OFFICIAL REPORT
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DRAFT

Delegated Powers and Law Reform Committee

Tuesday 7 May 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 7 May 2024

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DELEGATED POWERS AND LAW REFORM COMMITTEE

15th 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:

Siobhian Brown (Minister for Victims and Community Safety)
Michael Paparakis (Scottish Government)

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 7 May 2024

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 15th meeting in 2024 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off or put on silent their mobile phones and other electronic devices.

The first item of business is to decide whether to take items 6 and 7 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

10:00

The Convener: Under agenda item 2, we are considering three instruments, on which no points have been raised.

Damages (Review of Rate of Return) (Scotland) Regulations 2024 [Draft]

National Health Service (Scotland) Act 1978 (Independent Health Care) Modification Order 2024 [Draft]

Healthcare Improvement Scotland (Inspections) Amendment Regulations 2024 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instrument subject to Negative Procedure

10:01

The Convener: Under agenda item 3, we are considering one instrument, on which no points have been raised.

Healthcare Improvement Scotland (Fees) Regulations 2024 (SSI 2024/130)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

10:01

The Convener: Under agenda item 4, we are considering one instrument, on which no points have been raised.

Public Services Reform (Scotland) Act 2010 (Commencement No 8) Order 2024 (SSI 2024/131 (C 11))

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

10:01

Meeting suspended.

10:03

On resuming—

Judicial Factors (Scotland) Bill: Stage 1

The Convener: Under agenda item 5, we will take evidence on the Judicial Factors (Scotland) Bill from Siobhian Brown MSP, the Minister for Victims and Community Safety. The minister is accompanied by two Scottish Government officials: Michael Paparakis, policy and bill programme manager, and Megan Stefaniak from the legal directorate.

I welcome you all to the meeting. I remind you not to worry about turning your microphones on, as that will be done for you automatically. Before we move to questions, I invite the minister to make some opening remarks.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning committee, and apologies for my voice.

The Judicial Factors (Scotland) Bill seeks to implement the Scottish Law Commission's recommendation in its 2013 report on judicial factors. If passed, the bill will put in place an updated and comprehensive regime that will bring clarity, accessibility and efficiency to this vital but outmoded area of law. Reform of the law of judicial factors is perhaps not particularly high profile, but the bill will make important and practical changes for those who are involved with judicial factors in one way or another.

A judicial factor is a person who is appointed by the court to gather, hold, safeguard and administer property that is not being managed properly. Common examples of appointments include where there has been a breach of Law Society of Scotland accounting rules, where a sole practitioner dies and where there is no executor who is willing to carry out the administration of an estate. There are also circumstances in which a judicial factor could usefully be appointed but that does not happen for a number of reasons—say, where the estate of a missing person needs to be managed.

The overall modernisation of the office should make the appointment of a judicial factor more suitable in cases that involve missing persons, but I understand the complexities and difficulties that come with dealing with a loved one's estate in such circumstances. That is why I have agreed to work with the charity Missing People on the preparation of guidance for those who are considering applying to appoint a judicial factor.

The SLC recommends that some of the bill's provisions be extended to the whole of the United Kingdom, and my officials have started the process of engaging with the UK Government on pursuing a section 104 order to that end. The order would include provisions to allow the judicial factor to exercise their functions in relation to the whole estate, regardless of where in the United Kingdom the property is situated, and provisions with regard to a judicial factor's powers to obtain information from UK bodies and UK Government departments.

The Law Society of Scotland has highlighted the problem of the operation of the Solicitors (Scotland) Act 1980 with regard to incorporated practices, and it has asked for that act to be amended to extend the existing intervention powers in relation to sole practitioners to such practices. Amendments that have been lodged to the Regulation of Legal Services (Scotland) Bill will address those concerns.

The bill introduces a statutory framework that sets out clearly the essential features of the office of judicial factor and the broad parameters within which it should operate, and it will be to the benefit of all those who are involved in any capacity in judicial factories. I know that a number of areas of detail came up during the committee's stage 1 evidence sessions. I have worked with the committee and MSPs on another SLC bill in the current session in order to address the issues that have been identified, and I will continue to do so as the bill progresses through Parliament.

I look forward to answering the committee's questions.

The Convener: Thank you very much for your opening comments. We will certainly ask questions on some of the areas that you have covered, and the first of those is missing persons. As you will be aware, the committee has taken evidence from Missing People and the Law Society of Scotland, which said that the bill could do more to address the needs of the families of people who go missing. The Scottish Law Commission told the committee that it thinks that the solution lies not in changes to the legislation, but in good advertising of and guidance on the bill, as well as in the introduction of a court procedure that is accessible to the layperson.

You touched on this in your comments about working with Missing People on the preparation of guidance but, having heard the evidence, do you think that the bill should refer explicitly to the possibility of appointing a factor to a missing person's estate? To what extent do you believe that any policy concerns can be resolved purely through advertising and guidance on the legislation with regard to missing persons?

Siobhian Brown: I do not think that the bill needs any particular statement with regard to

missing persons, because we want judicial factors to cover all aspects and not just one specific aspect. However, as I said in my opening remarks, I am working with the charity Missing People on how we can strengthen the guidance for people in such situations.

The Convener: When Missing People gave evidence to the committee, it explicitly said that having a reference in the bill would assist matters. It was supportive of the strengthening of guidance, but it made it clear that it wants the bill to refer specifically to the issue. Its argument was not about ensuring that only one group of individuals would be highlighted in the bill; instead, it was attempting to highlight a group of individuals who are very much at the margins in order to assist them. After all, every single case will be different.

Siobhian Brown: I appreciate that. We will continue to work with the charity and I am open to doing so in the future. If there is anything that we can bring in to give some comfort to Missing People in particular, we will consider it.

The Convener: When Missing People was before the committee, it raised the interesting issue of the purpose of a judicial factor appointment in the context of the estate of a missing person. It pointed out that what a missing person might have done with their estate—for example, providing support for elderly relatives—might not always coincide with what is in the best interests of the estate, such as the conservation of funds. Will you provide further clarification on which approaches a judicial factor can take if there is such conflict? Is there a need for a specific legislative statement in the context of missing people?

Siobhian Brown: Section 10 of the bill is clear that judicial factors must

"hold, manage, administer and protect the ... estate for the benefit of persons with an interest in the estate."

I consider that most judicial factors will be expected to manage the estate in the interests of the missing person. The considerations that a judicial factor will take into account when making decisions—for example, whether they can take into account assumed preferences of the missing person—will depend on the purpose of the appointment and the specific circumstances of each individual case.

The bill is flexible, and the person who is seeking the appointment of a judicial factor may ask for additional powers to be conferred on them, such as the power to make gifts. It would be possible for a judicial factor to manage the estate in the interests of the missing person and to make payments to or take actions to benefit family members of the missing person, such as their children.

Tim Eagle (Highlands and Islands) (Con): Good morning, minister, and thank you for coming in. When the Charity Law Association was here, it commented that it does not think that the bill as drafted would really help in the case of charities. It wants new provisions in the bill that will specifically help with that. However, when the commission came in, it said that, rather than having new provisions, we could amend the current provisions of the bill. Do you have any thoughts on that or on how we could help in relation to the Charity Law Association's point?

Siobhian Brown: I understand that some concerns have been raised about the interaction between the bill and the charities legislation, which I have taken away to consider.

The bill is concerned with the general approach to the appointment of judicial factors. A judicial factor can also be appointed under more specific legislation, such as the charities legislation, when that is provided for, and the bill does not change that. The requirements under the bill will exist alongside any requirements in other areas of law such as charities law, trust law and company law, depending on the particular circumstances of the case, and a judicial factor might be required to comply with the relevant requirements in such areas. Section 10 of the bill makes it clear that the functions of a judicial factor under the bill are subject to provisions in other legislation.

The SLC has suggested some specific areas for possible amendment and it is important that we take time to explore those further, as well as the suggestions of other interested stakeholders including the Office of the Scottish Charity Regulator. I will write to the committee ahead of the stage 1 debate to set out my thoughts on the matter.

The Convener: Minister, in your opening statement, you touched on the section 104 process, and you indicated that discussions are already under way on that. As you are aware, section 104 has been a recurring theme in the SLC bills that the committee has looked at in the current session. Will you clarify whether the Scottish Government wants the information-gathering powers to extend to private sector bodies that are based elsewhere in the UK, such as banks and building societies?

Siobhian Brown: We are at the early stages of the process, so the exact drafting approach has not yet been agreed. However, the aim is to ensure that a judicial factor who is appointed to an estate can exercise their functions in relation to the whole of the estate, regardless of where in the United Kingdom the property is situated, and ensure that the relevant property is appropriately managed. As such, it is intended that the section 104 order will extend some of the provisions in the

bill to the whole of the United Kingdom, including provisions on the vesting of property in a judicial factor, the ingathering of property, a judicial factor's functions and information sharing.

The intention is also to explore the application of the requirement to comply with the information requests to bodies that are excluded under the bill, such as UK Government departments and bodies with other reserved functions. Officials have made initial contact with relevant UK Government departments about seeking a section 104 order. Those discussions have been positive thus far, and we will continue to have them as the bill progresses.

The Convener: Has there been any dialogue between you and the Secretary of State for Scotland on a section 104 order?

Siobhian Brown: Not at this stage.

The Convener: Do you consider that a section 104 order would apply sections 12 and 39 of the bill across the UK? If so, what timescale do you anticipate for that?

Siobhian Brown: Yes—we would include those. The average timescale in relation to section 104 orders at the moment is 12 to 18 months.

The Convener: It would be useful if you could keep the committee updated on any progress on that.

Siobhian Brown: Of course.

The Convener: Thank you.

10:15

Oliver Mundell (Dumfriesshire) (Con): The Law Society of Scotland and the Accountant of Court have both expressed concerns about the subsections of sections 12 and 39 that restate the current legal position in relation to data protection legislation, making clear that those sections do not authorise anything that would breach that. Various stakeholders have highlighted to the committee that legitimate information requests, especially by judicial factors, can already be denied or delayed. It is said that that is due to an unjustified reliance on data protection legislation, coupled with a failure to fully understand the judicial factor's role.

Do you see any validity in those policy concerns? If the bill is to cross-refer to the data protection legislation, do its legitimate uses need to be explained in more detail, either in the bill or in associated guidance?

Siobhian Brown: The powers under sections 12 and 39 operate within the framework and are consistent with the data protection legislation. Sections 12(7) and 39(6) simply clarify, for the avoidance of doubt, that those provisions are not intended to override the data protection legislation. Provisions that make it clear that data protection is not overridden are not unusual. For example, section 12 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and paragraph 24 of schedule 1 to the Elections Act 2022 make similar provisions. It is considered that such provisions can be useful in clarifying the interplay with data protection legislation.

As members know, data protection legislation is a reserved matter. There is information on the Information Commissioner's Office website, if people are seeking it. At this stage, we do not think that we need anything on the face of the bill regarding that.

Oliver Mundell: I thought that it was currently on the face of the bill and the question is whether it would be better to move it into guidance. That is my understanding.

Siobhian Brown: Yes—sorry. I apologise.

Oliver Mundell: That draws more attention to it than the Law Society feels is justified, given that it is already the law and it applies to everything. The Law Society feels that the specific mention of it almost overhighlights it, and that people who did not really understand what a judicial factor was might use that as a default reason not to engage.

Siobhian Brown: I will bring in Michael Paparakis, who has the history of this. However, my understanding is that it was not thought necessary. Even if the legislation on data protection is updated, it will always be updated by the UK Government on the Information Commissioner's Office website, so it will keep in step with things.

Michael, do you want to add anything?

Michael Paparakis (Scottish Government): The explanatory notes to the bill could be used as a means to clarify some of the interplay, or the concerns that were addressed to the committee by the Faculty of Advocates, which I think Mr Mundell mentioned. That could be one way to address the concerns. As the minister said, guidance on missing persons is also an issue that could be addressed in guidance.

Oliver Mundell: I think that it was the Law Society. The matter was raised by a lady who has been there for a very long time and is its in-house judicial factor. She therefore has a lot of experience of working with such legislation, and she said that it is not something that most people know about. They hear the term "judicial factor", but they are not clear about what that is. They do not understand that the person who is appointed as the judicial factor, in effect, acts as if they are the person, so there is already confusion. She is concerned that the bill's reference to the Data

Protection Act 2018 would lead to people defaulting to using that as a reason not to provide information. Will you consider moving that to the guidance or the explanatory notes, rather than the 2018 act being referred to so prominently in the bill?

Siobhian Brown: I am happy to take that point away and consider it.

Oliver Mundell: It is a strange one. I feel that data protection is always important but, based on the evidence that we heard about people who are not familiar with the legislation and are interacting with it for the first time, the reference seems to be over the top in this case.

Bill Kidd (Glasgow Anniesland) (SNP): As we all know, there will be a wee bit of to-ing and fro-ing in some of the sections, because they cross over each other quite a bit.

On qualifications for appointment as a judicial factor, when the Scottish Law Commission appeared before us on 16 April, it said that the court was best placed to decide who was suitable for the role. It highlighted that in the case of a farming business where two farmers fell out, for example, the person best placed to be appointed as a factor would be another farmer, because of their inside knowledge.

Section 4 of the bill sets out the qualifications required to be a judicial factor on that basis, with the main qualification being that the court decides who is most suitable for the role. The Scottish Law Commission and others, including the Law Society and Missing People, have said that the court is best placed to decide who is suitable in individual cases. Propertymark, on the other hand, wants the bill to be more prescriptive in its requirements, including by specifying certain professional qualifications. Having considered all the views that were expressed to the committee during stage 1 scrutiny, which policy decision out of those does the minister prefer? If you support any changes to section 4, will you please give us an idea of those?

Siobhian Brown: I do not consider at this stage that it is necessary for a person who is appointed as a judicial factor to hold a professional qualification. The bill takes a flexible approach to who may be appointed to ensure that it can cater to a wide range of circumstances. Discretion is given to the court to decide whether the person in question is a suitable person to hold the office in the particular circumstances of the case.

Reading the bill as a whole, it is clear that safeguards are in place—for example, judicial factors are supervised by the Accountant of Court, and they are under a duty to obtain specialist advice where appropriate. Most judicial factors who are appointed are either legal or financial professionals, but there may be circumstances where that is not necessary or even desirable—you mentioned our farming and agricultural expert.

To require a judicial factor to hold a professional qualification would also add unnecessary costs to the administration of the estate. I agree with what the Faculty of Advocates said, which is that we should trust the discretion of the court to take into account the circumstances of the individual case and appoint the most suitable person as the judicial factor.

Bill Kidd: On the back of that, when the Faculty of Advocates gave evidence to us on 23 April, it supported the current approach to appointments. When a judicial factor is appointed by the court 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. However, the Faculty of Procurators of Caithness has suggested that the current system does not work and that the judicial factor in those types of cases should always be wholly independent of the Law Society. On the other hand, the Law Society, the Law Commission and the Faculty of Advocates expressed their support for the present system.

Having considered all the submissions that were put to the committee on the issue, what policy position does the Scottish Government prefer, and would you consider a specific statement in section 4 of the bill on the use of the Law Society's in-house judicial factor?

Siobhian Brown: I consider that a matter for the Law Society and the persons involved in an application for an appointment. I can see the benefit of the Law Society having a knowledgeable in-house factor with considerable practical experience, and I can also see how that might help and protect clients.

The bill provides a way for persons opposed to the appointment of an in-house factor to make their views known. That could be done at the stage when the court is asked to appoint a factor. Any objections could be made to the court, which would have to make the decision. If there are any concerns about the actings or the appointment of the in-house factor appointment, they can be brought to the attention of the accountant or the Law Society. I do not know whether Michael has anything to add to that.

Michael Paparakis: I do not have much more to add. As the minister said, ultimately, if the Law Society decides that the in-house factor should be appointed, the application process for that presents an opportunity for objections to be made. If it thinks that someone independent of the Law Society should be appointed, and if there are any doubts or questions about the actings of the judicial factor during the subsistence of the judicial

factory, those can be brought to the attention of the accountant, who is under a duty to investigate.

Bill Kidd: I have a question on financial eligibility criteria and how they are applied between those whose finances would be assessed and the person applying to be the judicial factor.

Missing People's main policy concern regarding section 4 is practical: what will an application cost and will families be able to afford it? Can the minister offer families of people who go missing in Scotland assurances about the potential availability of legal aid and say whether financial eligibility criteria will be applied when considering legal aid applications? Would the resources of the applicant be assessed, or would it be those of the missing person?

Siobhian Brown: The assessment would be based on the applicant, and not on the missing person. The applicant would be able to get legal aid for advice and guidance from the solicitor initially, to work out whether they should go for a judicial factor or not and whether doing so would be relevant for them. If a person is on benefits, they would have their court fees paid by legal aid, and the applicant is the person who would be assessed.

Bill Kidd: It would be the applicant—right. Legal aid is available for people in those circumstances, then.

Siobhian Brown: It is, yes. Initially, everybody should get legal aid advice from a solicitor.

Bill Kidd: Okay. Staying on section 4, the Accountant of Court told us that there were other checks that she could potentially do on an applicant's suitability when they apply to be a judicial factor. That might include checking the applicant's credit status and whether they had been made bankrupt at any time. She said that the applicant could also be required to flag if their financial circumstances change after they have been appointed.

Did the Scottish Government give any consideration to putting those additional checks and safeguards in the bill? What do you regard as the potential advantages or disadvantages of including such requirements?

Siobhian Brown: The process for appointment is such that the accountant is not involved at the initial stages of an application. At that stage, it is a matter for the court alone. It would be open to the court to make inquiries that it considers appropriate to assist in deciding whether the person seeking appointment is suitable, and that might include whether they are currently bankrupt.

The accountant acts as a supervisor to factory estates, and such checks might be helpful in making sure that the function is carried out appropriately. It seems that the accountant already carries those checks out, so I do not think that anything further is needed.

Bill Kidd: Okay. Are you aware of the concerns that have been raised? Have you had a look at them?

Siobhian Brown: Yes, my officials have.

10:30

Foysol Choudhury (Lothian) (Lab): Under the current law, a judicial factor must find caution—which means to take out a specialist bond from an insurance company—to protect against any wrongdoing, such as theft of the estate, by the factor. In a policy change to the current law, section 5 of the bill abolishes the requirement on a judicial factor to find caution, except in exceptional circumstances. When proposing that new threshold, what investigation did the Scottish Government do of professional indemnity insurance or of any other possible alternatives to bonds of caution?

Siobhian Brown: I will hand over to Michael Paparakis, who has the technical knowledge to be able to answer that question.

Michael Paparakis: The Scottish Government did not look at the specific issue of indemnity insurance. As I understand it, the Law Society raised concerns during the commission's consultation. The SLC considered that matter and decided to proceed with the recommendations made in the bill.

Regarding the question of whether checks for indemnity insurance cover the actings of a judicial factor, the court would be able to make that sort of investigation. If there is any question or doubt, the court can ask the person applying, or the judicial factor to be appointed, whether the indemnity insurance covers that. If it does not, the court would have the option to order caution or something similar, such as a consignation of money.

Foysol Choudhury: The committee heard evidence from several legal stakeholders that the proposed threshold of "exceptional circumstances" may be set too high. It therefore might not result in caution being required where a layperson is being appointed and specific professional indemnity insurance might not be an adequate substitute for professionals. On the other hand, Missing People is concerned about the costs of caution and prefers the existing threshold. Having heard all the views expressed to the committee about that issue, are you still convinced that "exceptional circumstances" is the right threshold? If not, what policy alternatives would you propose, and why?

Siobhian Brown: I do not consider the threshold to be too high; I believe that it strikes the right balance between the incurring of unnecessary costs and protecting an estate from the improper actings of a judicial factor.

The evidence indicates that bonds of caution can be difficult to obtain and can cost thousands of pounds each year, which is paid for by the estate. That can be prohibitive in circumstances in which a family member is appointed to administer the estate of a missing person and can be completely unnecessary where indemnity insurance covers the judicial factor's actings.

Most current judicial factors are professionals with indemnity insurance, which, as the committee has heard, can cover their actings as a judicial factor. If a non-professional judicial factor is appointed, the court will have the discretion to order caution. The bill contains safeguards in relation to that, including the fact that all judicial factors are supervised by the accountant and that they must submit an inventory of the estate property and a management plan and must provide accounts for regular audit.

Any person who has concerns about a judicial factor can complain to the accountant, who is required to investigate and has the power to direct a judicial factor to do something. The accountant must also report any serious misconduct to the court.

The Convener: Tim Eagle has some questions.

Tim Eagle: Up until about a month ago, I did not know what the register of inhibitions was. I do now, and we have been having quite the debate on whether that is the correct place to give notice of the appointment of judicial factors. Various people who have been in front of us have debated that issue. Most would probably agree that that is not 100 per cent the right place, but there was concern about the cost of setting up a completely new location for that information. There was also concern about the public's ability to search the register of inhibitions. Having listened to that evidence, do you have any thoughts on whether the register that is the right place to put that information?

Siobhian Brown: Currently, only some kinds of appointments of judicial factors need to be publicised and most respondents to the SLC's consultation were of the view that some form of publication of appointments was necessary. The SLC consulted with the keeper of the registers and concluded that registration in the register of inhibitions was inappropriate.

I do not know whether Michael Paparakis wants to add anything to that.

Michael Paparakis: Ultimately, it comes down to the benefits and the disadvantages of having a new register versus sticking with the current register. I think that it was the Law Society that suggested that the register of inhibitions was a compromise.

Ultimately, the purpose of the register of inhibitions is to prevent someone from, for instance, taking a loan on property on which a judicial factor has been appointed. In terms of current practice, people would normally search the register of inhibitions for that type of case, which is why the register was chosen.

Last week, the Accountant of Court gave evidence about the possibility of using a new register. She said that that was possible, and suggested a figure for how much that could cost. I understand that she was potentially going to write to you with information that was a bit more considered, but her off-the-cuff figure gives you an idea of the costs.

Another potential issue is people not searching that register regularly, meaning that the appointment of a judicial factor of a property could be missed, which would obviously be counter to the policy that we want to take forward through the bill.

Tim Eagle: I clarify that the concern with the register of inhibitions is that it is not easily searchable by members of the public. However, you are content that that is the most cost-effective way of recording the appointment of judicial factors and that support is in place such that a member of the public will be able to search the register if they want to do so.

Michael Paparakis: Yes. The keeper of the register runs the register of inhibitions, and the costs of using it, on Registers of Scotland's website. If you are registered as a business, the cost is about a pound a search. If an individual was going to offer a loan on property or buy property, they would go through a solicitor. That solicitor would then search the register on their behalf. If an individual was doing that themselves, I understand the cost to be about £30 pounds a search. That may or may not be expensive, depending on your point of view.

Siobhian Brown: Could I have a two-minute break, convener?

The Convener: Sure; no problem. We will suspend briefly.

Siobhian Brown: Thank you.

10:38

Meeting suspended.

10:40

On resuming—

The Convener: Do you have any further questions, Mr Eagle?

Tim Eagle: No: what I have heard explains the matter. There was quite a lot of discussion about the register, but the explanations that have been given make sense to me.

Oliver Mundell: Section 17 of the bill covers the investment power of a judicial factor in respect of the estate. In respect of section 17, does the minister agree with certain stakeholders that it should be stated in the bill that a judicial factor could choose to invest in ethical, social or governance-tested—ESG—investments, even if that might not lead to a maximum income for the estate? Can you explain your reasoning here for the benefit of the committee?

Siobhian Brown: Yes, of course. Thank you for the question, Mr Mundell. There has been some confusion about what the Trusts and Succession (Scotland) Act 2024 allows in this area. To clarify, if there is no contrary intention in the trust deed, the 2024 act allows trustees properly to take non-financial considerations into account when choosing between investments for the trust. However, that is only in situations where the environmentally friendly investment, for example, has the best financial prospects or has financial prospects that are equally as good as those of another investment. In other words, trustees are not always bound to maximise financial returns where a suitable investment would be consistent with the purposes of the trust or where they have taken proper advice. Rather, the investment policy that trustees adopt should reflect the purposes of the trust.

The questions put to stakeholders by the committee included whether judicial factors should have a power to invest in lower-performing investments if they meet specified ESG criteria. That is different from the provision in the 2024 act, and I do not agree that there is a need expressly to confer such a power on a judicial factor. Not all judicial factors will need to make investment decisions, and the bill requires judicial factors to consider whether it would be appropriate to invest. That is not likely to be the case for all judicial factories.

The bill is not prescriptive as to how to invest, and it leaves it up to the judicial factor to decide on that, taking professional advice where appropriate. I am willing to look into the matter further, however, and I have asked my officials to write to stakeholders in the coming months, asking them for their views on whether an express power similar to those available to trustees would be welcome. I am happy to write to the committee ahead of the next stage with my thoughts on that.

Oliver Mundell: That is helpful. I guess that also ties in, to a certain extent, with some of the questions about missing persons and about where non-financial criteria fit in the legislation. There is some overlap in the charity sections, with the potential for people to be judicial factors for trusts. We want to understand this as we approach stage 2. We are modernising very old legislation, and we note from the evidence that we have heard on various areas that there are points when financial return, or holding things static exactly as they are, are not the sole considerations that people would expect to be taken into account. Are we going to change the role of the judicial factor slightly under the bill?

Siobhian Brown: We will talk to stakeholders, and I will then get back to you on that. I appreciate the points that you have made.

Tim Eagle: You may need to educate me on how to pronounce this word correctly. With regard to the fiduciary—there we go—nature of the judicial factor's duties, there was a discussion on whether those need to be explicitly laid out in the bill.

Some argued that the context was self-evident in the bill, while others said that those duties could be laid out more widely. What is the Scottish Government's view on that? Would you be open to amending the bill if you thought that that would be worth while?

10:45

Siobhian Brown: From reading the bill as a whole, I think that it is clear that the nature of the judicial factor's role is fiduciary. While the term "fiduciary duty" is not used in the bill, the Government considers that the bill will achieve the same effect.

A fiduciary duty is essentially a duty to act in good faith in the interests of another, rather than in one's own self-interest. Section 10 of the bill makes it clear that judicial factors have

"to hold, manage, administer and protect the factory estate for the benefit of persons with an interest in the estate."

It also requires judicial factors to

"exercise care, prudence and diligence"

and

"take professional advice when appropriate."

The Scottish Law Commission told the committee that it had set out

"very clearly in"

its

"report that the essence of the institution was that it was fiduciary"—[*Official Report*, *Delegated Powers and Law Reform Committee*, 16 April 2024; c 16.]

and that it was not considered "necessary" to include a specific reference to that in the bill.

I understand that some stakeholders have suggested that the matter should be clarified, but others, such as the SLC and the Faculty of Advocates, have pointed out that to add even a simple statement to that effect could have unintended consequences. However, it might be possible to add something to the explanatory notes to the bill in order to make that point clearer for users of the legislation, and I am willing to consider that further.

Tim Eagle: The Faculty of Advocates, with support from the centre for Scots law, has said to the committee that it would be useful to give the judicial factor an additional power in part 2 of the bill to seek directions from the appointing court. However, other stakeholders' views on that have been more mixed. There is some suggestion that the court already has the powers that it needs in the bill.

Having heard all the views that have been expressed to the committee, what is your position on that? Would you be open to amending the bill in such a way as the Faculty of Advocates suggests?

Siobhian Brown: I consider that an additional power that would allow judicial factors to seek directions from the court is not necessary, given the nature of the office and the fact that there are other options available.

Judicial factors accept offers on the understanding that they are there to use their judgment, take professional advice where appropriate and make decisions in relation to the estate. If they have any doubts as to whether they have the necessary powers to take a particular course of action, they can apply to the court for additional powers under section 11 of the bill. That can be done at any time after the initial appointment.

While the court directions might be useful in respect of trust estates and executries, that is because there is no equivalent to the Accountant of Court, and the only option is to go to court. Judicial factors, on the other hand, are supervised by the Accountant of Court, and if they are unsure about what they should or can do, they should consult the Accountant of Court and agree on a way forward. As such, I do not think that we need to add another route for directions, in particular as that would add a significant cost to the factory estate, given that seeking directions from the court comes with court fees and legal expenses. Before the committee reaches any conclusion on the issue, however, I urge you to seek the views of the Lord President in that regard.

Tim Eagle: Thank you—that is helpful.

Foysol Choudhury: Section 23 of the bill sets out the general rule that, if a judicial factor is involved in court proceedings on behalf of the estate, any legal costs that are associated with that will come out of the estate. The Faculty of Advocates and the Sheriffs and Summary Sheriffs Association have both said that section 23 could be modified to deal with exceptional circumstances where a judicial factor had acted unreasonably in a situation that is not covered by section 24 and so should be found personally liable for legal costs.

The SLC and the Law Society, on the other hand, were not certain that the suggested modification was the right approach. The commission, for example, feared that judicial factors would become unduly preoccupied with their risk of personal liability.

Having heard all the views that were expressed to the committee, what is the Scottish Government's position on the issue? Would the minister be open to amending section 23 of the bill in the way that has been suggested? Can you explain the reasons underpinning your views?

Siobhian Brown: Section 23 of the bill contains a general rule that any costs of litigation that is pursued by the judicial factor

"on behalf of the factory estate"

are

"to be met from the factory estate."

The general rule is, however, "Subject to section 24" of the bill. Under section 24, the court is given the power to find a judicial factor personally liable if they have breached their duty and the court finds it "appropriate" to hold them "personally liable".

We need to strike the right balance to allow a judicial factor reasonable space to manage an estate in good faith. I do not think that a judicial factor should be found personally liable if, with the benefit of hindsight, their actions are found to have been unreasonable but there has been no breach of duty.

Given the continuing need for competent judicial factors, we must be careful, and we do not necessarily want to put blocks in the way of people wanting to be appointed. Allowing for judicial factors to be held personally liable for taking actions that do not amount to a breach of duty would, in my view, be likely to discourage judicial factors from pursuing litigation that is in the interests of the estate, and perhaps even discourage individuals from acting as judicial factors altogether.

Foysol Choudhury: The organisation Missing People has expressed concern about what it sees as a lack of clarity associated with the interaction between the Presumption of Death (Scotland) Act 1977 and part 4 of the bill. Does the minister think the relationship between the two pieces of legislation needs to be clarified, either in the text of the bill or in associated guidance?

Siobhian Brown: I consider that the bill and the 1977 act work alongside each other. The bill allows for the appointment of a judicial factor to manage the estate of a missing person. If the missing person is subsequently declared dead by way of an application under the 1977 act, the purpose for which the judicial factor was appointed would no longer exist and the judicial factory would be terminated. As the committee heard, families of missing people may not want to apply immediately for a declarator, and the appointment of a judicial factor to manage the missing person's estate is an alternative.

Foysol Choudhury: Missing People raised another issue with part 4, specifically with regard to what the procedure would be if the missing person came back and the judicial factory was still on-going. Can the minister confirm whether, under the bill, termination of a judicial factory would be automatic in those circumstances, or whether it would instead, as the committee suspects, require a court's approval? What is the policy rationale for the approach that the Scottish Government has taken in that respect?

Siobhian Brown: A judicial factor is a person who is appointed by the court, and I consider that there must be a formal process for bringing the office to an end. That would protect both the missing person who has returned and the judicial factor, who may be a family member. It is important that the formerly missing person can take over the management of their estate as quickly as possible, but it is also important that the actings of the judicial factor can be scrutinised and that they can be discharged of liability.

The bill provides an administrative process, overseen by the Accountant of Court, for the termination of the judicial factory. In most cases, that process would be used. Alternatively, the bill also provides persons "with an interest" with a route to

"apply to the court for distribution"

of the factory estate.

Foysol Choudhury: Do you think that it is necessary to put a definition either in legislation or in guidance?

Siobhian Brown: That point has been raised with regard to missing persons. At this moment, our answer is no, but we are happy to consider it.

The Convener: I call Bill Kidd.

Bill Kidd: Thank you, minister, for the replies that we have been getting—I am sure that they will be extremely helpful.

There is a relationship between section 34 of the bill, on discharge, and section 38, on investigations. The committee has been considering the interrelationship of those two sections. Section 34 says that discharge usually ends a factor's liability, and section 38 covers the investigatory powers of the Accountant of Court and the court.

Can the minister confirm what the position is if a factor is discharged under section 34, but misconduct subsequently comes to light? What is the policy justification for the approach that would be taken in that instance?

Siobhian Brown: Section 34 of the bill and the accompanying explanatory notes make it clear that the effect of the discharge is that

"the judicial factor is no longer ... accountable"

for what has taken place during the course of the judicial factory. As such, once the judicial factor is discharged, the Accountant of Court would not be able to investigate or report any misconduct under section 38. The SLC report is clear that, once the factor leaves office, that should

"end any obligation ... to account further to the estate or those representing it."

To do otherwise would run the real risk of discouraging individuals from taking on the role, which was a point that the Accountant of Court made in her evidence to the committee last week.

Importantly, there are safeguards in place. Judicial factors are supervised by the Accountant of Court and are required to regularly submit accounts and report to her on the management of the estate. Before a judicial factor can be discharged, the accountant has to audit the final accounts and be satisfied that everything is in order.

Further, section 34 makes it absolutely clear that discharge has no effect on criminal liability. Both criminal liability and any civil liability that is connected to it continue after the discharge, which means that a judicial factor can still be held accountable, for example, if they have committed fraud in the course of the judicial factory.

Bill Kidd: This area can be complex for people who do not have much training, if any. What do you make of the view that the interrelationship between the two provisions in sections 34 and 38 needs to be explained more clearly in the text of the bill, for everyone's benefit?

Siobhian Brown: I will bring in Michael Paparakis for that question.

Michael Paparakis: Our position is that it is clear how the two provisions work. As the minister set out, section 34 is about the Accountant of Court's power to investigate, which would obviously end upon the discharge of the factor. The explanatory notes are a vehicle by which we could try to make it clearer, as there have been some concerns raised by stakeholders. That could be a way to clarify the situation but, equally, it is important to note that, although the Accountant of Court is not able to investigate after a factor is discharged, that would not prevent other people from doing so. For instance, persons with an interest in the estate could raise an action in court to try to recover any funds that have attached to any criminal liability.

Bill Kidd: That is perfectly reasonable. However, you mentioned that the explanatory notes could perhaps be strengthened to give people a clearer idea of the situation, particularly those who are very concerned about the outcomes that may apply in their own cases. Could that be looked into?

Siobhian Brown: I am happy to take that away, and we will definitely consider it.

Bill Kidd: Thank you very much for that.

11:00

Oliver Mundell: The Law Society of Scotland, in its response to the committee's call for views, said that the bill as introduced contains "a significant departure from" the Scottish Law Commission's draft bill. It stated:

"Specifically, the Law Society considers that there has been a 'watering down' of the levels of legal and accountancy knowledge required for the roles of the Accountant and the Depute Accountant."

On the other hand, the committee heard from the Scottish Courts and Tribunals Service that the bill reflects the existing approach, and that the existing approach works well. The SCTS believes that, as the same person who is the Accountant of Court also serves as the public guardian, it is important to think about a person's suitability in the context of both roles, taking into account in particular that the public guardian's work takes up the majority of the time.

Having heard all the evidence, does the Scottish Government agree with the SCTS, or are you minded to look again at the matter?

Siobhian Brown: I do not agree that the bill lowers the criteria that are required for a person to be appointed as the Accountant of Court. While the drafting of the SLC's provision has been updated, there was no intention to depart from the recommendation in the SLC report. That recommendation was that the accountant

"should have a knowledge of law and accounts."

The report states that that does not necessarily mean that they should be required

"to be formally qualified in both, or either".

The bill provides that the accountant must be

"appropriately qualified or experienced in law and accounting."

To my mind, that is not a "watering down" of standards, and I consider that the bill gives effect to the SLC recommendation.

Last week, I heard what Patrick Layden had to say to the committee regarding the issue. The point was raised with him in correspondence after the session, and he confirmed to me that the drafting of the bill is consistent with the SLC's policy recommendations.

Under the bill, the SCTS will determine whether the person who is appointed is the best fit for the role. That seems to be a sensible approach to take, in particular given that the Accountant of Court is an SCTS employee. The SCTS has had the power to appoint an accountant for around 90 years, and I am not aware of any concerns that have been raised about whom it has appointed over that time or the experience or knowledge of those people.

Oliver Mundell: That is helpful. To take it a stage further, I note that the bill will potentially widen the number of people who are using judicial factors or engaging with judicial factory. If you heard that someone was an accountant, would you expect that they had some form of accountancy qualification? I think that that is the point.

Siobhian Brown: Yes, I think that it would be up to each judicial factor in each case, based on merit.

Oliver Mundell: I am saying that if you heard that someone was an Accountant of Court, you would, if you were not familiar with all the other pieces of legislation, think that they were an accountant—

Siobhian Brown: You would think that they were an accountant per se.

Oliver Mundell: Yes, and that they had the training that would go with that.

Siobhian Brown: You raise a valid point. In general, a layperson would probably assume that the Accountant of Court was an accountant, so we could perhaps look at how we make that a bit clearer.

Oliver Mundell: Yes—it is about the balance of skills within the team. I know that that becomes an operational matter, but—

Siobhian Brown: If I may, I will bring in Michael Paparakis, because he has a lot of knowledge of the history and the technical aspects of the role.

Michael Paparakis: With regard to the Accountant of Court, the committee heard from her last week the view that there does not need to be a professional qualification required, and that there is considerable experience in the role. As the minister pointed out, the SCTS has had the power to appoint the accountant for nearly 90 years, and there have been no questions raised about the qualifications.

The Accountant of Court has the ability to buy in professional experience. For example, they can obtain legal opinions or expert views from an accountant if they need to do so. As we understand from our discussions with the Accountant of Court, their role as a supervisor does not require them to be qualified by holding either a legal qualification or an accountancy qualification, because their role is supervisory and administrative, and it is about giving advice. To require an accountancy qualification or a legal qualification may mean that the person who is appointed is overqualified for the role, and the qualifications may not be used in the way that they otherwise might be.

Oliver Mundell: I hear that, and it is all helpful. I do not want to push you on that—I am conscious that you are an official, rather than the minister—but we have had the question of the level of qualification posed to us. There may not be any practical examples, but the Law Society is currently posing that question to us. It is coming from the Law Society, as a relatively significant stakeholder, rather than from me, so in that sense, it is not unfounded.

Siobhian Brown: Absolutely. We will take that away and consider it.

Oliver Mundell: That is why I wanted to push it a wee bit further.

Siobhian Brown: That is fine.

Tim Eagle: I have a couple of relatively specific questions around section 38(4). The first question is around the requirement for the accountant to refer a judicial factor to their "professional body". Can you clarify for the committee whether the professional body for solicitors is the Scottish Legal Complaints Commission or the Law Society of Scotland?

Siobhian Brown: I do not see any difficulties with the report on serious misconduct by a solicitor acting as a judicial factor being sent to the Law Society, because my understanding is that, if there was a complaint, it would be sent to the Law Society in the first instance and then to the SLCC.

The Law Society advised my officials that, under the provisions of bill, if the accountant were to report serious misconduct by a solicitor, the Law Society would pass that on to the SLCC as a matter of practice, and there is nothing in the bill that would prevent the accountant from sending a copy of the report to the SLCC as well.

However, I will consider the matter further to see whether what would happen in practice could be more accurately reflected in the bill.

Tim Eagle: That is good, because there was a concern that the SLCC should be the first point of call. However, if you have spoken to the Law Society and it has said that it would pass the report on, that is fine.

My second question is also about section 38(4). The accountant must refer a judicial factor to their professional body, but that is before any potential misconduct has been determined by the court. There was a concern that that does not seem a fair way around it; instead, the court should decide first and, if an issue has occurred, that would be referred on to the professional body.

Is the minister still of the view that that subsection is framed correctly? Would you like to comment on that?

Siobhian Brown: Yes—I think that the section strikes the right balance between protecting the estate and dealing with serious misconduct. The accountant is under a duty to investigate complaints and reach a decision, and it is only right that, if they conclude that there has been serious misconduct, they report it to the appropriate professional body. The role of the court is to dispose of the matter as it sees fit.

The alternative—of allowing a court to intimate—would mean that time would have to pass before the accountant finds that there has been serious misconduct, and the court process begins to decide the appropriate disposal. It is only right that the professional body is notified of the matter as soon as possible, to allow it time to consider it. In my view, that early notice is an important safeguard for the protection of the estate and possibly other cases in which the judicial factor acts professionally.

Tim Eagle: Therefore, in your mind, the two processes are almost running side by side. That complaint would take reference to any on-going court case at the same point and come to the same conclusion. Thank you very much.

The Convener: On that particular area, the minister is very much aware that we have had dialogue in the past regarding McClure Solicitors in my constituency. One of the main concerns

from constituents—and others outside of the Greenock and Inverclyde constituency—was the fact that a judicial factor was not put in place. I am very much aware of the other legislation—the Regulation of Legal Services (Scotland) Bill—that is going through Parliament at the moment. Whether they are amended or not, if the two bills pass through the parliamentary process, I like to think that there will be some clarity in the future. If a similar situation were to arise again in the future, it would be a clearer process for everyone to see and understand, as compared with the sense of confusion for people who have been affected by the McClure case.

Siobhian Brown: Thank you, convener. I know that you have taken a great interest in the situation with McClure Solicitors, and you have discussed that with me and with the Law Society. The Law Society's position on that is on the public record, because it was given to the committee in an evidence session in the past couple of weeks.

I am aware that the matter has been reported to Police Scotland, and I understand that Police Scotland has commented that an assessment of the information is on-going. Therefore, it would be inappropriate for me to comment much further on the individual circumstances of the case.

However, in general, a judicial factor appointed under the Solicitors (Scotland) Act 1980 does not carry out any legal work in the way that an incoming firm is able to. In many cases, it might be preferable for another firm to take over the business of a failing firm rather than for a judicial factor to be appointed, provided that there are no concerns as to any misdeeds.

Ultimately, the Law Society is the regulator and will be best placed to decide whether to seek the appointment of a judicial factor to a solicitor firm. However, I am also working closely with you and other MSPs in relation to the regulation of legal services.

The Convener: I will move on. In response to the committee's call for views, the Faculty of Procurators of Caithness said that it thought that there should be a specific provision for an interested person or organisation

"to raise concerns about the Judicial Factors management of the estate."

It proposed that concerns should be raised first with the Accountant of Court and that, if a party was unsatisfied with the outcome, there would then be a role for the court.

A number of witnesses have suggested that various complaints procedures already exist in practice and that the bill says all that is necessary on the subject. Does the Scottish Government think that the complaints process needs to be made clearer—either in the bill or in some other way?

Siobhian Brown: Currently, if someone has a complaint against a judicial factor, they can raise that directly with the judicial factor or with the Accountant of Court, given the accountant's supervisory role. That will continue under the bill, with the accountant being required to investigate any concerns in relation to judicial factors acting.

The bill also gives the accountant a power to issue directions to the judicial factor and, further, if the accountant concludes that there has been serious misconduct or material failure, they must refer the matter to the court to be dealt with. Most judicial factors are members of a regulated profession, and that is another way for complaints to be heard.

The committee has heard from a number of stakeholders, and there does not seem to be any support for a new complaints procedure to be set out in the bill. I consider the current approach to be a practical and sensible way to deal with complaints at the moment.

Does Michael Paparakis want to add anything?

Michael Paparakis: As the minister pointed out, the bill is clear that the duty is on the Accountant of Court to investigate any misconduct and to determine the outcome of that. The Accountant of Court and the SCTS have their own web pages; it could be explored with them whether they can use those web pages to set out the complaints procedure with the accountant. It might already be on the web pages and could be flagged in a better way, but that is one option that we could explore with them.

The Convener: As has been discussed today and in previous sessions, somebody who becomes a judicial factor does not necessarily have to be from a regulated profession. When Missing People appeared before the committee last week, its representative said that they felt that it was not clear from the bill what the complaints procedure is—for example, if one family member of a missing person has concerns about how another family member is operating as a judicial factor. They also felt that, although setting out the complaints procedure would be helpful, it did not need to appear in the bill but, instead, could appear in guidance. From their evidence, the consideration would be that, when a missing person is involved, not every judicial factor is from a regulated profession—they could be a family member. Will you consider those concerns with regard to guidance?

Siobhian Brown: We are happy to consider that further.

Foysol Choudhury: Minister, you will be glad to know that this is, I think, the last question. The Law Society has highlighted to the committee that it would like powers in addition to those that are provided under the Solicitors (Scotland) Act 1980 to deal with certain issues that can arise with firms taking the form of incorporated practices.

When the Law Society gave evidence on 23 April, it indicated that its preferred legislative vehicle for change was stage 2 amendments to the Regulation of Legal Services (Scotland) Bill. Is it the Scottish Government's view that that bill is the right place to add the powers that the Law Society seeks?

11:15

Siobhian Brown: Yes. The Regulation of Legal Services (Scotland) Bill team is working on amendments with the Law Society and other MSPs to address that concern. I am comfortable that that bill will address the specific issue.

The Convener: Do colleagues have any further questions?

Tim Eagle: I have a quick general question that has come to mind as various of the witnesses have been speaking. Pretty much all of them welcomed the update under the Judicial Factors (Scotland) Bill. One referred to a couple of paragraphs in a Victorian bill that referred to the old judicial factors. I read in previous notes that the Scottish Law Commission first published a discussion paper on this in 2010, with full recommendations in 2013. We are now in 2024. Is it normal for law reform to take that long? Is there an issue there? Can we do something to speed up law reform in Scotland more generally?

Siobhian Brown: I will bring in Michael Paparakis. On the basis of my experience of being a minister for a year, I note that the Trusts and Succession (Scotland) Bill, which went through last year, was on the same timescale, in that work had first been done 10 years ago. There is a bit of a challenge in relation to the parliamentary timetable and where we can slot in such legislation, but we have taken through eight SLC bills, and we are determined to keep progressing with them. Michael may want to come in, as he has a lot of history with this.

Michael Paparakis: There are a number of SLC reports that we are looking to take forward and to which we are giving consideration this session. The judicial factors report is from 2013, but we are starting to get through those reports. This is the third SLC bill that we have brought through this session; I think that we have brought through eight over the past 10 years or so.

The Parliament and the committee have done a lot of work to amend the Parliament's standing orders in relation to SLC bills, which means that bills such as this can be taken through by this committee rather than a normal subject committee. That allows us scope and time in the legislative programme to deal with Scottish Law Commission reports.

We are getting through the backlog. A couple of other reports have been considered in this session. The minister wrote to the chair of the Scottish Law Commission, Lady Paton, in—I think—September last year about how we are considering reports on aspects of leases and contract. There have been three bills this session, and there are a couple of years left of the session. We are working our way through that.

I should say that the judicial factors report is probably the oldest one that we are considering. The trusts report was from 2014, so that was also old. However, I think that the contract one is from 2018, so we are taking a leap forward. Obviously, the reports are still a bit dated, but we are committed to implementing the reforms and are working our way through them.

Tim Eagle: Thank you—I was just curious. Law is maybe always not that fast, but I wondered whether there was a hold-up, because there is quite a lot that we want to come through the system, as you mentioned. If all the reports take 10 years, that will take quite a long time. However, if it is simply about parliamentary time and space, I suppose that the best use of the committee is in how we can push things forward.

Siobhian Brown: I note that we recently hosted Lady Paton, who came here with people from all over the UK to show them around the Parliament. They were really impressed that we had the committee, which enables scrutiny of the proposals that are put forward. That is positive.

The Convener: I am sure that I can speak for all colleagues on this issue, which has certainly come up in the past. Mr Eagle is a new member of the Parliament and of the committee. The committee is always happy to oblige when it comes to SLC reports and legislation. The valuable work that we have undertaken in this and the previous session shows the level of scrutiny that we give to legislation. We are always happy to have more.

As there are no further questions from colleagues, and as the minister has nothing to add, I thank her and her officials for their evidence. The committee may follow up by letter with any additional questions that stem from the meeting.

11:20

Meeting continued in private until 11:49.

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