OSCR would tend to put something like that up. A more explicit power might be useful—I am just giving a personal comment here—but clearly it needs to be consistent with other JF appointments.

Morna Grandison: This was partly what we wrestled with when the bill was being looked at. It all comes back to the question of where you go to get information. How does the information about the appointment of a judicial factor get out? There is well-established practice with regard to the register of inhibitions in sequestration cases, with people put on notice for due diligence and all the rest of it. Effectively, a court officer is appointed. I think that the provision builds on the back of that pre-existing practice. As for whether that is what the register of inhibitions was meant for, it is, at least, somewhere people will look and that we will be concerned about if they try to deal with property that belongs to the person or the body that owns the property. It is the natural place to go searching; it is almost as simple as that. I am not clear that it is in everybody's consciousness to go to the Accountant of Court to look up whether an estate is the subject of a judicial factory, because this is not a well-known bill and because of the availability of that information. The provision was possibly just a compromise on a register for court officers that was known to people.

10:15

Dr MacPherson: I will pick up on that specific point. The register of inhibitions would ordinarily be looked at in the context of conveyancing transactions; that is, transactions that relate to land belonging to a counter party—the debtor, essentially. If a particular route is chosen and judicial factories are to be registered there, the practice of looking at that register might become wider, in that it would not just be limited to conveyancing and connected types of transactions. That is, of course, uncertain at the moment. Under the current practice, you would not necessarily look at that register unless you were in the context of dealing with a conveyancing transaction or some other major transaction in relation to a party that you think might have an entry on the register of inhibitions.

Tim Eagle: My apologies. I am relatively new to the committee, so I am trying to get my head around all this. Am I picking you up right—your suggestion is that judicial factors should not be in that register, because it is already quite specific, and that there potentially should be a new register

where you can register a judicial factor—or is that not what you are saying? Are you saying that the compromise is that judicial factors can be in that register, but that it will make it much wider in its concept?

Dr MacPherson: I am rather conflicted, because I think that, in an ideal world, you would have a separate judicial factors register. If that register were straightforward and simple to set up, with little cost involved, that would seem to be the preferable option. However, in the circumstances, this might just be the best compromise available. I would say that there are certain limitations or issues with doing so. It somewhat broadens the scope of that register, which might change practices around it, for good or bad. We need clarity as to what the precise effect of such a registration in that register would be.

Tim Eagle: Okay.

Oliver Mundell (Dumfriesshire) (Con): I want to move on and ask a new series of questions. In response to the committee's call for views, the Faculty of Advocates said that it would be desirable to give the judicial factor the additional

"power to seek direction from the appointing court."

When the commission gave evidence to the committee, it seemed to suggest that there were already sufficient powers for the court in section 11. Can the faculty elaborate on what its proposed power would add to section 11? Do any of the rest of the panel want to comment on the desirability of an extra power for the court to give directions?

Gavin MacColl: First, from the perspective of the Faculty of Advocates, the point that there should be a specific power to seek the court's guidance on, in essence, what a factor might do in a particular situation, is to give clarity to the position. It is not spelled out in section 11. If one compares and contrasts it in particular with the situation that would pertain in relation to the law of trusts and trustees, where there are well-recognised powers to go to the court for such directions, one could see people argue that the want of the specific power could be seen to indicate that that specific power did not exist. Section 11 makes certain provision, but that provision is really aimed at things that can be foreseen at the start of the process.

However, in the real world, things come up during the course of a judicial factory that, simply put, have not been anticipated. That is perfectly understandable, because it is only once the factor has taken office that they can understand the issues. The faculty's perspective is that it would be desirable—as it has been, and as is the approach that is regularly used in other areas of law—for a factor who has a query about whether they can do something to be able to go to the court and ask, "Can I do this, or do I need to do something else?" That would be preferable to them being put into a position where they have to guess and could then be subject to litigation after the event. That would simply clarify the position and provide a relatively straightforward approach.

Oliver Mundell: I do not want to put you on the spot, but do you have any specific examples, or could you come back to the committee with them, so that we could go back to the commission on that or review the matter with other witnesses? I am trying to find a specific circumstance in which the additional power would be helpful.

Gavin MacColl: The most obvious example is that the power is within the context of the law of trust, which is a closely analogous area of the law, as it deals with people who hold property on behalf of someone else and are exercising a fiduciary capacity; that is what trustees do, just as judicial factors do. On a regular basis, trustees will find themselves in situations where they are considering, "Do I have the power to do something?" They will regularly make applications to the court to answer that question.

Oliver Mundell: I hear the point. What I meant was whether there is a practical current example where the issue has come up in relation to judicial factors. Have the Faculty of Advocates and other organisations come across examples that have informed your views, or are they based on the law of trusts?

Gavin MacColl: Our view is based on our experience that shows that unknowns crop up. The faculty's approach is to look at a bill that is intended to future proof and to give the maximum discretion to parties in order to allow them to deal with things as they come up, rather than to say that a bill should, as it were, retrospectively react to things that are known. A bill should say, "Here is a power that would be available. If it is used, great; if it is not used, it provides no difficulty for anyone."

Oliver Mundell: That is fine. I guess the tricky thing is that the person who was involved in driving the bill forward and in its drafting has said that there is not a problem and that the power is already catered for. I am trying to work out whether that power is needed. If there are no specific examples of where it is needed at the moment, it is harder to push back and say that section 11 does not cut it. That is why I was asking.

Gavin MacColl: The point that I was looking to make was that, as I would read section 11, it really looks at things at the start of the process, rather than during the course of the process, which is where unknowns can crop up.

Dr MacPherson: Perhaps unsurprisingly, as an academic, I do not have practical examples on

which to draw, but I agree with Gavin MacColl's points. When I read the response from the Faculty of Advocates to the call for views, I found myself nodding in agreement with the suggestion that it would be wise for there to be a provision along the lines that it suggests. It is commonplace, as was indicated, that issues arise in the course of a judicial factory and, indeed, in analogous situations, such as those in which trustees are involved. Giving that clarity would be helpful. Certainly, there is no harm in including a specific provision on the matter.

Morna Grandison: I have heard what has been said by other parties. However, I note that the Scottish Law Commission commented in its evidence that there are ways for factors to seek comfort and direction from the court through returning to court for powers or by seeking the advice of the Accountant of Court. The slight difference is anticipated by the bill in that the judicial factor is a decision maker. It was pointed out by the Scottish Law Commission in its evidence that it is for them to make decisions on the specifics. It varies slightly from a situation in which there is a trust, because a trust is long and enduring, whereas judicial factors are often brought in for a specific purpose. The court will have entrusted the factor to carry out something specific.

Therefore, I agree that, when petitioning, you will want to give thought to that matter. However, I have not found a difficulty in the sense that, if there was a real issue, it is not the case that I could not go back to court at a later date to get some powers—if I felt that the power bank that I had was deficient. In fact, one of the good things about the bill is that it clarifies the powers. In the past, I have had to go back to the act of sederunt of 1700 or so, and it is not really clear to any of us from that what the powers are. However, the bill clarifies those and you can ask for the suite of powers that you think may be needed in the course of events.

Professor Morgan: I have a tiny point to add context from the charity perspective. I do not disagree with anything that my colleagues have said but, in practice, in a charity case, one would expect that the judicial factor could exercise the normal powers of a charity trustee to approach OSCR for consent to do something. Therefore, on a practical level, it is much more likely that the judicial factor would approach OSCR for consent on those matters. In particular, quite often, in the case of a charity, you would want to go through some kind of scheme of reorganisation, which is allowed for in chapter 5 of the Charities and Trustee Investment (Scotland) Act 2005. Therefore, although there might be occasions when a charity JF might want to go back to the court, it is worth noting that that is another reason why we need a bit more in the bill about the interaction with OSCR's powers.

Oliver Mundell: We have talked a bit about the similarity of this legislation and the law around trusts. Section 17 covers the investment power of a judicial factor in respect of the estate. Following the approach in the Trusts and Succession (Scotland) Act 2024, do witnesses think that the bill should include the provision for a judicial factor to choose to invest in ethical, social or governance-tested investments, even if those might not lead to maximum income for the estate?

Dr MacPherson: That is a reasonable suggestion. I certainly do not think that it should be mandatory for a judicial factor to have to make such investments. However, I can certainly understand why there might be a desire for consistency with trusts, especially because the Trusts and Succession (Scotland) Act 2024 has recently been passed. There is an intention to uncouple, to some extent, judicial factories from trusts, but they are analogous in various respects and judicial factories might even be viewed as a special type of trust relationship. Therefore, I certainly would not be against the idea of including provision along the lines that you are suggesting and for the sake of consistency with the Trusts and Succession (Scotland) Act 2024. It might therefore be advisable to adopt that course of action.

In the previous evidence session, there was a suggestion that judicial factories are often significantly shorter in duration than trusts and that it might not be wise to put in place for judicial factors the same provisions that exist in relation to trustees, as the duration of trusts is often rather longer. However, in our response to the call for views, we managed to include data that we had received from the Accountant of Court, which showed that, even though, on average in recent years, there were only about seven or eight judicial factories, at the end of last year, there were still 42 live cases, which indicates that a number of those have been going on for a considerable time.

There might also be situations in which there have already been investments that constitute part of the estate that have had non-financial considerations that were part of the decision-making process, and there might be a need for reinvestment by judicial factors. As a result, it would be reasonable to at least allow, if the circumstances justify it, for non-financial concerns along the lines of ESG principles—or, as I think it is in the 2024 act, "ethical, social or environmental" considerations—to be considered.

Morna Grandison: The Law Society was in favour of this proposal in the Trusts and Succession (Scotland) Act 2024.

Oliver Mundell: The centre for Scots law at the University of Aberdeen, Professor Grier at Abertay University and R3 have all said that the fiduciary nature of the judicial factor's duties needs to be spelled out explicitly in the legislation. The commission seems open to that to some extent, if it is stated as a general principle rather than a detailed treatment of the topic. What does the centre for Scots law think of the commission's view? What do the rest of the panel think of the views expressed so far on this topic?

10:30

Dr MacPherson: I suppose that different approaches can be taken here. It might be as simple as adding in at, say, section 10(1), which states,

"It is the general function of a judicial factor to hold, manage, administer and protect the factory estate",

the phrase "as a fiduciary". It is not quite "abracadabra", but it is something similar—it is magic wording that helps clarify the position. In its report, the Scottish Law Commission was rather clear that it views a judicial factor as a fiduciary in the same way as, for instance, a trustee.

However, there are no specific duties in the bill in relation to, say, conflicts of interest. If you look at the Companies Act 2006 by way of comparison, you will see that directors of companies are also fiduciaries, and that legislation spells out far more clearly specific duties in relation to matters such as conflicts of interest that directors owe to a company.

Given how the bill is at the moment, I would not expect lots of different duties to be inserted, but having something as simple as stating that the factor was acting as a fiduciary would at least help by making reference to some of the existing law on the matter. Someone looking at the provision might, having read section 10(1), then scan down to section 10(3), which just refers to exercising

"care, prudence and diligence"

and taking

"professional advice when appropriate."

That does not seem as high a standard as you would want from someone in a fiduciary capacity.

The Companies Act 2006 also states that most of the duties in it—that is, the general duties of directors—are fiduciary and that they can be enforced in the same way as other fiduciary duties. Perhaps something along those sorts of lines would be appropriate, too.

I note that the bill shies away from duties. Instead, it wraps up duties and powers into functions, which I think is okay, but it would be helpful if it had something a bit more explicit about the fiduciary nature of a judicial factor.

The Convener: Would anyone else like to come in?

Morna Grandison: I do not disagree with anything that has been said.

Professor Morgan: I come back to the point that I keep making with regard to charity cases. The bill interacts with existing requirements on charity trustees, and an explicit statement that a judicial factor has the powers and duties of a trustee would be helpful in this regard.

Gavin MacColl: The faculty had no strong view on the matter—it was not something that we had perceived. Having read the bill as a whole, as one should do, I would not have thought that there was any doubt that a judicial factor would be seen as someone exercising a fiduciary function. Consequently, it is not entirely clear to me what is achieved by simply spelling that out for the sake of spelling it out. I am always slightly conscious that, in attempting to spell something out, you somehow draw lines that were not intended to be there.

That is my note of caution. If it can be done well, it does no harm, but it is unclear to me that anyone looking at this from a technical perspective would see this as being anything other a fiduciary role.

The Convener: We should also bear in mind that a small number of individuals will be practising this, and they will be expert in this particular area of law.

Dr MacPherson: Perhaps I can follow that up quickly. I mentioned the provisions in the Companies Act 2006, but I would note that the term "fiduciary" is also expressly mentioned in various places in the Trusts and Succession (Scotland) Act 2024. That might be something to consider, too, given the connection between judicial factors and trustees.

The Convener: Back to you, Oliver.

Oliver Mundell: I am happy with that, convener. Thank you.

Bill Kidd: We have to some degree been talking about judicial factors as if they were all queuing up outside the door, waiting to get a job. The Faculty of Advocates and the Summary Sheriffs Association have both suggested that section 23 be modified to deal with exceptional circumstances in which a judicial factor has acted unreasonably in a situation not covered by section 24 and that they should be found personally liable for legal costs in that circumstance.

The commission was not certain that the suggested modification was the correct approach to take, and it feared that judicial factors would become unduly preoccupied with their own

potential risk of personal liability in such circumstances. Does anyone on the panel think that the commission's position on the issue is the correct one to take, or that that would even be an issue at all?

Gavin MacColl: I simply observe that if the concern is that people would be somehow worrying about the fact that they might be personally liable, the faculty would propose that, in exceptional circumstances where people had essentially done something wrong—and in most situations, they would have done something wrong knowing that they were doing something wrong—they should potentially, if the court deemed it appropriate, be found personally liable. Simply put, why would it be fair for the people who are properly entitled to benefit from the estate to have to carry the cost of somebody who had possibly knowingly done something wrong? I would be surprised if that concern, which is pretty standard across large swathes of the law of Scotland, would put people off from fulfilling that function.

Morna Grandison: The Scottish Law Commission's comments on that are very relevant. If a factor follows the process of seeking advice and consulting with the Accountant of Court, I am not clear why, if a case were taken to court, their actions would subsequently be found to be unreasonable. If the sheriff finds that there is evidence that the factor had lied to the court about something that had happened, the sheriff can bring that point to the Accountant of Court, and a decision can be taken by the accountant on whether the estate has suffered loss. There is already a process for people to make complaints about a factor's behaviour, so the safeguards in the bill are already okay.

Bill Kidd: Based on what has been said, it would seem to be an unlikely scenario anyway, but should such a thing happen, is it not already covered?

Morna Grandison: That is my view. There are still avenues to be brought by bringing it to the attention of the Accountant of Court.

Tim Eagle: I will move on to sections 34 and 38 of the bill. Section 34 of the bill deals with the discharge of the judicial factor, and section 38 deals with the accountant's investigation powers. The centre for Scots law made a comment on the interrelationship between those sections and whether it was laid out correctly in the bill. The commission came back and explained that section 38 could apply first, before section 34, but I am bit confused by that, because it did not quite explain how it would work the opposite way round—for example, if a factor was discharged and then something came to light. Could Alisdair MacPherson, or anybody else on the panel, shed light on the interrelationship between those sections?

Dr MacPherson: Yes. I was also confused about that. The point that you just made is exactly what we had in mind. There are a few things to pick up on. First, section 34 specifies that the judicial factor's accountability ends upon their discharge, except where they have incurred criminal liability. We wonder whether that captures everything that we want it to, because criminal liability is sometimes quite difficult to achieve. There may be problems with successfully prosecuting someone in relation to criminal matters. Presumably, that provision also includes civil liability arising in relation to that criminal liability—that is not spelled out, although it may be implied.

However, I am thinking of instances such as the serious misuse of funds or other property in the estate—fraud. Fraud is not just criminal; there is also civil law fraud. The circumstances might not amount to criminal fraud or there might not be enough evidence for a successful prosecution but there might be enough for it to constitute civil law fraud. In the Bankruptcy (Scotland) Act 2016, with regard to the discharge of a trustee in sequestration, liability will continue if there has been fraud. It does not limit it to the criminal form of fraud. That is the first point.

The next point, as you suggested, is the relationship between sections 34 and 38. Let us imagine a situation where there was fraudulent behaviour by a judicial factor—but perhaps not enough for it to be successfully prosecuted as criminal conduct—that comes to light only after discharge. When we look at section 38, whereby the Accountant of Court has the ability to investigate and then, if there is serious misconduct, pass that on to the court, it is not clear to us whether that is prevented from happening by virtue of the discharge. If there is behaviour by way of fraud before discharge that comes to light only afterwards, is section 38 and its operation precluded by virtue of the discharge? That is not clear to us, so that should be clarified.

If it is the intention that section 38 continues to operate in those circumstances, provision could be made for that so the operation of section 34 could be without prejudice to the operation of section 38. You could seek to limit it where discharge has taken place in terms of how section 38 operates. If section 38 does apply, the court may dispose of the matter in whatever manner it considers to be appropriate. However, as we mentioned in our response to the call for views and as you suggested, it is not entirely clear how those sections operate in tandem with one another. There is also the question about whether section 34 is drafted in the most appropriate way.

Tim Eagle: Are there any other comments on that? I see that there are not—I agree with you.

The Convener: In response to the committee's call for views, the Faculty of Procurators of Caithness said:

"There should be a specific provision for an interested party to raise concerns about the Judicial Factors administration of the estate."

It proposed that

"in the first instance this should be with the Accountant of Court"

and that if the interested person or organisation were unsatisfied with the outcome, there would then be a role for the court. When the Scottish Law Commission appeared before the committee last week, it was decidedly unsure about the policy merits of that idea. What do witnesses think of that proposal? Can you identify any benefits of or drawbacks to that suggestion?

Morna Grandison: The Law Society shares the Scottish Law Commission's views, as expressed during that evidence session. What mischief is being complained of is very unclear. The factor's role is complex and difficult. Factors are very closely scrutinised in all their actions by the Accountant of Court's office. That is done annually through the accounting process and in relation to any major activities through the management plan or as a result of regular contact with the Accountant of Court's office, where the factor and the accountant will discuss in detail the steps that a factor will take to address issues arising in the case. The factor will report on the outcomes that they have covered.

The very nature of the appointment requires a factor to balance a number of competing priorities and interests. There is no question that the decisions that are taken by a factor can be contentious for some parties who might have an interest in the estate. However, there are numerous safeguards in place in the bill that allow people to raise concerns. There is no evidence that the existing system of raising concerns is not working, and any additional burden and legislative process that are added to the bill are likely to simply deter people from taking on the appointments and therefore reduce the legislation's effectiveness.

Professor Morgan: I will provide the charity context in that regard. It is quite common for people to complain about how charities are being run in those circumstances. As we know, the number of judicial factor appointments to charities in Scotland is still relatively small but, by parallel with the England and Wales regime of interim managers, it is not at all unusual for people to complain that the interim manager is taking vast resources out of the charity and not really doing very much, or that they are closing down projects that could perfectly well have continued and, therefore, the beneficiaries of the charity are losing out.

In practice, in England and Wales, people would normally try to raise their complaints with the Charity Commission, which has directly appointed the interim manager. It would be sensible to have the same arrangement in Scotland so that people could draw their concerns to the attention of OSCR. OSCR's role in supervising the judicial factor is kind of implied in that OSCR is seeking the appointment of the judicial factor, but some more direct accountability along those lines would be helpful. Obviously, in an extreme case, somebody in Scotland who is concerned about a charity judicial factor could go back to the court, but you do not really want them to have to do that, except as a last resort.

10:45

The Convener: Does anyone else want to come in on this?

Dr MacPherson: Those points seem fair to me. Also, as a member of one of the Law Society of Scotland's committees, I should probably not dissent from what Morna Grandison has said, so I will leave it there.

The Convener: Over the past 10 years, the Accountant of Court has registered 77 new cases. Of those, 44 have now been concluded, with the average case length being 37 months, and the median length of a judicial factor's appointment over the period being 31 months. If the bill—amended or otherwise—completes the parliamentary process, do you think that the legislation would make that process quicker or longer, and do you think that more judicial factors might be implemented as a consequence of the bill?

Dr MacPherson: I imagine that there might be a modest increase in the usage of the law of judicial factors as a result. In the documentation that accompanies the bill, it is anticipated that about 12 judicial factories per year in total would commence, as opposed to seven or eight at the moment, and it does not seem unreasonable to suggest that that might be the case.

On efficiency, you would imagine that having the clarity that the bill seeks to provide would make the process a bit more efficient. I would not be able to put a timescale on how much quicker an individual judicial factory would take, but I imagine that there might be a modest improvement.

Morna Grandison: The intention of the legislation, by clarifying the role of the factor and their powers and so on, is to make it much more

amenable to resolving issues. I know from practical experience that people talk about the potential of appointing a judicial factor but everybody balks at the thought of it. However, the bill would demystify the process and people would be able to see how they could make practical use of it. Of course, the whole point was to speed up the process, to impose solutions for difficult problems and to allow a decision maker to make decisions and move on, so I hope that the legislation will reach that aim.

I analysed my numbers for the committee's information. My cases, on average, take four and a half years to complete. I have always tried to get them into a shorter period of time but, invariably, things always crop up that prevent us from moving them on as fast as we would like.

Professor Morgan: If the process can be simplified, as the bill proposes, it will be possible to consider more judicial factor appointments to charities. As you have probably gathered, OSCR would generally consider it to be a last-resort step, used only in the most serious cases.

The Charity Law Association queries why OSCR can appoint a judicial factor only by going to the Court of Session, whereas in other cases, as Mr MacColl has mentioned, the bill allows for a sheriff court to make the appointment. Although we have not heard from OSCR on that issue, we query why that is not allowed in charity cases.

Gavin MacColl: The bill will certainly not make judicial factories take any longer. Will it encourage more of them? Possibly, simply because it will give publicity—within the legal profession more than anywhere else—to the fact that factories are there as a measure that can be imposed or used in certain practical circumstances.

However, within my branch of the profession—and I am putting to one side and taking out of all this Law Society solicitors' judicial factories, which are a class unto themselves—the perception, whether it be right or wrong, is that judicial factories can be expensive. That is a reason for people tending to shy away from them. Perceptions can often drive the remedies that people go on to seek. The bill does not—and, indeed, cannot—address issues of cost, as they will be wholly dependent upon a factory's individual circumstances.

I would have thought that there was nothing other than good stuff in the intent behind this, and I would not have thought it likely to drive a massive explosion in the amount of judicial factories—nor should it, frankly.

The Convener: Okay—thank you. I call Tim Eagle.

Tim Eagle: I have one question for Professor Morgan about charities. Are you content—and, indeed, are we as the committee content—that we have, through your submission and what you have said today, your wish list? Have you put to us everything that you would like to see for the charity sector in this bill, or do you want to write to us to detail exactly what you would like to see, based on some of your comments today?

Professor Morgan: That is a very helpful question. We have given some general indications in our submission, and I think that, last week, Patrick Layden highlighted to you four specific sections where he felt that some interaction might be useful. If we could respond further to that in writing, that would be very welcome.

Tim Eagle: Would that be okay, convener?

The Convener: Yes.

Tim Eagle: That is perfect. Thank you.

The Convener: As the panellists have no further comments to put on the record and my colleagues have no final questions, I thank the panel very much for their time this morning. If, after today, there is anything further that you would like to inform the committee of, please do so in writing.

I suspend the session briefly for a change of panel and a very short comfort break.

10:52

Meeting suspended.

10:57

On resuming—

The Convener: For our second panel today, I welcome Morna Grandison, director of interventions, Law Society of Scotland; Sandy Lamb, partner, Lindsays; and Ken Pattullo, partner, Begbies Traynor.

I remind the panellists not to worry about turning on the microphones, as they will be turned on automatically. If you would like to come in on any questions, please raise your hand or catch the eye of the clerks. There is no need to answer every question—you can simply indicate that it is not for you. However, if you want to follow up in writing afterwards, please do so.

Before we move to questions from the committee, I want, first of all, to thank you for agreeing to appear before us today. It is helpful for the committee to get the views of those practising as judicial factors.

For the benefit of the committee, can you describe the type or types of judicial factories that

you are currently, and have been, involved in? Specifically, what are the general purposes of your appointment? For how long have you been, and do you usually find yourself, in post? How did you initially come to be appointed as a judicial factor by the court?

Sandy Lamb (Lindsays): I suspect that my experience as a judicial factor is, given those with whom I am on the panel, relatively limited. However, I am a partner at a legal firm that deals with a number of trusts and executries, and I am presently involved in two judicial factories, both of which have analogies to the working of a trustee.

The first came about because of a dispute between two executors, which was completely unresolvable for a number of reasons. One chose to petition the court for the appointment of a judicial factor, and it was suggested that it might be appropriate for me, as an independent lawyer with some experience of executry and trust work, to deal with the case. The second factory involves a situation with a deceased chap. For reasons that remain unclear, no one has been willing to stand up and act as executor, but there are obligations and, indeed, benefits to his estate in having someone appointed.

That is broadly the background of my involvement. Both factories are on-going, so I cannot say how long they should take, but one is well into its fourth year while the other is less than a year old.

11:00

Ken Pattullo (Begbies Traynor): All my judicial factories have been straightforward with one exception, which was many years ago, and which perhaps in hindsight should have been a straightforward bankruptcy. It was a petition to the court in respect of somebody, and there was considerable contention in relation to the estate. All of my recent ones have involved partnerships in which there has been some reason why the partnership itself cannot continue.

One of my recent appointments happened just before Covid; I appreciate that that was five years ago, but it is still relatively recent. Both partners had been made bankrupt, and one had been hospitalised for several years and was therefore unable to deal with anything. The partnership had, by definition, been terminated, so a decision was reached.

There was also confusion about which partnership subsisted. It was a farming partnership dating back more than 100 years; all the original partners had died and the subsequent partners had become the partnership. A decision was reached that a judicial factor was the best way forward to deal with the partnership estate in order to prevent a fire sale of the farm. On a balance-sheet basis, the partnership estate was still completely solvent, albeit that the individual partners clearly were not. If enough funds could be made available from the partnership estate to pay off the bankruptcy, which was what eventually happened, that was deemed to be a good thing, so the appointment of a judicial factor was the way forward.

Recently, there was an interim judicial factor appointment that did not proceed to a full judicial factor appointment, because once we had been in office for around 18 months—the case dragged on—the partners eventually came to their senses and decided that it would be sensible to reach an agreement about how the partnership should proceed.

I have not been appointed to the most recent one yet, but I expect to be. We were contacted by a firm of a solicitors up in either Orkney or Shetland—I cannot remember which—in relation to a partnership in which relations between the partners had completely broken down but the partnership assets still needed to be dealt with and the partnership itself carried on in some way.

That is my experience of judicial factories.

Morna Grandison: Thank you once again, convener. I appear as a practitioner with 30 years' experience as the in-house judicial factor for the Law Society of Scotland. As I have said, I have 57 appointments under my belt, covering approximately 100 estates.

The appointments in section 41 of the Solicitors (Scotland) Act 1980 are relatively unique in that they arise from a situation where there has been a breach of the accounts rules and there is a shortfall in the funds held for clients, where the books and records are in such a mess that it is impossible to know the firm's financial position or where it is anticipated that a claim might arise on the client protection fund.

In all such cases, I take over the management of the firm, and my first job is to try to find a solution for the firm and its clients in order to minimise the disruption so far as we are able to do so, and to ensure that the remaining client funds and papers are protected. In most cases, we seek to pass the firm on to a new firm of solicitors, because we are unable to provide legal services to clients and we cannot complete their transactions. Having secured the disposal of the practice, we work closely with the acquiring firm to resolve the client issues that gave rise to the appointment.

In the first instance, if the client account was short as a result of theft by a practitioner, we would work with the client to evidence their loss and assist them and their new solicitors with the processing of the appropriate claims. If the

situation arose because the accounting records were poorly kept, we would work to reinstate the records while working with the new firm to assist it and to ensure, where possible, that clients were not prejudiced by the circumstances in which they found themselves.

Ultimately, I report the detailed outcome of the investigation and, in particular, should any criminal activity have taken place, I will report it to the police and work with them as they pursue the party or parties involved. As part of the process of dealing with the cases, we will pursue the debts of the firm and settle the clients' claims from the moneys held on the client account. We seek to recover whatever assets are available to us, particularly assets where theft has occurred. In many cases, the appointments can extend to the solicitors' personal estates, and we will recover money from their personal assets where possible.

I can be involved in extensive litigation in relation to my cases, which can take a number of years to be resolved. We work very closely with the master policy insurers of the firm, intimating claims when they are received from clients of the firm and providing evidence to the insurers that will help them to settle claims.

Once all the client claims have been paid; the debts ingathered, as far as we are able to; the assets recovered; the ordinary creditors paid—though that is most unusual in most of my cases; and the reporting concluded, I will wind up the case and apply for my judicial discharge. As I said in the earlier evidence session, my cases take, on average, about four and a half years to conclude.

The Convener: Thank you very much for that.

Oliver Mundell: The commission believes the proposed reform of the law of judicial factors to be an ideal area for the commission's law reform project and extremely worth while. I have listened carefully to what the panellists have said about their experience. Do you agree that it is a worthwhile area of reform? From your previous experience, what practical difference will the new legislation make to you when you operate as a judicial factor?

Morna Grandison: As I stated earlier, this is a modernising bill. It is easy to read and understand the relevant processes arising from a judicial factor's appointment. The bill clearly sets out the powers and duties that I alluded to earlier; the ordinary powers of a judicial factor in the present acts go back to acts of sederunt, but under the bill, people will understand what a factor can and cannot do. Currently, it is a question of going back to the well-developed case law, which is fine if you have a good memory for which case gives you, say, the power to unlock lockfast places. However, it is not so great if your memory is failing—as mine is, occasionally.

The bill's most important aspect is that it is enabling legislation that allows the factor to develop innovative solutions to complex problems and to propose solutions to the interested parties and then take them through, implement them and go to court for sanction in that respect.

Sandy Lamb: I certainly think that it is important to modernise the law. I cannot disagree with anything that Ms Grandison has said. From my personal experience and that of my colleagues within and without my firm, I would say that, although those of us in the trust and estate community in Scotland, generally speaking, know fine what a trust, an estate and the powers of a trustee are, a number of colleagues, although they have an idea of what a judicial factor is, do not really know the detail at all. Therefore, it can only be a good thing to modernise the law, make it clear what the powers are and are not, and have a modern way of administering them, so that everyone understands exactly what can and cannot be done.

Ken Pattullo: I entirely agree that the bill is a good thing. This is the first time that there has been any new legislation in relation to the issue for over 130 years, so it is all to the good. Carrying out our duties as judicial factors is about doing the right thing. As I have said, my experience has mainly been in relation to partnerships; you secure the assets, get them all in and think generally about what should be done with them, in conjunction with the Accountant of Court. It is entirely a good thing that the bill is being brought in and that all the legislation in relation to the issue is being updated.

Oliver Mundell: Section 12 relates to the information-gathering powers of judicial factors. There is an exception to the requirement to comply for United Kingdom Government ministers and departments, and for bodies exercising reserved functions, such as His Majesty's Revenue and Customs. A section 104 order might ultimately extend the full scope of the information-gathering powers to UK Government ministers, departments and bodies, but we are not sure whether that will happen yet. If the issue is not addressed via a section 104 order, will that present any problems for you? If so, how significant are those potential problems?

Ken Pattullo: To be honest, I can see no real reason why the information-gathering powers should not extend to everyone. The vast majority of what I do relates to insolvency of companies and bankruptcy of individuals. We have significant information-gathering powers in that respect, and I would like the information-gathering powers for judicial factors to be brought into line with them. I

can see no reason why anyone should be able to say, "I'm sorry, but I'm just not going to give you that information."

Sandy Lamb: Referring again to my experience of dealing with deceased estates, I would just say that an executor stands in the shoes of a deceased and has all the rights to the information that a deceased would have had. That is in itself essential to carrying out an executor's duties in dealing with an estate. A judicial factor has to deal with all the matters that affect the judicial factory estate, which is hard to do without having access to all the information. I confess that I am not completely au fait with what would and would not be available under section 12, but I broadly agree with Ken Pattullo that it ought to be as broad as possible.

Morna Grandison: I have described the work that I need to do. Speed is of the essence in securing assets and understanding what is going on in the estate, the liabilities and so on. It is essential to get co-operation from Government departments as part of the process. In the past, we had significant difficulties in dealing with HMRC and getting information; eventually, we had to go to the HMRC solicitor's office in Scotland. The problem was that HMRC's legislation did not recognise judicial factors and therefore it did not consider that a judicial factor was a party to which it could disclose information. That has now been dealt with by the solicitor's office, and we have a good relationship with it. It obtains the information and understands the nature of the appointment and the requirement for disclosure to help us fulfil the functions and understand what has gone on.

11:15

Where Government departments hold material information—and it might not just be HMRC; it could be many different departments, depending on the circumstances of the case—having them comply with requests for information from a factor is material in achieving the speed at which we need to act and deal with matters to get them resolved. Therefore, the notion in the bill that giving information to the factor is optional is difficult to understand.

The main problem that we find is the cost of continually writing back and forth to people while they think about things—and not just in the sense that, if we need to secure assets or if funds are available, arguing over the rights takes money and time and can delay the administration significantly.

The Convener: Before I bring Oliver Mundell back in, I note that you gave the example of HMRC. Are there any other departments with which there have been challenges and delays in getting information?

Morna Grandison: At one stage, I had to contact the Ministry of Defence for some information as a result of the appointment. Again, there were a lot of problems in dealing with that. We found a workaround, but finding such workarounds takes time and comes with costs.

Oliver Mundell: I was just going to ask, for clarity, whether you would be keen to have a section 104 order. That is what I am taking from what you have said.

Morna Grandison: I am sorry—I did not fully catch that.

Oliver Mundell: I take it, from what you have said, that you would be keen to see a section 104 order.

Morna Grandison: Indeed.

Ken Pattullo: Yes, absolutely.

Oliver Mundell: My next question also relates to section 12, which states that the information-gathering power is subject to existing data protection legislation. That means that, under section 12, a person can refuse to supply information if to do so would be a breach of the data protection legislation. The Law Society has suggested that that provision in the bill might make life more difficult for judicial factors. Do panel members agree? Is it helpful or unhelpful to judicial factors to emphasise that links exist between the bill and the data protection legislation? For the Law Society, is this not simply a restatement of the law as it stands?

Morna Grandison: I go back to the point that I made about speed being of the essence in information gathering and about the fact that judicial factors, who they are, their powers and their duties are widely misunderstood. If you are dealing with, say, an English bank, it might be extremely difficult to get to the right department to get funds frozen. Many times, we have encountered people using the Data Protection Act 1998 as their default position—they say that they cannot tell you anything or give you any information. Eventually, however, we get through to the legal team. The actual position is that I am standing in the shoes of the firm or the individual, and I am entitled to receive the same information that they would have been entitled to. The issue is in including in the bill a piece of legislation for people to hide behind in the first instance so that they refuse to give information, because they misunderstand the law. That might make it more difficult for us to operate.

Sandy Lamb: I agree with that. I do not think that a restatement of the law as it stands is helpful. The misunderstandings among those with whom we interact as to whether or not the Data Protection Act 2018 applies are very unhelpful.

Anything that can cut through that is to be commended.

Ken Pattullo: I entirely agree with that. Data protection is often thrown back at us whenever we submit a request to whoever it might be; whether I do so, for example, in my capacity as judicial factor, or as trustee in bankruptcy, or liquidator. At the end of the day, we are appointed as officers of the court, so people cannot really hide behind data protection and say, "No, I am sorry, but I am not going to give you that." I entirely agree that it is unhelpful to have that in the legislation.

Oliver Mundell: The point being made is pretty clear.

The Convener: Before we move on, is it common for judicial factories to be cross-border, both within the UK and further afield? Have you come across that?

Ken Pattullo: Certainly not in those that I have had, which have all been purely within Scotland. I cannot think whether they had any assets outwith Scotland. I do not think so, is the answer, as far as I recall.

Morna Grandison: I have had cases where I have had property abroad that I needed to realise. Finding a mechanism to secure that presents its own challenges. I have also had situations where—as I said—individuals have opened up English bank accounts in the hope that they would be able to operate almost outwith my appointment terms.

Sandy Lamb: In my experience, which is more limited than that of my colleagues, the dramatis personae of the cases have all been Scottish and located in Scotland. In one instance, there were assets in England, in the sense that there were accounts in banks that are located in England—nothing particularly dramatic—and we had no difficulty dealing with it.

The Convener: Will the bill aid the work that you do if there are cross-border issues? I know that that is a difficult question.

Ken Pattullo: I cannot see that it can do any harm. At the moment, the only legislation that we have is a couple of paragraphs from an act from Victorian times. The bill is clearly much more wide-ranging and up to date and, as someone mentioned earlier, it will receive a bit of publicity at least among the legal profession, whether or not it receives much wider publicity. It is entirely a good thing that the legislation is being brought in, and I hope that it will solve any problems that might have arisen in the past.

The Convener: Would it be fair to say that, if the legislation passes through the process, there will be a role for the Scottish Government to engage with associations that will have operations elsewhere in the UK as well as, potentially, their international counterparts?

Morna Grandison: Yes.

Ken Pattullo: Yes, absolutely.

Tim Eagle: I have a quick question about qualification requirements. As the bill stands, a judicial factor basically just has to be a suitable person, as the court decides. There were a couple of comments, including from Propertymark, to say that individuals should have a specific qualification when dealing with properties. Is it fair enough for a judicial factor simply to be a suitable person? Given some of the information that we heard this morning about the broadness of a judicial factor's work, that is probably useful, but I would appreciate your comments on whether the law should be more explicit.

Ken Pattullo: I think that the bill's provision is probably suitable. In the end, the court must be satisfied about the suitability or appropriateness of the person it appoints as judicial factor. Sandy Lamb is a lawyer, Morna Grandison deals with all the Law Society factories and I am also a professionally qualified person, so I cannot see that any additional qualifications need to be put in place. When I have a case that includes dealing with a property, I appoint a property person to advise me on that. I am clearly not an investment expert, so if there are investment funds I will appoint an investment adviser to deal with that and if there are legal matters, I appoint a solicitor.

Sandy Lamb: At the risk of hearing, "Well he would say that, wouldn't he?" I would say that what I and solicitors like me do when we deal with trusts and estates is analogous to certain aspects of dealing with judicial factories.

I am not in favour of any specific judicial factory qualification, but, in practice, accountants and lawyers are, generally speaking, well suited to the role and, indeed, it will be at the discretion of the court. Ken Pattullo's point is well made: one ought to be under a duty to obtain advice on any areas about which one is uncertain, whether that be marketing, property, surveying, investment or tax. If one is not a specialist, one ought to be under a duty to get specialist advice and, indeed, ought to have the power to obtain that.

The Convener: Morna Grandison, do you have anything to add?

Morna Grandison: I do not think that I have anything to add beyond what I explained earlier.

The Convener: We move on to a question that is really for Morna. The witnesses will be aware of the situation with McClure Solicitors, which ceased trading in 2021, when Jones Whyte was appointed to take over a substantial volume of case work on trusts, executories and powers of attorney. If the

McClure case had been suitable for the appointment of a judicial factor, the committee is interested to know how that would have operated in practice, given the scale and nature of the case load that McClure Solicitors had. To give you some indication of that, it was estimated that there were more than 60,000 wills, 20,000 powers of attorney and about 18,500 trusts.

Who would have assumed responsibility for the on-going work required for existing cases in areas such as trusts and executories when it is presumably challenging for an in-house judicial factor to have expertise in all the specialist areas of legal practice?

Morna Grandison: I do not have a lot to add to what I explained earlier. You are raising the question whether, in a case similar to that one, I and my team would do that work as an in-house appointment at the Law Society. As I said in my earlier evidence, the answer is simply no. We would have to dispose of the practice to another firm that operates in the legal sector to allow them to deal with that.

What might happen in particular cases is that the disposal of a practice might be split up, with specialists in trusts taking one part and another firm taking another part of the business. I have done that before.

The important thing is that members of the public have a professionally regulated firm that can take forward their legal business and provide the appropriate advice and guidance in relation to that.

There will always be a challenge when there is a vast volume of cases. As I said, the important thing is to place the business with another regulated firm so that it can move things on as quickly as possible for clients of the business.

11:30

The Convener: Would it be quite common to divide up the existing business to regulated firms?

Morna Grandison: I have done that in the past. Somebody will come along and say, "I'll take your wills and trust stuff, but I don't want the general chamber practice, and I don't do litigation work." It is more difficult for members of the public, because it is more difficult to get them to the right people and to understand why their stuff is with one firm as opposed to another. That is not always the preferable option, but it is done on the basis of which firms are willing to assist and take on work in such situations.

The Convener: I have a final question on that subject. For talking's sake, if multiple firms offered to assist in a situation akin to the one that you described, how would you decide which firm or firms should get the work? If two firms suggested that they could take the work on wills, what criteria would the Law Society use to decide whether to give the work to firm A or firm B?

Morna Grandison: To be clear, I point out that, if I were appointed as a judicial factor, such decisions would be taken by me, not by the Law Society. Decisions would be based on the offerings from the various firms. It would not always be a commercial matter, in the sense of the amount of money that was put on the table by an acquiring firm. It might be about ensuring that the proper resource would be provided in relation to the detail of the arrangements that were made. On all that, I would seek advice and guidance from the Accountant of Court about what, overall, would be in the best interests of the estate and of the clients of the estate. I would need to balance all the competing priorities.

The Convener: Does either of the other witnesses want to come in on that?

Sandy Lamb: No.

Ken Pattullo: No.

The Convener: I did not think that you would, but I thought that I would give you the opportunity.

Foysol Choudhury: One policy argument supporting the change of approach to caution in section 5 of the bill is that, when a professional is appointed to the role, professional indemnity insurance provides a suitable alternative to obtaining a specialist bond of caution. Do any of the witnesses want to comment on whether the scope of their professional indemnity cover protects those with an interest in the estate to the same extent as a bond of caution does?

Morna Grandison: I am not clear that the professional indemnity insurance that the Law Society carries for such matters would fully cover the estate if I had stolen the money in the estate, which is obviously what a bond of caution would do. The point is that, in any case, even if cover were available for the estate, it is still my liability and a liability of my estate personally. If it is theft, the responsibility comes back to my estate.

Ken Pattullo: My firm's professional indemnity goes up to £30 million, so it would massively exceed any amount of caution. To be honest, caution has always seemed to be a slightly odd thing. The most recent bond of caution that I had was several thousand pounds, which had to be renewed every single year. Again, that seemed to be a complete waste of money and a bit of a gravy train for the insurance industry, to be honest. I am not sure whether it has ever paid out on any of those bonds of caution, but professional indemnity would more than adequately cover any amount of caution.

Sandy Lamb: As you may have noticed, I am very fond of making analogies with other areas of legal practice. It is a requirement for guardians of incapable adults under the Adults with Incapacity (Scotland) Act 2000, whether they are professionals or laypeople, to obtain caution in respect of the financial guardianship of the estate under their care. It is also a requirement for executors dative—that is, executors appointed by the court, most often where there is no will—to obtain caution. It seems to me that a judicial factor obtaining caution is broadly analogous to either of those cases, although Ken Pattullo's point about the cost is well made.

The market for bonds of caution is not, as I understand it, terribly well developed. There are a few big players, but not many. It is a costly exercise. My view is that it ought to be at the discretion of the court. If that is the case, one would expect the court to take a sensible view, based on the availability of professional indemnity cover or otherwise to the intended judicial factor.

Ken Pattullo: I will add to that. For the most recent judicial factory that I had, only one or two insurance companies were prepared to provide that bond of caution. It is a monopoly or a duopoly, which is never good for competition.

Foysol Choudhury: Sorry, did you just say that it was never paid?

Ken Pattullo: It was paid, but only one or two insurance companies were prepared to provide that cover in the first place. In effect, you pretty much had to pay whatever they demanded. There was no real competition from any other insurance companies. As Sandy Lamb said, there are not many around, so why on earth should they bother to compete with any other insurance provider?

To give you an idea, the majority of what I do is insolvency, bankruptcies and company liquidations. The premium for something like that would be about £6 or £10, as opposed to several thousand pounds, and it is not renewed every year. That cost is for the lifetime of the case, so if the case lasts 10 years, that bond stays in place for 10 years.

Bill Kidd: I will continue somewhat in that vein. In response to the committee's call for views, the Faculty of Advocates said that it would be desirable to give judicial factors the additional power to seek directions from the appointing court. When the Scottish Law Commission gave evidence to the committee, it suggested that the possibility of seeking advice from the Accountant of Court, coupled with the opinion of requesting extra powers from the court under section 11, was all that would be required. Do you agree with the commission's position, or do you see benefits to what the faculty is proposing? If you wish, you can explain your views with reference to practical examples of relevant situations.

Sandy Lamb: I think that a judicial factor ought, in conjunction with the Accountant of Court, to be—as suggested—in a position to seek directions or additional powers from the appointing court. That is absolutely necessary and relevant.

In a matter with which I am dealing, that has become necessary simply because the matter in question is so open ended that it requires that fairly significant decisions be taken about the future of assets. It is unclear whether, in my role as judicial factor, I have the relevant power to carry out what is proposed.

Morna Grandison: I do not have anything to add to what I said earlier.

Ken Pattullo: I agree. I cannot see any harm in having a power to apply to the court if something comes up that, for whatever reason, the judicial factor thinks he cannot properly make a decision on without the approval of the court.

Bill Kidd: That would mean that everyone would be working in conjunction with one another rather than battling against one another for decisions. That seems to be perfectly fair.

Section 17 of the bill covers the investment power for a judicial factor in respect of the estate. Would you be comfortable as a judicial factor making environmental, social and governance investments relating to the estate, or would you require an express statement in legislation that that is permitted?

Ken Pattullo: I would prefer an express statement in legislation. My general impression is that judicial factors, like anyone else who is dealing with investment, would probably be bound to try to achieve the best possible investment returns. As I mentioned, if I was appointed as a judicial factor and there were funds to invest, I would take the advice of an investment adviser. If environmental, social and governance aspects were to be included, it would be preferable to have it specifically stated that that is an option.

Sandy Lamb: On one hand, I do not think that there should be specific restrictions on investment, so I am not sure that any specific allowance of a particular category is appropriate. If a judicial factor is to be allowed to invest in any investment that a natural person could invest in, you do not have to say that they are allowed to invest in that particular category.

As I mentioned before, I would be very much in favour of anyone generally—in particular, a trustee, a fiduciary, a judicial factor or anyone who is in such a position—obtaining advice. Where a financial guardian is looking after an incapable adult's finances, the office of the public guardian

requires that financial advice be taken if funds cross a threshold. That ought to be the case for judicial factors. If it is required that funds be invested for a relevant length of time, advice ought to be taken. If there is a power for judicial factors to take financial advice, and if that advice includes sticking funds into ESG investments, that is what the factor should be doing.

If I were advising a judicial factor or a trustee, I would not say to them, "You make some decisions on what's going to be invested, whether that is in relation to environmental, social or any other considerations." I would say, "You need to get professional advice on those investments."

Morna Grandison: I gave evidence on behalf of the Law Society of Scotland earlier, but my view as a factor is that the provision is prescriptive. Adding that power to the bill will not necessarily future proof the legislation. In a judicial factory case, the factor is likely to look at the Trusts and Succession (Scotland) Act 2024 and follow the guidance and the fiduciary duty of a factor. They can look to other areas. They can go to the Accountant of Court to seek guidance on all that, and, of course, they can take independent investment advice and weigh up the benefits of that.

11:45

However, we should remember that the bill envisages many different types of case, and few of them will probably end up having long-term investment decisions being made in the estates. Following the guidance of an independent financial adviser is the only course for a factor to take safely.

I worry about why the bill talks about that type of investment and not something else. When I talk about future proofing, I mean on the basis that it is important to take away from legislation things that are currently the norm. One of the concerns that I have about the drafting of the bill is that it talks about share certificates, cash accountings and all the rest of it, which might have been relevant when this was all being considered 20 years ago. It does not talk about cryptocurrencies, non-fungible tokens, digital wallets and all those sorts of things, which we did not think about 20 years ago when they did not exist. I am therefore concerned about future proofing the bill because it talks about very specific matters, which is potentially dangerous.

Bill Kidd: We talked earlier about how long some judicial factories can last. Do you think that the average judicial factory lasts long enough that there needs to be concern about the nature of the investments? You have said that there are new kinds of investment that might not have been thought of before. Will some judicial factories last long enough to cause concern, even though they did not cause concern at their start?

Morna Grandison: It all goes back to the nature of the appointment. The appointments that I take on are about getting the assets and distributing them to the people who are entitled to them. It is not a long-term hold, although charities' situations might be different, because they have an investment portfolio to provide for the future of their charitable purposes.

It is the same in the case of trust judicial factories, if there has been a trust and there have been investments. The point about the bill is that it gives a broad framework for management of judicial factories, regardless of what the appointment is. It is for the judicial factor in that type of case to look at whether or not there are long-term investments as part of their management and in discussion with the Accountant of Court.

Sandy Lamb: One of the typical features in independent financial advice, and one of the questions about scope that financial advisers will want to know, is how long people intend to invest for. That is dealt with. Questions around putting something in for a relevant length of time will be addressed if one is taking advice, and the financial adviser will tailor their response based on the answer. It is very much context-specific and, as has been said, will depend on what the purpose of the appointment of the judicial factor is.

Bill Kidd: Mr Pattullo, do you have anything to add?

Ken Pattullo: No. I think that I have said everything that I want to say on the matter.

Bill Kidd: Thank you.

Tim Eagle: I have a question about the potential for a complaints procedure to be set out in the legislation. The issue was raised in our discussion with the first panel, so Morna Grandison has already given an answer. Some submissions said that, in the event that something were to go wrong, the first recourse should be to the Accountant of Court, which might be a good idea if a complaints procedure were available thereafter. Do you have thoughts on that?

Morna Grandison: I highlighted my view on the issue earlier.

Ken Pattullo: I would probably not be keen on the proposal. Obviously, the Accountant of Court can deal with any complaints; if there are subsequent complaints, people such as Sandy Lamb, Morna Grandison and I are all professional people to whose professional bodies complaints can be made. I would be loth to encourage development of what we might call a complaints

charter by including that proposal in legislation. There is no legislation that says that people cannot make a complaint to a relevant body; if someone wants to make a complaint, they will find a way to do so.

Sandy Lamb: I agree. Professionals are regulated; they have regulators with complaints procedures. If the Accountant of Court is to be the supervisor of judicial factors, that ought to be the forum for specific complaints about judicial factors. Given that, and the ability of the Accountant of Court to go to court, I do not see any need for an additional complaints procedure.

Tim Eagle: In terms of your work, where you have had an investigatory role as well as the judicial factor role, have you come across cases in which there are complaints? Does that happen often? Do you get to the point at which things break down to such an extent that complaints come in, or is that such a rarity that it is not really a concern?

Morna Grandison: I have had numerous complaints made by parties with interests in things that I have and have not done, and they have been resolved through the process of referral to the Accountant of Court. That process works. For example, last year, I had a case that was taken to court. I stress that that was not done by the Accountant of Court; an individual, in opposing my discharge, complained to the court that I had not done something specific. I reassure the committee that I was judicially discharged and that the court was quite happy with all my actings. The point is that the mechanisms work, as I see them, and people have the ability to take matters forward if they have an interest in the estate.

Ken Pattullo: I do not want to tempt fate, but I have so far not had any complaints about the judicial factors that I have dealt with. I am conscious that Morna Grandison deals with more of them than I do, and deals with lawyers who—dare I say it?—will be quite ready to complain if things go against them.

The Convener: Thank you. I know that Foysol Choudhury had indicated that he wanted to come in, but I think that his area of questioning has already been covered.

We have no further questions, so I invite our witnesses to make any points that have not been covered so far.

As no one wishes to make any further points, I thank our witnesses for coming to today's meeting. If any more points occur to anyone after today's meeting, they can make the committee aware of them in writing.

11:55

Meeting suspended.

11:56

On resuming—

Instrument subject to Affirmative Procedure

Scottish Tribunals (Listed Tribunals) Regulations 2024 [Draft]

The Convener: Agenda item 3 is consideration of an instrument that is subject to affirmative procedure. No points have been raised on the instrument. Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

11:56

Plant Health (Export Certification) (Scotland) Amendment Order 2024 (SSI 2024/86)

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2024 (SSI 2024/102)

The Convener: Agenda item 4 is consideration of two instruments that are subject to negative procedure. No points have been raised on the instruments. Is the committee content with the instruments?

Tim Eagle: I am content with them, but I am interested in the fees and how they have been set, and whether that could provide a barrier to export. Although that is not in the jurisdiction of the committee, could we write to the lead committee to highlight that as a potential concern, or is that not within our remit?

The Convener: We could raise that point with the lead committee.

Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: That concludes the public part of the meeting.

11:57

Meeting continued in private until 12:16.

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