OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 16 April 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 16 April 2024

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DELEGATED POWERS AND LAW REFORM COMMITTEE

12th 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:

Charles Garland (Scottish Law Commission)
Patrick Layden KC TD (Scottish Law Commission)
Alexander Stewart (Mid Scotland and Fife) (Con) (Committee Substitute)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 16 April 2024

[The Convener opened the meeting at 10:11]

Interests

The Convener (Stuart McMillan): Good morning, and welcome to the 12th meeting in 2024 of the Delegated Powers and Law Reform Committee. We have received apologies from Tim Eagle MSP. In his place, I welcome Alexander Stewart MSP.

I remind everyone to switch off or silence their mobile phones and other electronic devices, please.

The first item of business is a declaration of interests. In accordance with section 3 of the "Code of Conduct for Members of the Scottish Parliament", I invite Alexander Stewart to declare any interests that are relevant to the committee's remit.

Alexander Stewart (Mid Scotland and Fife) (Con): Good morning, convener. I am delighted to be here. I have no relevant information to give to the committee at this stage.

The Convener: Okay. Thank you very much.

Decision on Taking Business in Private

10:11

The Convener: The next item of business is to decide whether to take items 7 and 8 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Judicial Factors (Scotland) Bill: Stage 1

10:11

The Convener: Under agenda item 3, we will take evidence on the Judicial Factors (Scotland) Bill. I welcome Patrick Layden KC TD, who is former lead commissioner at the Scottish Law Commission, and Charles Garland, who is interim chief executive of the Scottish Law Commission.

I remind the attendees not to worry about turning on their microphones, as they are controlled by broadcasting. If you would like to come in on any question, please raise your hand to catch my eye or indicate to the clerks.

Before we move to questions, I invite Patrick Layden to make some brief opening remarks.

Patrick Layden KC TD (Scottish Law Commission): Thank you, convener.

It is some time since I retired from working as a Scottish Law Commission commissioner. I am privileged to be allowed to appear here today to represent the commission.

We welcome the Scottish Government's decision to introduce legislation to implement the commission's report on judicial factors. The subject is one that exemplifies the rationale for the existence of the commission. It is an area of law of continuing value to the citizens of Scotland, it is in need of reform, and it is not politically sensitive. It is precisely the kind of topic that the commission is ideally placed to address.

Judicial factors are a home-grown institution developed to deal with a continuing need—that is, the holding, administration and protection of property where it is not possible, practical or sensible for those responsible for the property to carry out those functions. Before the union with England, appointments of judicial factors were made by legislation of the Scots Parliament, the Scottish Privy Council and the Court of Session. After the union, appointments were made by the Court of Session, which also made acts of sederunt to regulate the institution. Acts of sederunt are a form of subordinate legislation that are nowadays generally limited to regulating court procedure. Formerly, they had a wider remit. It is recorded that, in the 1750s, the court made an act of sederunt that required striking Edinburgh brewers to return to work. That demonstrates that then, as now, the court had its finger on the capital's pulse.

The Scottish Law Commission did some work on judicial factors in the 1970s. That culminated in a report on the powers of judicial factors, which was produced in 1980.

The subject was put on the commission's agenda again in 1990, but work was interrupted by other projects, including references from the Government.

A discussion paper was published in 2010. In light of the responses to the proposals and questions in that paper, the commission prepared a final report with a draft bill, which was submitted to the Scottish Government in 2013.

10:15

I should perhaps say that, as a rule, the Scottish Law Commission seeks to reflect consultees' knowledge and expertise when formulating its proposals. When the views of those consulted tend in a particular direction, the commission will normally move in that direction in its report and any attached draft legislation. The current bill largely follows the commission's recommendations. Some changes have been made since the Scottish Government's separate consultation, and developments in drafting practices have led to some stylistic alterations, but the general thrust and content of the legislation are as recommended by the commission.

Broadly, the bill does not seek to regulate every aspect of the operation of judicial factories. Rather, it seeks to establish the parameters within which a well-established and successful institution can operate better at present and develop further in the future. It extends the jurisdiction of the sheriff court so that the jurisdiction of that court and that of the Court of Session are broadly concurrent. It leaves in place the Court of Session's discretion to take account of future contingencies so that, if circumstances arise that have not occurred previously but where it would be appropriate to appoint a judicial factor, it could be done without difficulty.

On behalf of the Scottish Law Commission, I have great pleasure in commending the bill to the committee.

The Convener: Thank you for that, Mr Layden. You have already answered my opening question, but I will ask one thing as an opening for the committee. The Scottish Law Commission has suggested some changes to the draft bill. Are you content that the bill still follows the ethos and the wider considerations of the SLC's work?

Patrick Layden: Yes. It is recognisably the same piece of legislation.

Alexander Stewart: Good morning, Mr Layden. I have a number of questions to go through with you. Two organisations that responded to the committee's consultation—Missing People and the

Law Society of Scotland—have said that the bill could have done more to address the needs of families when people go missing. In what ways did you consider that group during the development of the policy proposals, and can you highlight any parts of the bill that you think will improve the situation for such families?

Patrick Layden: The legislation will enable the appointment of a judicial factor whenever that is required. If somebody who has gone missing has enough property to require administration, it will be competent to apply to appoint a judicial factor to look after that property.

The bill works, and the family of somebody who has gone missing would be able to ask for a judicial factor to be appointed to look after that property. As I read the concerns expressed in the Missing Persons written evidence, it is worried about the procedure that might have to be gone through, the cost of going to court and the technical requirements that might get in the way of ordinary folk just going along and getting somebody appointed. That cannot be addressed in the primary legislation but it could be addressed by the way in which the act is advertised. It could also be addressed in guidance given to citizens advice bureaux so that information about how to get to the court and appoint a judicial factor could be disseminated. It could also be addressed by providing for a court procedure that would enable folk who are not legally qualified to make the appropriate application.

Nothing in the legislation would prevent that, but, as Missing People said, one of the things that you must take account of is that, if somebody has gone missing and somebody else has been appointed as his judicial factor, there is a risk that the property involved may not be used as it should be. The legislation addresses that aspect. Does that answer your question?

Alexander Stewart: Yes, thank you.

The Charity Law Association has said:

"the Bill pays little regard to the role of judicial factors in the charity sector".

How would you respond to those concerns, and can you highlight the parts of the bill that you think show that the charitable sector has not been overlooked in that regard?

Patrick Layden: They have not been overlooked in the sense that the Charities and Trustee Investment (Scotland) Act 2005 expressly provides for the appointment of a judicial factor to the affairs of a charity.

However, I am conscious that the functions that are conferred on judicial factors—all their powers and duties are rolled up as functions in the Government's bill—say nothing about a continuing duty to distribute property. Of course, it may well be that a charity to which a judicial factor is appointed has enough money to carry on operating as a charity and a continuing duty or discretion to distribute money to the proposed beneficiaries of the charity, but nothing in the bill expressly deals with that.

There is one other difficulty about intimation to those interested in the estate. If we are talking about a charity with a wide remit, quite a lot of people might be involved and intimation to each of them would be impossible.

It may be that the particular requirements of a judicial factory in relation to a charity justify the inclusion of specific provision in sections 3, 15, 27 and schedule 1.

I take the point made by the charity sector people. At the end of the process, the Government will be able to say what it is proposing to do about those concerns. For what it is worth, they seem to me to be legitimate concerns and there would be a way of addressing them.

Alexander Stewart: There is an exception to the requirement to comply with the information-gathering powers under sections 12 and 39 that would enable United Kingdom Government ministers, their departments and bodies that are exercising reserved functions, such as HM Revenue and Customs, to choose whether to comply. It may be for the Scottish Government to answer, but can you explain the rationale for that exception? What policy impact would that have in practice?

Patrick Layden: The rationale is that the Scottish Parliament cannot impose duties on UK Government departments—that is a matter for the Scotland Act 1998.

I would not have thought that that would make any practical difference to the operation of the bill. There are court decrees, requests for information and administrative co-operation at all levels between relevant authorities in Scotland and the rest of the UK. The provision of information to a judicial factor appointed by a sheriff court or the Court of Session in Scotland would not be met with any difficulties.

I do not see that as a practical problem. It is one that has to be worked around because of the structure of the devolution settlement, but it is not something that will, in my view, cause any practical difficulties.

The Convener: Before we move on, and I hesitate to ask this question, but, particularly in respect of that area, would a section 104 order be made use of?

Patrick Layden: Yes. You will find that that was covered in the commission's report, for which a

draft section 104 order was prepared. No doubt, life will have moved on and what will eventually be produced will not be the same as what is at the tail end of the report, but something along those lines will be put in place. At least, that was the Government's intention.

The Convener: We move on to section 4 of the bill, under which the main qualification that is required for appointment as a judicial factor is that the court considers a person "suitable" for that role. In response to the committee's call for views, some respondents, such as Missing People, supported that approach. Others wanted the bill to be more prescriptive. Propertymark, for example, wanted professional qualifications to be specified. Did the commission consider an approach that would involve specifying in statute that professional qualifications would be required for some circumstances in which judicial factors were appointed, but not others?

Patrick Layden: I think that we did, but I am thinking back 14 years, so I will not swear to it. As I said in my opening statement, we are providing a general structure—a general framework—for the appointment and operation of judicial factors. It is a matter of horses for courses. If, as is normally the case, you are administering an estate with quite a lot of money in it and quite a lot of legal ramifications, it would be appropriate to have a solicitor appointed. There would be other cases in which, for example, as apparently frequently happens, a husband and wife are partners in a farming business and fall out, and they cannot bring themselves to agree to even the sensible decisions to keep the farm going. Ideally, a judicial factor in a case such as that would be a farmer—someone who could make those decisions, carry them out and make it work—and a legal qualification would be singularly out of place.

The legislation enables the court to take account of the circumstances of the particular estate and to appoint an appropriate person to deal with it. I do not think that it would be sensible to go further than that. I know that the estate agents were putting in a plea for a specific mention of estate agents, and we would not have done that. The court has the power to appoint the person who is best qualified, and I think that it is sufficient to leave it at that.

The Convener: We also received evidence from the Faculty of Procurators of Caithness. In its submission, it states:

> "We are firmly of the view that whatever other provisions may be made, the Judicial Factor should be wholly independent of the Law Society of Scotland, and there should be explicit prohibition of any current officer or employee of the Law Society of Scotland being appointed as the Judicial Factor".

Do you agree with that suggestion?

Patrick Layden: No. The Law Society has a duty to make sure that solicitors act properly in the interests of their clients. As I understand it—the Law Society will be able to tell you when it comes to give evidence—it is only when a solicitor's affairs are getting into such a state of confusion that they have fears for their clients' money that the Law Society will intervene. It has to do that, I suppose that it would say, regrettably often—not very often, but more than it would like. It seemed to me, when I was talking it over with the Law Society—we had consultations and meetings with the Law Society in particular—that having a solicitor on the staff who could act as judicial factor in a range of cases was a very sensible way forward.

I have the disadvantage of not having read anything more that the Faculty of Procurators of Caithness said. They may have had a bad experience up in Caithness—I do not know—but, from my perspective and the commission's perspective, the arrangements that the Law Society has put in place seem to be eminently sensible.

10:30

The Convener: I have one final question in this area. I assume that you are aware of the situation that arose with McClure Solicitors.

Patrick Layden: No, I am not.

The Convener: McClure Solicitors was a Greenock-based firm with 14 offices across the UK that went into liquidation in 2021. I have had discussions with a range of constituents and with individuals from the legal fraternity who have reached out to me. One question that has consistently been asked is why the Law Society would not have appointed a judicial factor to deal with McClure's.

McClure's had an estimated 19,000 individuals with trusts, about 63,000 wills and more than 20,000 powers of attorney, so it had a lot of clients. The question that has consistently been put is why a judicial factor was not appointed. I have met the Law Society, which has given me an explanation as to why no judicial factor was appointed. That explanation seemed to be fair and rational, but in the circumstances that I have just outlined, based on your past experience, do you think that it would have been worth considering the appointment of a judicial factor?

Patrick Layden: That is certainly the kind of case in which an application for the appointment of a judicial factor could competently be made, but I am not in a position to second-guess the rationale or otherwise for what the Law Society decided. As you have spoken to the society, you are in a better position than I am to judge that.

All that I can do is hope that we have set up a system that would enable such an appointment to be made in appropriate cases. From what you have said, that sounds like an appropriate case, but because every case has its own features, it is difficult to advise on that.

The Convener: Sure—thank you.

Oliver Mundell (Dumfriesshire) (Con): My question follows on from what you said before. You said that although it does not happen all the time, the Law Society has to step in, or put a judicial factor in place, regrettably often. In the light of the McClure case and others, is there a conflict between the Law Society regulating the work of solicitors and it putting a factor in place to take over when something goes wrong? Was that considered in how the bill was drafted?

The bill seeks to consolidate the law, but there are still other pieces of legislation on the statute book that provide the power to appoint a judicial factor in specific circumstances. Was any thought given to bringing all that into this bill? Why did you not do that? As a result of that, are there still situations in which the responsibility for appointing a judicial factor is not as clear as it could be?

Patrick Layden: In the practical business of setting out legislation, there is always a tension about the best place to put a provision. The bill gives general provision about judicial factors. You are absolutely right that there are several other bits of law that allow judicial factors to be appointed. There is the Charities and Trustee Investment (Scotland) Act 2005, and the Law Society has the power to do that under the Solicitors (Scotland) Act 1980.

We did not take the powers out of those provisions and bring them into our bill because they are sufficiently separate. If you were trying to find out what happens when solicitors do not act properly, you would look in the Solicitors (Scotland) Act 1980, because that is the code for solicitors; if you wanted to know whether a judicial factor could be appointed to a charity, you would find that in the Charities and Trustee Investment (Scotland) Act 2005. Those are the logical places to look for that information, so we left it there.

As I am sure you know, in relation to proceeds of crime, people are appointed to look after the estate or the property that has been confiscated pending a court decision. Those people look very much like judicial factors—they are judicial factors in all but name. However, the people who put that legislation together decided to put the administrator of property into their legislation, rather than hark back to judicial factors. As a matter of legislative and legal policy, the Government will say, "Let's put it all in one place," and as a matter of drafting practice and discretion, the draftsman will say, "We will amend the Solicitors (Scotland) Act 1980 to take account of this, that or the other, but we will not take the provisions out of there and put them in our bill, because that is a sensible place to leave them."

I am not sure whether that answered your question.

Oliver Mundell: It certainly started to answer it. For clarity, where you have left provisions untouched in other legislation and have made only minor amendments to reference that legislation, was the commission broadly happy with how the provisions in other legislation operate at the moment? There would have been a chance to amend some of those provisions through the bill if there had been a policy reason for doing so.

Patrick Layden: I apologise; I may have missed the answer to the first part of your previous question, which was about the possibility of a conflict of interests in the Solicitors (Scotland) Act 1980 and the way in which solicitors are responsible for supervising the operation of individual solicitors and appointing judicial factors to look after them.

It may be that what was behind your question was that the solicitors' administrative body—the council of the Law Society of Scotland—was not keen on appointing judicial factors because it looks bad for the profession. I am making a general statement. There is always a general feeling that the people who run a profession are perhaps not the best people to look into possible defects in its operation.

The great safeguard that we have in relation to solicitors is that the Law Society has an interest in making sure that solicitors operate properly. It also has an interest in looking after the wider interests of the profession, because if a solicitor defaults and his clients lose money, all the other solicitors have to contribute to making that up. The existence of the solicitors guarantee fund ensures that the appropriate bodies in the Law Society are not overinfluenced by the reputational damage that might be done to the profession if individuals are taken out of practice and a judicial factor is appointed. That is a very crude way of putting it, but—

Oliver Mundell: That was helpful. There are provisions for appointing judicial factors in other legislation. The commission has looked at those, and it is broadly happy with them. Is that correct? Obviously, the bill would have been a chance to change those provisions.

Patrick Layden: Yes, it would. We could have taken those provisions out of other legislation and put them in our bill.

Oliver Mundell: You could have modified them.

Patrick Layden: We might or might not have modified them, because the policy in the 1980 act is for the 1980 act. We would not have changed that without widening our scope quite a lot, because that is a matter of the regulation of solicitors, not the regulation of judicial factors. We could certainly have taken the provisions out of the 1980 act and put them in our bill, but for the reasons that I have tried to explain, we did not do that.

Oliver Mundell: That is helpful. You felt that changing those provisions in other legislation was out of scope for this bill, as it would have widened it beyond your interest.

Patrick Layden: We would have thought that that was beyond the scope of the project.

Oliver Mundell: That is helpful—thank you.

Bill Kidd (Glasgow Anniesland) (SNP): I thank the witnesses for their responses, which have been very helpful.

Section 5 of the bill would abolish the requirement to find caution, save in exceptional circumstances. One policy justification for that is that, when a professional is appointed as a judicial factor, they will have professional indemnity insurance. However, in response to your discussion paper in 2010, the Accountant of Court said that she thought that the scope of accountants' professional indemnity insurance might not be as broad as is generally thought, and that it might not cover embezzlement by accountants. If you remember that—I know that that is going back a bit—did the commission resolve that concern when it was raised when developing its policy on section 5?

Patrick Layden: The change that section 5 makes is in relaxing the requirement to find caution. At present, it is a requirement in every case for the judicial factor to do so; it is a guarantee that if he or she defaults with the money, somebody else—insurance policies—will pick up the bill. I am told that although caution is not difficult to get, it costs money, so you would try to avoid the expense, if at all possible. Therefore, the absolute requirement has been changed into a discretionary matter for the court.

I have absolutely no idea what the Accountant of Court's concerns about accountants' professional indemnity insurance have to do with the finding of caution in appropriate cases. I cannot help you with that. I know why section 5 says what it says, but from my recollection, it had nothing to do with professional indemnity insurance for accountants. The Accountant of Court will no doubt be able to tell you what her concerns were.

Bill Kidd: That would be useful; we could perhaps delve a bit deeper into that.

Staying on caution, in response to the committee's call for views, the University of Aberdeen and R3 said that they thought that the threshold for requiring caution in section 5 is now too high. Do you have any comments on that? For example, does the phrase "exceptional circumstances" fit with the general policy desire to make judicial factors a solution for the families with missing relatives? Do you see the link there?

Patrick Layden: As Missing People said, it is possible that, in a family situation, you might feel that it would be very desirable for whoever was appointed as a judicial factor to find caution. They might not be professionals operating a judicial factory in a disinterested and arm's-length manner—they might have much more of an interest—so it is possible that those would be the circumstances that might make it desirable to consider the requirement to find caution. I really cannot say.

Every case will be different, and the court that appoints a judicial factor will have to take all the circumstances into account. However, the intention was to make it less routine to require judicial factors to find caution. Whether the phrase "exceptional circumstances" is the right test is a matter for judgment. The Government will undoubtedly be able to explain its thinking on the matter when it gives evidence.

Bill Kidd: That is useful. Thank you very much for that.

Oliver Mundell: Part 2 of the bill proposes various powers and duties for a judicial factor. 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 directions from the appointing court",

which could be used, for example, in the event of a dispute or uncertainty about what steps the factor should take. Would the commission like to comment on that as a policy idea?

10:45

Patrick Layden: There is a power in section 11 that enables the court to withdraw, retain or keep back from a particular appointment some of the functions that are set out in the legislation, and there is a power in section 11 for the factor concerned to go to the court and ask for additional powers. I did not quite understand what point the faculty was making.

Oliver Mundell: I think that the Faculty of Advocates was saying in its submission that, after someone is appointed, there could be a dispute

about how they are carrying out their functions and that, in those circumstances, it might be helpful for that individual to be able to go back to the court and seek clarification that what they are doing is in order and consistent with the powers that they were appointed to use.

Patrick Layden: I am still not entirely sure that I have grasped the essence of what the faculty's concern is.

Oliver Mundell: The committee can take that up with the faculty. We are likely to hear from it; we could send you further details and then you could comment.

Patrick Layden: At the moment, a factor who is in some doubt about whether what he or she is doing is within the functions that have been conferred would discuss the matter with the Accountant of Court. If it was some positive action that was in question—something that they were going to do—they could go to the court and ask for an extra power to do that.

The aim of schedule 1 is to set out, in very general terms, a very wide range of powers. It has always been possible for judicial factors to go back to the court and ask, "Does that mean that I can also do X?" Indeed, one of the reasons for putting all the powers into schedule 1 is to stop people having to go back to the court to ask, "Can I do X?", as X is now covered in schedule 1. However, there might still be cases in which things have to happen that are not envisaged in schedule 1, and people can go back to the court to fix that.

Otherwise, the factor is appointed to make decisions. The court has frequently emphasised that it will not authorise the factor to do this, that or the other; it expects the factor to use their own discretion. The court might say, "We're not going to stop you doing this—whether you do it or not is your business." That is the point about judicial factors. That is what makes them a unique office. It is the fact that they are being appointed to exercise a discretion—under control and under supervision, but nevertheless to exercise a discretion.

Oliver Mundell: That is helpful; the drafting probably speaks to the policy intent.

I also want to ask about section 19, which covers the investment power of a judicial factor in respect of the estate. Following the approach in the Trusts and Succession (Scotland) Act 2024, should it be made clear in the bill that a judicial factor could choose environmental, social and governance investments, even if those might not lead to maximum income for the estate? This committee recommended that change in our report on the 2024 act, reflecting the changing thinking on environmental, social and governance issues.

Patrick Layden: Would that be an amendment to section 17 that you would be after, then?

Oliver Mundell: I think that it would probably be in section 19, but that would be up to drafting colleagues—and probably in section 17—

Patrick Layden: Section 17 is about investment and section 19 is—

Oliver Mundell: I am sorry; I meant to say section 17. I apologise that I had the wrong section.

Patrick Layden: The duty of the factor is not to give effect to the Government's views on appropriate investment; it is to maintain the estate for the ultimate benefit of those who are entitled to it. If I were a factor, I would be cautious about taking into account considerations other than the general financial parameters within which investment takes place.

Oliver Mundell: For example, a factor who is put in place might also be thinking about the organisation's reputation. It might be that, in strict financial terms, they could get a better return on investment by going with option 1, whereas option 2 might produce a lower short-term return but would be more consistent with the organisation's values and wider public image. I guess that we were thinking about such a scenario in relation to trusts and succession.

Patrick Layden: The factor would be taking a risk. How much of a risk he would be prepared to take would be a matter for him. However, at the end of the day, I do not see what answer he would have if somebody were to say, "Option A would have produced a 10 per cent return. You chose option B, which has produced a 5 per cent return. You should account to us for the missing 5 per cent."

Oliver Mundell: That is why we were asking whether it should be in the bill that they have the—

Patrick Layden: That is a matter of policy. At the moment, the object of appointing a factor is for them to maintain the estate and generally manage it properly, in the interests of the ultimate beneficiary. If the policy were to require a factor to do something other than that, it would have to be clearly stated in the legislation.

Oliver Mundell: So you would not think it appropriate in this case.

Patrick Layden: It is not for me to say whether it is appropriate in this case. I am not responsible for the policy. What the bill does is consistent with the factor's duty to maintain the estate in financial real terms for the benefit of the ultimate beneficiary. That is the limit of the office at present. If there were to be a policy that the factor should do something else—something more or

something less—that would need to be carefully thought through and drafted. However, whether it is drafted is a matter for the Parliament. As somebody once said, bills are made to pass as razors are made to sell.

Oliver Mundell: Thank you.

The Convener: Charles Garland, would you like to come in?

Charles Garland (Scottish Law Commission): I will add a short comment. Generally speaking, judicial factories have a different timescale to trusts. Many trusts will be set up for the long term, or at least for the medium term, so the importance of the environmental, social and governance investment option might be more of an issue there than it would be in judicial factories, where the primary interest is in holding and administering the estate and then giving it back if that is possible. It might take a slightly less focal position, although I know that some judicial factories end up staying in place for a long time.

Oliver Mundell: That is helpful. Thank you.

The Convener: Oliver, before you continue, I would like to follow on from that point.

If a judicial factor were in place for a long time, notwithstanding Oliver Mundell's question about the ESG investment power, would the bill as it stands provide them with flexibility to consider other investments or other ways to invest? Alternatively, should an amendment be lodged to provide the ESG power, would that be helpful?

Charles Garland: As I understand it, the bill as it stands does not have the express powers that are now in the Trusts and Succession (Scotland) Act 2024. Whether they would be appropriate is another issue. Schedule 1 has a long list of different powers.

It might be unusual for a judicial factory to be anticipated, at the outset, to last for a long time. I have in mind a case that was submitted in evidence to the commission a number of years ago. It was a farming judicial factory that was still in place 25 years, I think, after it had first been put in, but there was no evidence that there had been any intention, at the outset, that that was how it would go.

Therefore, the ESG investment powers might be better suited for at least medium or longer-term funds. I am certainly not an expert on it, but the anticipated timescale of a judicial factory, as opposed to a trust, might be an issue as to the relevance of that power.

The Convener: I have a final question on that, out of interest. That one example, at 25 years, is a long period of time. I do not think that anyone would have anticipated that length of time. Do you have any figures to hand on the average length of time that a judicial factory would be in place?

Charles Garland: I do not, I am afraid—no.

The Convener: Okay. We can look into that.

Patrick Layden: The Accountant of Court would be able to tell you, definitively, what the average length was, I imagine.

The Convener: That would be very helpful, and we could consider that further. Thank you.

Oliver Mundell: Academics from the University of Aberdeen and Abertay University, as well as R3, all said that the fiduciary nature of the judicial factor's duties needed to be spelled out explicitly in legislation. Professor Grier also thought that a clear statement was needed as to the legal remedies if there were a breach of those duties. Does the commission have a view on that?

Patrick Layden: We said very clearly in our report that the essence of the institution was that it was fiduciary. That was based on several court decisions. The courts have considered it frequently, initially in relation to whether a factor could charge professional fees for doing legal work on behalf of the estate. The answer was no, he could not, because it would give him a conflict of interest between his duty as a factor and his professional position. To our mind, it is a self-evident feature of the institution that it is fiduciary, so it was not necessary to say precisely what that meant in the legislation.

Oliver Mundell: Would it be easy to set out in legislation what that meant, or would that be a difficult task?

Patrick Layden: It would be very easy to say, "This is fiduciary," but what fiduciary means in particular cases is more difficult. Unless you have a clear idea of where it will lead you, it is, in my view, better to leave it as a general, understood principle, without trying to tease out exactly what it might mean in individual cases. If you tease out what it means in five or six individual cases, some intelligent person will come along and say, "What about case 7? You have not covered that, and therefore perhaps it does not extend to case 7."

If we leave it as a general principle, the courts know what they think it means at present, and if they decide to change that in the future, in the light of further change in circumstances, they will be able to do that without having to wrestle their way around an unfortunate phrase in an act of Parliament.

11:00

Oliver Mundell: Thank you. In response to the committee's call for views, the Law Society made the opposite challenge and thought that the bill's

requirements in section 15, on the duty to make a management plan, and section 16, on the duty to submit accounts to the Accountant of Court—I hope that my notes are right on this—were more prescriptive than those of the commission's draft bill. Is the bill more prescriptive than the commission had in mind?

Patrick Layden: I have not looked at that particular aspect. If there are changes between what we suggested and what the Government has decided to implement, those changes will have been informed by considerations within Government, and you will have to ask it what effect it thought those changes would have and what the policy was for making them.

Foysol Choudhury (Lothian) (Lab): Both the Faculty of Advocates and the Sheriffs and Summary Sheriffs Association have said that section 23 of the bill could be modified to deal with exceptional circumstances in which a judicial factor had acted unreasonably but not negligently in relation to litigation and so could be found personally liable for legal costs. Does the commission have any comments on the current policy and on the drafting of section 23?

Patrick Layden: Before a judicial factor became involved in litigation, he would certainly consult the Accountant of Court and take separate professional legal advice as to the prospects of winning or losing, or the desirability of fighting the case. It is still possible that, having taken that advice and acted in accordance with it, he might be thought, at the end of the day, to have acted unreasonably. I imagine that many people who get involved in litigation and lose wonder why they did it and whether it was actually worth it. You make that decision when you start.

Whether it is desirable to make a factor personally liable for a decision at the end of the day that he has acted unreasonably, even though he went through all the correct advice-taking procedures, is a matter of policy. However, to do so would have the effect that a judicial factor might be more reluctant than is desirable to defend in litigation the interests of the factory estate, because he is too concerned—albeit legitimately concerned—about his personal liabilities if the litigation turns out badly.

It would be possible to say, "If you are subsequently found to have acted unreasonably, we will make you personally liable for the costs of the litigation." However, that would be a great disincentive to the factor's starting the process. Whether to impose that disincentive is a matter of policy. At the time, we thought that the balance that we had on that was correct.

If a factor acts improperly, the court can make him find the money out of his own resources, but a factor who is acting in good faith, taking the proper advice and doing what he thinks is best in the interests of the estate ought not—according to this legislation—to be penalised if somebody says, at the end of the day, "We think that that was unreasonable." It is reasonable to consider litigation, consult the Accountant of Court and take outside advice. If the outside advice and the accountant's advice are that litigation is a reasonable thing to do, it is quite difficult to say, "Well, we're going to come along later and do you for the expenses if you get it wrong"—that is, if the court decides the litigation against them, which is what it comes down to. People who try to predict what courts will decide are in tents with crystal balls.

Foysol Choudhury: Section 34 sets out the rule that discharge usually frees the judicial factor from liability as a factor under civil law. Section 38 requires the Accountant of Court to report to the court where "serious misconduct" or other material failures are found. The court then has a discretion to dispose of the matter as "it considers appropriate". For the benefit of the committee, what is the commission's understanding of the interrelationship between the two provisions? Does the commission think that any drafting changes are required to improve clarity?

Patrick Layden: The provisions deal with different things. In terms of timing, it might be that section 38 would come into play before section 34. If the accountant thinks that a factor is doing something that is seriously wrong—misconduct—the accountant will report to the court and the court will take such action as it thinks appropriate.

If the accountant thought that a factor had been engaging in such action, there would be no question of them granting a discharge to the factor. The misconduct and its consequences would be an open question that would have to be resolved before you could consider granting the factor a discharge. That is an entirely separate exercise from saying that, where the accountant has considered the factor's final accounts and final report and has discharged the factor, that should be the end of the matter.

The factor must have finality, and the finality comes from the accountant's inspection of the factor's proceedings during the factory, the accountant's acceptance after audit of the final accounts and the accountant's decision that the factor can be legitimately discharged. Once that has happened, there has been an adequate process to sort out the rights and wrongs or any questions about how the factor has acted, and he has been discharged. He should then be able to say, "Right, that's all behind me; I've done that. I will carry on with life," without people coming along

later and saying, “Ah, but we don’t think you should have done that three years ago.”

That is how I read the relationship between the two sections. That is what we were intending to do, and I think that we have achieved it.

Foysol Choudhury: Do any changes need to be made to clarify things?

Patrick Layden: I do not think so, but I am always willing to be persuaded. If the gentlemen and ladies from the University of Aberdeen think that clarification is required, they should say so. I am sure that the Government will always be willing to listen to suggestions on how to clarify the legislation. Either section might not be perfectly drafted in itself, although I have not heard of any suggested defects. There is always an open question for the draftsman of whether they could have got it better.

Bill Kidd: My question is about the Accountant of Court, a role that you have talked about quite a wee bit this morning. There seems to be a differentiation between the SLC’s draft bill and the current draft bill that is not so much about the role but about who and how qualified that person is. In relation to sections 35 and 36 of the bill, the Law Society of Scotland commented on what it regards as a significant departure from the commission’s draft bill and a watering down of the level of legal and accountancy knowledge that is required for the accountant and the deputy accountant roles. The SLC’s draft bill said that they were to be

“knowledgeable in matters of law and accounting”.

However, in the current draft bill, they must be, in the opinion of the Scottish Courts and Tribunals Service,

“appropriately qualified or experienced in law and accounting”.

The policy memorandum to the bill also makes it clear that formal qualifications are not necessarily required.

What does the commission think about that approach to sections 35 and 36? Do you share the Law Society of Scotland’s concerns about that differentiation?

Patrick Layden: The provision that we produced required the accountant to be qualified, as you say. The position in the bill is a lower qualification in formal terms. You would have to ask the Government why it has changed that and what its thinking is. Our thinking is in the report and the draft bill that we produced. I would say that it is the appropriate thing to do, because that is what we said in the report. If the Government wants to change it, that is a question for the Government, and you would have to take it up with the Government.

Bill Kidd: The Government will look at what you have said when it is formulating its approach but do you think that it might approach you to get further clarification on what you are looking for? There seems to be at least a bit of a differentiation there, shall we say.

Patrick Layden: Our approach and views are sufficiently set out in our report, and I would not expect the Government to come back and ask us whether we really meant what we said.

Bill Kidd: Right. That is fair enough. It is just that, because there is such an element of divergence there, I was not 100 per cent sure. Maybe it is not as wide as has been presented, but there will be discussion about it.

Patrick Layden: Somebody who is

“appropriately qualified or experienced in law and accounting”

would have all the qualifications that anyone might want, but they might also be thoroughly up to speed on the various practical requirements of the position, even without those formal qualifications.

Bill Kidd: That is quite clear, but the wording in the bill does not make it as clear.

Patrick Layden: It is certainly a difference, if the Law Society’s point is about the formal qualification. Whether that is absolutely critical is a matter of judgment and, in this case, it is the SCTS which will be making that judgment.

Bill Kidd: Thank you.

Foysol Choudhury: Normally, the Scottish Legal Complaints Commission acts as a gatekeeper for all complaints about solicitors in Scotland although a complaint about conduct may be referred back to the Law Society to determine its substance. Section 38 of the bill places a duty on the accountant to report misconduct or failure of a judicial factor to their professional body. Is there therefore a potential policy issue in relation to bypassing the SLCC’s usual role and applying a different threshold for referral to the Law Society than the SLCC is required to apply?

11:15

Patrick Layden: The short answer is that I do not know. The provision says what it does. If the judicial factor is a solicitor, the professional body is the Law Society. I do not think that we had any intention of bypassing any other disciplinary or investigative body.

I cannot see that there would be any particular problem in doing that. We could say that “body” includes any other body appointed to investigate professional failures. In this case, “professional body” would cover a situation in which the judicial factor was an accountant, or one in which the

judicial factor was an estate agent, if the estate agents get their way. It would cover a professional body of any sort, if the judicial factor was a member of that body and if that was a relevant consideration.

If you are asking whether there should be another provision to include any separate disciplinary mechanism, that could happen. It is not in the bill at present, but it could easily be added.

The Convener: In response to the committee's call for views, the Faculty of Procurators of Caithness said that there should be a specific procedure for an interested person or organisation to raise concerns about a judicial factor's management of an estate. Those concerns would first be raised to the accountant and, if the outcome was unsatisfactory, there would then be a role for the court. What does the commission think of that proposal and can you identify its benefits and drawbacks?

Patrick Layden: The major difference between judicial factors and ordinary trustees—although, in many ways, a judicial factor is a trustee—is that the factor is closely and consistently monitored by the Accountant of Court. The court appoints a factor to look after the estate, which is what makes him a judicial factor, but that is done under the supervision of the accountant, so there is a clear responsibility for the accountant to ensure that the factor operates correctly.

That is purely legal policy. If you want to have a situation in which someone who complains about an accountant and does not like the answer can go to the court and then move up the legal system, you can do that, but I would want to see evidence that the present system was not working and that the accountant had demonstrably failed to take account of some obvious defect in how the factor was operating before I looked for another solution.

It is very easy to say that we must have a way of fixing that, but there would be serious resource implications, and serious implications for the judgments that factors and accountants have to make, if you introduced a new way of attempting to second-guess how the system operates. You could do that, but you would want evidence.

Before I was a law commissioner, I used to get involved in judicial review, which happens when a public body is said not to be operating properly or acting reasonably or what have you. We used to find that, in many areas of the law, a person in a particular position—a judge, a Lord Advocate or a minister—had discretion that the courts had always recognised and that they would not interfere with. If someone in such a position said that something was the right thing to do, the courts would not try to second-guess that. However, that lasts only until that person does something so off the wall that something needs to be done about it. That has happened in a number of areas of Government and local authority operation. Such people have that discretion. It says so in the statute, and we must not interfere with that until they do something so bad that we have to find a remedy.

In the case that you mentioned, as a matter of legal policy, I would want to be persuaded that the accountant had gone so far wrong that we needed a separate way of approaching the matter. Short of that—and there are other ways of raising such things—if the accountant were, in fact, being unreasonable and disregarding the serious and genuine complaints, a way would be found of drawing that to the attention of the court. I do not think that, barring examples of the accountant not operating properly, it would be a sensible way to go. However, like everything else, it is a matter of policy. You could do it, but you would find yourselves with the disgruntled character who would never give up—they would go to the accountant and be dissatisfied, go to the court, appeal and so on. We have seen a number of examples of that during recent years. Do not go down that road—that would be my instinct.

The Convener: This is the final question. You have said a number of things about the bill as it stands, and there are obviously some differences between the bill and the SLC report. Do you have any final comments or considerations on the views expressed by the stakeholders in relation to the bill?

Patrick Layden: No, our role came to an end—we were functus—when we produced the report and the draft bill. We have always accepted that the actual content of a bill was for the Government, because it is responsible for promoting the legislation and it will make changes for reasons that were not open to us to consider. It was perfectly able to explain those reasons and defend them when it introduced the bill to Parliament. It is then for Parliament to decide—and it may have a separate view on the matter—what it is prepared to pass.

As I said, bills are made to pass as razors are made to sell. If the bill does not do the things that we want it to do, or if it does things that we do not want it to do, the Parliament has the ultimate voice in the matter. The Law Commission is very far down the food chain, and we are satisfied with the preparation work that we did.

We are grateful that the Government has chosen to put the bill before Parliament, and we are grateful that Parliament is taking the time to consider it. We earnestly hope that it will be passed in more or less its current shape, because

we think that it will produce a better institution to serve the people of Scotland.

The Convener: Thank you for that. As colleagues have no further questions and witnesses do not wish to make any further comments, I thank both Patrick Layden and Charles Garland for their helpful evidence.

The committee may follow up by letter with any additional questions stemming from the meeting. If witnesses wish to add anything after the meeting, they are most welcome to do so, and they should please do so in writing.

I will suspend the meeting briefly to allow our witnesses to leave the room.

11:24

Meeting suspended.

11:28

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Agenda item 4 is consideration of two instruments subject to the affirmative procedure, on which no points have been raised.

Sea Fisheries (Remote Electronic Monitoring and Regulation of Scallop Fishing) (Scotland) Regulations 2024 [Draft]

Transport Partnerships (Transfer of Functions) (Scotland) Order 2024 [Draft]

The Convener: Is the committee content with those instruments?

Members *indicated agreement.*

Instrument subject to Negative Procedure

11:28

The Convener: Agenda item 5 is consideration of an instrument subject to the negative procedure. An issue has been raised on the instrument.

Scottish Local Government Elections Amendment (Denmark) Regulations 2024 (SSI 2024/101)

The Convener: The instrument amends the Local Government (Scotland) Act 1973 to add Denmark to the list of countries whose citizens are eligible to stand for election as members of a local authority in Scotland if they have leave to enter or remain in the United Kingdom.

Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than four days. The instrument breaches that requirement as it was laid on 26 March 2024 and comes into force on 7 May 2024.

In correspondence with the Presiding Officer, the Scottish Government explained that that breach had occurred as it could not lawfully make regulations to implement the treaty until after the UK Parliament completed its scrutiny process, which ended on 25 March. The treaty is expected to come into force on 7 May, at which point the provision in the instrument must be in place to comply with the UK's international obligations.

As the instrument has not been laid at least 28 counting days before it came into force as required by section 28(2) of the 2010 act, does the committee wish to draw it to the attention of the Parliament on reporting ground (j) for failure to comply with laying requirements?

Members *indicated agreement.*

The Convener: Is the committee content with the Scottish Government's explanation for that breach of the laying requirements?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:30

The Convener: Agenda item 6 is consideration of two instruments not subject to any parliamentary procedure, on which no points have been raised.

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (National Security Prevention and Investigation) 2024 (SSI 2024/84)

Avian Influenza (Preventive Measures) (Scotland) Amendment Order 2024 (SSI 2024/87)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: With that, I move the committee into private.

11:30

Meeting continued in private until 11:48.

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