

Judicial Factors (Scotland) Bill

Financial Memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Judicial Factors (Scotland) Bill, introduced in the Scottish Parliament on 5 December 2023.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 40–EN);
 - a Policy Memorandum (SP Bill 40–PM);
 - a Delegated Powers Memorandum (SP Bill 40–DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 40–LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

The Bill

4. A judicial factor is a person appointed by the court to gather, hold, safeguard and administer property which is not being properly managed. Although the volume of appointments of judicial factors is low they have an important role to play.
5. The office of judicial factor has a long history in Scots law and there is a continuing need for capable administrators to be appointed to manage the property of those who cannot, should not or will not manage it properly themselves. Although there is a continuing need, the current law on judicial factors is now regarded by those who use it as outdated with a cumbersome procedure which is no longer fit for purpose. This is principally due to the fact that since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to the details of the procedure. Moreover, there seems to be a lack of clarity as to the extent of judicial factors' powers which often results in judicial factors being reluctant to take certain actions, despite them being deemed to be desirable, without applying to court for

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additional powers first. Some powers of judicial factors are also to be found in other legislation, which makes it difficult for third parties dealing with judicial factors, and even the judicial factors themselves, to know what they are or are not entitled to do.

6. The provisions contained in this Bill will put in place an updated and comprehensive regime which will bring clarity, accessibility, and efficiency to this vital but outmoded area of the law. Furthermore, the flexibility introduced by the regime would mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. Overall, the Bill introduces a statutory framework which sets out clearly the essential features of the office of judicial factor, and the broad parameters within which it should operate and will be of benefit to all those involved, in any capacity, in judicial factories.

Costs on the Scottish Administration

7. The proposals are not thought to have the potential to result in costs to the Scottish Administration other than those associated generally with the enactment of any new legislation. These are, for instance, printing and publication costs which are regarded as routine running costs rather than being attributable to the Bill.

Costs on Scottish Courts and Tribunals Service

8. One of the essential features of the statutory framework introduced by the Bill is the supervision by the Accountant of Court of all active judicial factories. The Accountant of Court is an employee of the Scottish Courts and Tribunals Service (SCTS).

9. According to figures published by SCTS, as at 2022 there were 64 active judicial factories supervised by the Accountant, and there have been an annual average of 7 applications for appointment of a judicial factor for the years 2018 to 2022. The provisions in the Bill would see a number of steps in relation to judicial factories dealt with by the Accountant of Court rather than the court. These include the simplified processes for bringing a judicial factory to an end. The current costs for considering applications will depend on the circumstances individual to each case. For instance, from a sample of 7 cases provided by the Law Society of Scotland, costs of an application for appointment of a judicial factor range from approximately £3,000 to £14,000.

10. The flexibility introduced by the regime would mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances, but under the current legal framework there are around 7 applications for appointment per year. Based on the costs provided at paragraph 9, this gives costs of the average number of applications in a year ranging from £21,000 to £98,000.

11. Changes brought about by the Bill have the potential to reduce the duration of a judicial factory, and these potential savings are set out below at paragraph 12. For instance, the clarity as to a judicial factor's powers and duties, the simplified processes,

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the encouragement of settlement in cases of dispute and the greater use of procedures for approval by the Accountant of Court of a scheme for distribution of the factory estate and termination, recall and discharge by the Accountant of Court, as opposed to the courts, could help to reduce the length of time a judicial factor is appointed to manage property. The Scottish Government has discussed the costs associated with the Bill with the Scottish Courts and Tribunals Service as employer of the Accountant of Court.

12. Based on the statutory fees payable to the Accountant of Court on certain events (see below), bringing a judicial factory to an end sooner could result in a cost reduction. For instance, where there is an annual requirement to submit accounts, there is a charge on the factory estate for fees payable to the Accountant for auditing each set of accounts. Depending on the size of the factory estate, these savings could range from £123 to £1,247 where a judicial factory is brought to an end 1 year earlier. The costs and savings would be borne by the factory estate while any statutory fees paid to the Accountant are retained by SCTS.

13. In terms of costs, SCTS previously gave rough estimates of judicial costs based on applying an hourly divisor (which takes into account guidance on allocation of court business, in particular judicial annual leave and training requirements) to overall salary costs, including pension and NI contributions.¹ Staff costs are calculated in a similar way. This information was published in 2019 but the Scottish Government does not expect the figures to have varied significantly in the intervening period.

14. Applying the criteria referred to above SCTS estimate the current staffing costs per hour of a case to be:

- For an Inner House case = £965;
- For an Outer House case = £312;
- For a Sheriff court case = £238.15.

15. These estimated figures give an indication as to how much judicial time costs in a litigation. The figures do not however include running and overhead costs to the courts. Applications for the appointment of a judicial factor are rare and spread across the entire court system and so the additional costs of this nature would be minimal. Judicial time not spent considering an application for appointment would be spent considering other proceedings. The estimates provided by SCTS also do not include costs to the parties in paying for legal representation, which will vary but will of course be met by the parties.

16. Further, currently, the average costs of bringing a judicial factory to an end range from approximately £1,000 - £25,000, taken from a sample of 6 cases provided by the Law Society of Scotland. The costs associated with discharge can vary significantly

¹ This information was produced in the Financial Memorandum to the Defamation and malicious Publication (Scotland) Bill published in 2019, and available at <https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/defamation-and-malicious-publication-scotland-bill/introduced/financial-memorandum-defamation-and-malicious-publication-scotland-bill.pdf>

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depending on whether parties involved in the case raise objections and lodge defences. Where parties agree to the scheme of distribution prepared by the judicial factor, then under the provisions in the Bill which widen the circumstance for administrative discharge (section 27), these figures would be savings although the Scottish Government expects any savings to be towards the lower end of this range.

17. Based on these figures, the range of costs in a judicial factory from beginning to end are presented below, although this does not take into account the ongoing costs of the judicial factor carrying out their work, which will vary depending on the individual circumstances of each case. The costs are borne by the factory estate in most instances.

Beginning of appointment	Ongoing costs	End of appointment
£3,000 - £14,000 (Including statutory court fees of £332 for petition to court £23 for registration of bond of caution by Accountant £34 - £799 for checking inventory)	Annual auditing of accounts of £123 - £1,247.	£1,000 to £25,000 (Including statutory fees of £61 for reporting by accountant)

18. Assuming an average duration of 3 years for a judicial factory, the table below provides the range of costs based on the current 7 applications per year and on 12 applications per year, being the anticipated increase arising out of the Bill. Again, these costs would be borne by the individual factory estates in most instances.

	Beginning of appointment	Ongoing costs	End of appointment
7 applications per year	£21,000 – £98,000	£369 - £3,741	£7,000 - £175,000
12 applications per year	£36,000 - £168,000	£1,476 - £14,964	£12,000 - £300,000

19. It is difficult to estimate the costs which will arise for the Accountant of Court given the low number of judicial factors and the occasions in which the new functions might arise and on what frequency. Provisions in the Bill will ensure that the Accountant of Court can charge fees and be reimbursed for any outlays reasonably incurred in connection with their functions, which will offset any additional costs. Whilst a matter for Scottish Ministers, the SCTS has indicated that any additional fees would require to be

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reflected in any future Fees Order so that matters could, for instance, be properly charged. The current fees payable to the Accountant of Court for submitting documentation are a mixture of one off, recurring and ad hoc fees payable in relevant circumstances, and are:

- Registering case and receiving and delivering up bond of caution - £23
- Examining factor's inventory – 0.333% of the value of the estate as disclosed: minimum fee payable – £34; (b) maximum fee payable - £799
- Auditing each account, based on estate value –
 - £0 - £30,000 – £123
 - £30,001 - £50,000 - £250
 - £50,001 - £250,000 - £623
 - £250,001 - £500,000 - £935
 - £500,001 and above – £1,247
- Reporting with regard to discharge, special powers, other special matters, surplus estate or scheme of division - £61.
- Copying documents (exclusive of search fee) - £7 for up to 10 pages and £0.50 for each page thereafter for a photocopy; £7 for a copy of each document in electronic form.

20. Sections 33 and 43 of the Bill allow the Accountant to charge a fee for certain events. Section 33 concerns the termination of a judicial factory and will involve the Accountant.

21. The flexibility introduced by the regime would mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. As mentioned above, there have been on average 7 applications for appointment made each year to the Scottish courts, down from the annual average of 12 applications cited by the SLC when it published its Report on Judicial Factors in 2013. The number of active judicial factories and the number of applications for appointment will be monitored by the Scottish Government and SCTS for signs of a significant and sustained increase in numbers. It is anticipated that should there be an increase in the volume of applications, additional costs could be offset by amendments made to any future Fees Order, as discussed above.

22. This may be particularly relevant where the sheriff clerk is under a duty to register an appointment of judicial factor in the Register of Inhibitions. Under the current fee order, there would be a £25 registration fee on each occasion which would be payable by the sheriff clerk in the first instance. The Bill makes clear that any amount payable by the sheriff clerk to register a notice of appointment (or by the Accountant to register certificate of termination, recall and discharge) is to be met from the factory estate (see sections 6, 29 and 33).

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23. The figures presented here are described as fees charged to the factory estate. While there will be a cost to SCTS in relation to those tasks carried out by the Accountant and for which a fee is charged – for example, the work undertaken to audit accounts - wider Scottish Government policy is to ensure that fees reflect the cost of the processes involved in administering the civil courts, whilst maintaining a well-targeted system of fee exemptions to protect access to justice.

24. The SCTS, in its Corporate Plan 2023-26, announced that work to transform the services provided by the Office of the Public Guardian and the Accountant of Court is under way. This work includes the development of a new case management system, which will allow faster processing of cases, and more user-friendly access to services via a secure and efficient digital system.

25. The SCTS has indicated that the provisions of the Bill and any rules of court required to support these might require amendments to the new case management system. However, at the time of the Bill being laid in Parliament it has not been possible to quantify any potential costs associated with this.

Costs on the Office of the Scottish Charity Regulator (OSCR)

26. Applications for the appointment of a judicial factor over a charity are normally made by the Office of the Scottish Charity Regulator (OSCR). These applications arise where there are concerns that there has been misconduct in the administration of a charity, where the property of the charity needs to be protected or where it is not being used for its charitable purposes. A judicial factor will normally be appointed to manage the affairs of the charity and take steps to safeguard its assets. In some cases, where it is established that the charity is insolvent, then it may be necessary for the judicial factor to apply to have the charity sequestered.

27. In most instances where OSCR has appointed a judicial factor, because of serious governance issues in the charity or because charity assets are at risk, OSCR has sought the appointment of an interim judicial factor. Should the interim judicial factors appointment be made permanent by the Court the costs of the judicial factory are borne by the charity. OSCR has borne the legal costs of the appointment of a judicial factor thus far, but in the future the legal costs of the appointment may need to be borne by the charity.

28. In the last 5 years OSCR has appointed 3 judicial factors. In two of these applications for appointment, the external legal costs borne by OSCR, including VAT, Counsel's fees and outlays were in the region of £6000; in the other, costs were in excess of this due to more complex factual circumstances, but full figures cannot be provided because of commercial sensitivity.

29. The Scottish Government does not expect costs for appointment to alter significantly as a result of the reforms made by the Bill, but these costs are one part of the overall costs of a judicial factor. The update of the law around the appointment and supervision of judicial factors has the potential to reduce costs overall.

Costs on local authorities

30. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities. Having discussed the issue with a number of local authorities, COSLA has advised the Scottish Government that it is not aware of any having applied to the courts for appointment of a judicial factor, nor there being any instances of a local authority (or officer of a local authority) accepting office of a judicial factor. The costs of making any application for appointment would depend on the circumstances individual to each case, but as mentioned above at paragraph 9, applications for appointment currently range from approximately £3,000 to £14,000 based on a sample of 7 cases.

Costs on other bodies, individuals and businesses

Costs on Scottish Legal Aid Board (SLAB)

31. The Scottish Legal Aid Board does not anticipate that the provisions of the Bill will have a significant impact on the legal aid fund. Taking into consideration the range of circumstances in which a judicial factor is appointed the view is that, currently, it is unlikely someone seeking appointment of a judicial factor would be eligible for legal aid. This would likely remain the same if the Bill provisions were implemented. Advice and Assistance might be available for advice given in the lead up to the appointment of a judicial factor but not for any appointment itself.

Costs on individuals and businesses

32. No significant cost implications are anticipated to result from the commencement of the Bill. Legal professionals and accountants are most likely to be impacted by the reform of the law as they are most likely to be either involved in applications for, or appointed as, judicial factor. Anticipated costs are likely to be borne by firms in making their staff aware of the changes to the law affected by the Bill. An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in relevant fields, would be likely. The Scottish Government expect costs would be small and would be incurred only on first implementation. More information is provided below in respect of CPD costs.

33. The range of costs provided below in relation to CPD are the costs of familiarisation with the changes in law. Given that there is no requirement for the person appointed as a judicial factor to hold any formal qualifications, most persons could be appointed to office (provided that the court considers them to be a suitable person to hold the office). It is likely, however, that in most cases it will be solicitors who will be appointed, and it may be that only a subset of solicitors would specialise in law relating to judicial factors and be willing to accept appointment. Currently, 93% of appointed judicial factors are either solicitors, accountants or the Law Society of Scotland's intervener (involving applications under the Solicitors (Scotland) Act 1980).

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34. Generally, familiarisation costs of any change in the law will be incurred by those providing training within legal firms. However, the provision of such training is typically already provided for within a firm's budget, with the cost of maintaining solicitors' legal knowledge being covered by the firm's fee earning income. Scottish solicitors are required to undertake 20 hours of Continuing Professional Development (CPD) each year and familiarisation training on changes to the law would typically count towards this figure. Those solicitors affected could choose to spend some of their time on training in this area in the relevant year and therefore there might be no overall increased cost in doing so if they undertake training on this topic rather than on another topic. If there is a need for additional training on the law in this area, some firms will be able to do the training in-house (larger firms often provide some in-house training for staff) and/or solicitors could access training and CPD via other providers.

35. An indication of the Law Society of Scotland's own CPD costs for members (i.e. solicitors):² 3 hours = £115 + VAT; 6 hours = £241 + VAT. There are a number of other providers of CPD and training in Scotland. The Scottish Government anticipates that no more than 3 hours will be required for familiarisation costs for each individual.

36. Under circumstances where a professional chartered accountant might be appointed as judicial factor, an indication of CPD costs provided by the Institute of Chartered Accountant Scotland (ICAS) are £145 + VAT for a 3 hour course. The Scottish Government anticipates that no more than 3 hours will be required for familiarisation costs.

37. Overall, it is therefore likely that initial training in relation to this Bill would not represent a significant additional cost to law firms.

² Non-members (i.e. non-solicitors) can attend these sessions too but at a higher rate.

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