

ANNEX B

LIST OF RECOMMENDATIONS

1. That the Acts of Sederunt of 31 July 1690, 25 December 1708, 22 November 1711, 31 July 1717 and 13 February 1730 be expressly revoked. (paragraph 2.14)
2. That section 33 (limitations on vesting) of the Bankruptcy (Scotland) Act 1985 be amended to ensure that property held by a person as a judicial factor will not vest in the trustee in sequestration. (paragraph 2.43)
3. That applications for the appointment of a judicial factor should continue to be made by way of petition. (paragraph 3.3)
4. That petitions for the appointment of a judicial factor should continue to be competent in both the Court of Session and the sheriff court.(paragraph 3.6)
5. That the provisions of the draft Bill attached to this Report should be without prejudice to the appointment of a judicial factor under any other enactment or rule of law. (paragraph 3.10)
6. That the provisions of the draft Bill should apply to any judicial factor, so called, appointed under that Bill or any other enactment or rule of law. (paragraph 3.10)
7. That petitions for the appointment of a judicial factor made under section 41 of the Solicitors (Scotland) Act 1980 should no longer be made in the Inner House of the Court of Session. (paragraph 3.11)
8. That it should be competent, in either the Court of Session or the sheriff court, for the appointment of a judicial factor to be made in the course of other proceedings. (paragraph 3.14)
9. That it should continue to be competent to appoint interim judicial factors. (paragraph 3.22)
10. That an interim appointment should be kept under review by the Accountant.(paragraph 3.22)
11. That, subject to any modifications which the appointing court may make, the provisions of the draft Bill should apply to an interim judicial factor as they apply to a permanent judicial factor. (paragraph 3.22)
12. That intimation of the petition should be made to those appearing to the petitioner to have an interest in the estate. (paragraph 3.23)

13. That the definition of "interest" should be expressed widely enough to enable the court to make an appointment whenever it considers it appropriate to do so. (paragraph 3.24)
14. That any natural person of full legal capacity, and who is in the view of the court a suitable person, should be eligible to be appointed as a judicial factor. (paragraph 3.27)
15. That it should be competent to appoint as a factor a person who is not domiciled in Scotland. (paragraph 3.27)
16. That a person domiciled outside Scotland who accepts appointment as a judicial factor is deemed thereby to prorogate the jurisdiction of the Scottish courts. (paragraph 3.27)
17. That the court should have a discretion as to whether or not to require a judicial factor to find caution; but that that discretion should be exercised sparingly. (paragraph 3.36)
18. That where caution is required, the amount of caution should be fixed by the Accountant, who should also be able to vary the amount from time to time. (paragraph 3.36)
19. That the grounds for the appointment of a judicial factor should be that there is property which requires to be managed properly and:
 - (a) that it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it; or
 - (b) that there would otherwise be benefit in having it managed by a judicial factor. (paragraph 3.45)
20. That all property in relation to which the factor is appointed should vest in the factor, in that capacity. (paragraph 3.74)
21. That a certified copy of the interlocutor of appointment should be sufficient warrant for the factor to intromit with the factory estate. Where, however, a requirement for caution has been imposed, the certified copy interlocutor should not be issued before the Accountant has informed the court that the requirement has been complied with. (paragraph 3.74)
22. That where the property is of a nature such that the completion of title to it requires some further formal step, such as the registration of a notice of title in the Land Register, the factor should have a discretion to take that step. (paragraph 3.74)
23. That section 24 of the Titles to Land Consolidation (Scotland) Act 1868, section 13 of the 1889 Act and section 25 of the Trusts (Scotland) Act 1921 should be repealed. (paragraph 3.74)

24. That section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed, in so far as relating to judicial factors. (paragraph 3.74)
25. That, without prejudice to sections 41 and 42 of the Solicitors (Scotland) Act 1980, a judicial factor appointed on the estate of a solicitor by virtue of that Act should be vested in all the property held by the solicitor in question, including, unless the court determines otherwise, all such property held by that solicitor in a fiduciary capacity. (paragraph 3.82)
26. That the appointment of a judicial factor should be:
 - (a) registered in the Register of Inhibitions; and
 - (b) intimated to the Accountant by the clerk of court. (paragraph 3.86)
27. That, where an appointment of a judicial factor subsists for 5 years, a fresh registration should be made in the Register by the judicial factor. (paragraph 3.86)
28. That a general duty should be imposed upon a judicial factor to manage the estate for the benefit of those who have an interest in it. (paragraph 4.14)
29. That that general duty should be subject to:
 - (a) any special statutory regime under which a judicial factor may be appointed; and
 - (b) the terms of the interlocutor appointing the judicial factor. (paragraph 4.14)
30. That a court appointing a judicial factor should have a discretion to add to, or subtract from, the duties which would otherwise be imposed upon a judicial factor under or by virtue of any enactment. (paragraph 4.14)
31. That a judicial factor should be able at any time to apply to the court to be relieved of any duty imposed by or by virtue of the interlocutor of appointment. (paragraph 4.14)
32. That a judicial factor should be required to exercise care, diligence and prudence in carrying out the functions of the office. (paragraph 4.14)
33. That a judicial factor should be under a duty to ingather the whole of the judicial factory estate. (paragraph 4.17)
34. That the judicial factor should ensure that all cash accounts, share certificates and other assets of a like nature, appertaining to the judicial factory, should be readily identifiable as such. (paragraph 4.17)
35. That the judicial factor should be under a duty to prepare an inventory of the estate, and send it to the Accountant within six months of being appointed. (paragraph 4.19)

36. That the judicial factor should be under a duty to inform persons appearing to be creditors or debtors of the judicial factor estate of the fact of the appointment. (paragraph 4.19)
37. That the factor should be under a duty to prepare a management plan, to be agreed with the Accountant, in such detail as the Accountant may stipulate. (paragraph 4.25)
38. That a judicial factor should be under a duty:
 - to prepare regular reports, including accounts, for the consideration of the Accountant, at such intervals and in such form as the Accountant may specify.
 - not to delegate any functions, unless authorised by the draft Bill, or permitted to do so by the appointing court or the Accountant.
 - to take professional advice where it is appropriate to do so.
 - to consider whether and, if so, how, to invest the funds of the estate.
 - where it is sensible to do so, to enforce or defend any claim in relation to the estate. (paragraph 4.33)
39. That, where the parties with an interest in the estate are in disagreement, the judicial factor should be under a duty, either personally or through others, to mediate, or otherwise to attempt to persuade them to come to an agreement. (paragraph 4.37)
40. That where it proves impossible to persuade the parties to resolve their differences, the judicial factor should be required to prepare a scheme for the solution of the difficulty, either by a suggested distribution of the estate or otherwise. (paragraph 4.37)
41. That a judicial factor should have all the powers of a natural person beneficially entitled to the estate. (paragraph 5.7)
42. That those powers should include the specific powers:
 - (a) mentioned in the schedule to the draft Bill; and
 - (b) conferred on the judicial factor by any other enactment. (paragraph 5.7)
43. That the statutory provision, currently in section 2(3) to (6) of the Trusts (Scotland) Act 1961, which enables a judicial factor on a trust estate, with the consent of the Accountant, to act in a way at variance with the trust purposes, should be re-enacted in the draft Bill attached to this Report. (paragraph 5.13)
44. That the court should have a discretion to add to, or to exclude, any of the judicial factor's powers in a particular case. (paragraph 5.15)

45. That the factor should be able to apply to the court for additional powers during the course of the judicial factory. (paragraph 5.15)
46. That, without prejudice to any other lawful means of requiring information to be provided, a judicial factor should have a specific power to request information from persons and bodies holding information as to the affairs of the judicial factory estate; and such persons and bodies should be under a duty to comply with any such request. (paragraph 5.18)
47. That the processes for termination of the judicial factory, recall of the appointment of the judicial factor, and discharge of the judicial factor, should apply to a part of the judicial factory estate as they apply to the whole. (paragraph 6.9)
48. That a judicial factor who considers that the purpose of the appointment has been fulfilled, or is impossible to fulfil, should seek the agreement of the Accountant to a scheme for the distribution of the estate. (paragraph 6.18)
49. That the judicial factor should be required to intimate the scheme so agreed, with the accompanying documentation, to those with an interest in the estate. (paragraph 6.18)
50. That any person with an interest in the estate should be entitled to lodge objections with the Accountant within 21 days of such intimation. (paragraph 6.18)
51. That, if no objection is lodged, the judicial factor should distribute the estate in accordance with the scheme. (paragraph 6.18)
52. That the procedure seeking the agreement of the Accountant to a scheme for the distribution of the judicial factory estate should be followed even in cases where the persons with an interest in the estate do not agree with the judicial factor's proposed distribution of it. (paragraph 6.22)
53. That where a person with an interest objects to the proposed distribution, the Accountant should refer the matter to the court.(paragraph 6.22)
54. That where such a matter is referred to the court, the person making the objection occasioning the reference should be required to find caution for the expenses of the ensuing litigation, unless that appears to the court to be unjust in the circumstances. (paragraph 6.22)
55. That in any such proceedings the court should make such orders as to the disposal of the estate as seem to it to be appropriate. (paragraph 6.22)
56. That it should be competent:
 - (a) for a judicial factor who considers that it is appropriate to distribute the factory estate with a view to the judicial factory

being terminated, but who has failed to persuade the Accountant of that position; or

- (b) for a person with an interest in seeking the distribution of the estate, who considers that it is appropriate to distribute the estate with a view to the judicial factor being terminated, but who has failed to persuade the judicial factor and/or the Accountant of that fact, to petition the court directly for distribution of the estate. (paragraph 6.25)

- 57. That, in either case, the petitioner should be required to satisfy the court that reasonable attempts have been made to persuade the judicial factor to formulate a scheme for distribution and seek the Accountant's approval of it, or to obtain the Accountant's approval, as the case may be. (paragraph 6.25)
- 58. That a person with an interest in seeking the distribution of the estate who raises such a petition should be required to find caution for the expenses of the litigation, unless that appears to the court to be unjust in the circumstances. (paragraph 6.25)
- 59. That where such a petition is successful, the court should direct the judicial factor to distribute the judicial factor estate as seems to it to be appropriate. (paragraph 6.25)
- 60. That a judicial factor who has distributed the estate in accordance with the scheme, or as instructed by the court, should apply to the Accountant for termination of the judicial factor, recall of the appointment, and discharge; and should submit with that application final accounts. (paragraph 6.27)
- 61. That the Accountant should audit the accounts and, where they are satisfactory, should issue a certificate terminating the judicial factor, recalling the judicial factor's appointment and, where so advised, discharging the judicial factor. (paragraph 6.27)
- 62. That it should remain open to the Accountant to write off a judicial factor, and, where appropriate, grant a formal discharge to the judicial factor, where the funds available are insufficient to meet the expenses of formulating, and obtaining approval of, a scheme for distribution of the estate. (paragraph 6.29)
- 63. That a judicial factor who seeks recall of the appointment, and discharge, before the purpose of the appointment is fulfilled, should do so by way of petition to the court. (paragraph 6.31)
- 64. That such a judicial factor should prepare accounts, and submit them to the Accountant. (paragraph 6.31)
- 65. That the Accountant should audit the judicial factor's accounts, and prepare a report on them, and on whether, in the Accountant's opinion, the appointment

should be recalled and discharge granted, for submission to the court.
(paragraph 6.31)

66. That it should be competent for any person with an interest to petition the court for the recall of the appointment of the judicial factor. (paragraph 6.32)
67. That any person initiating such a petition should, unless the court determines that it would not be in the interests of justice, be required to find caution for the expenses of the litigation. (paragraph 6.32)
68. That any petition for the recall and discharge of a judicial factor, which does not also seek termination of the judicial factory, should contain a crave for the appointment of a successor.(paragraph 6.33)
69. That the appointment of the new judicial factor should take place at the same time as the recall of the appointment of the previous judicial factor. (paragraph 6.33)
70. That, upon consideration of the petition, and the Accountant's report, the court should, if so advised:
 - (a) recall the present judicial factor's appointment and appoint a successor;
 - (b) discharge the present judicial factor. (paragraph 6.34)
71. That, provided they have been approved by the Accountant, the outgoing judicial factor's closing accounts should be the opening accounts of the successor. (paragraph 6.37)
72. That, where there is no agreed closing inventory or balance sheet, the incoming judicial factor should make up an inventory and balance sheet, and agree them with the Accountant. (paragraph 6.37)
73. That where a judicial factor dies or becomes incapacitated in office, the Accountant should petition the court for the appointment of a replacement judicial factor and, where appropriate, for the recall of the appointment of the predecessor judicial factor. (paragraph 6.43)
74. That the replacement judicial factor should ingather the estate and prepare an inventory and management plan. (paragraph 6.43)
75. That the replacement judicial factor should, in addition, update and close the accounts of the predecessor factor as at the date of the replacement factor's appointment. (paragraph 6.43)
76. That a replacement judicial factor who considers it appropriate to do so should then apply to the Accountant for the discharge of the predecessor; and that the Accountant should, if it appears appropriate, grant a certificate of discharge. (paragraph 6.43)

77. That a certificate of termination granted by the Accountant should be registered in the Register of Inhibitions by the Accountant. (paragraph 6.44)
78. That, allegations of criminal conduct apart, a judicial factor who has been granted a discharge should not be accountable for what has taken place during the course of the judicial factory. (paragraph 6.45)
79. That judicial factors should be entitled to be remunerated for the work they do, on the basis of fees fixed by the Accountant after appropriate consultation. (paragraph 7.11)
80. That different rates should be able to be fixed for different levels of work, different circumstances and for interim judicial factors. (paragraph 7.11)
81. That judicial factors should be entitled to be paid, at intervals throughout the year as agreed with the Accountant, for the work done prior to the submission of the relevant fee note. (paragraph 7.11)
82. That the invoices which judicial factors submit should enable the Accountant to determine what work has been done, by which level of professional or administrative person, and how long it has taken. (paragraph 7.11)
83. That judicial factors should be entitled to recover all their reasonable outlays as and when they are incurred. (paragraph 7.11)
84. That in relations between the judicial factory estate and third parties, it should be made clear that liabilities fall upon the estate, and not upon the judicial factor. (paragraph 7.12)
85. That where the estate is involved in litigation, the expenses of that litigation should fall upon the estate, and not upon the judicial factor. (paragraph 7.13)
86. That where a liability of the factory estate is due to a breach of duty by the judicial factor, the factor may be found personally liable for all or part of that liability. (paragraph 7.14)
87. That it should be made clear that the judicial factor stands in place of the judicial factory estate, and any persons having an interest in it, for the purposes of dealings with third parties. (paragraph 7.15)
88. That a title obtained, in good faith and for value, from a judicial factor is not challengeable on the ground that the appointment of the factor is subsequently recalled. (paragraph 7.17)
89. That where a person has, in good faith and for value, obtained title to property from a person who has obtained that property from a judicial

factor, that title is not challengeable on the ground that the transfer from the judicial factor should not have been made. (paragraph 7.17)

90. That it should be made clear that:
 - (a) obligations to or by the estate should be subject to the normal rules of prescription, notwithstanding the appointment of a judicial factor; and
 - (b) obligations due by a judicial factor to the factory estate should not prescribe during the course of the judicial factory.(paragraph 7.19)
91. That persons with an interest in the estate should not have any locus directly to raise questions as to the judicial factor's actings, or, in particular, to the audited accounts, other than by making representations to the Accountant, or by seeking the replacement of the judicial factor. (paragraph 7.29)
92. That it should no longer be competent to appoint a curator bonis on the estate of any person. (paragraph 7.37)
93. That section 35 of the 1849 Act be repealed without re-enactment. (paragraph 7.41)
94. That section 37 of the 1849 Act be repealed without re-enactment. (paragraph 7.42)
95. That it should continue to be the function of the Accountant generally to supervise the conduct of judicial factors, and to see that they observe the terms of the relevant legislation and of their appointment. (paragraph 8.6)
96. That it should continue to be a requirement for the appointment of a person to the office of the Accountant or Depute Accountant of Court that that person should have a knowledge of law and accounts. (paragraph 8.8)
97. That, subject to the provisions of any other enactment, the Accountant should hold no other office. (paragraph 8.8)
98. That the Accountant should not be entitled to receive any income other than that set by the Scottish Court Service. (paragraph 8.8)
99. That the Accountant should be under a duty:
 - (a) to approve the inventory; and
 - (b) to approve, amend or, where necessary, set out the management plan to be implemented by the judicial factor. (paragraph 8.11)
100. That the Accountant should have a general power to direct a judicial factor as to the performance of the duties of the office. (paragraph 8.14)

101. That a judicial factor should be able to apply to the court to challenge a decision of the Accountant. (paragraph 8.14)
102. That the Accountant should be:
 - (a) required to charge fees in respect of the various functions carried out in relation to judicial factories; and
 - (b) empowered to remit payment of fees where it appears that it will not be possible or practicable to recover them. (paragraph 8.17)
103. That, without prejudice to any other lawful means of requiring the provision of information, the Accountant should have a power to require any person or body in the United Kingdom to supply information necessary for the carrying out of the duties of the office in relation to judicial factors. (paragraph 8.20)
104. That the inventory, management plan, annual accounts and audit report relating to a given judicial factory should be made available, either for inspection or in hard copy, to persons with an interest in the estate, upon cause shown and payment of the requisite fee. (paragraph 8.20)
105. That the Accountant, upon reaching the conclusion that the judicial factor is guilty of serious misconduct or has materially failed to discharge the duties of the office, may report this misconduct or failure to the court for determination, and to any professional body of which the judicial factor is a member. (paragraph 8.23)
106. That the court, on being satisfied that there has been such misconduct or failure on the part of the judicial factor, should have power to make such orders as it considers appropriate. (paragraph 8.23)
107. That the Accountant should be under a duty to audit, or to secure the audit of, the judicial factor's annual accounts.(paragraph 8.26)
108. That the costs of any external audit should also be borne by the judicial factory estate. (paragraph 8.26)
109. That the judicial factor should be entitled to challenge any decisions taken by the Accountant in relation to those accounts, if necessary by application to the court. (paragraph 8.26)
110. That, once any challenge has been dealt with, the audited accounts should be conclusive as between the Accountant and the judicial factor, and against all other persons. (paragraph 8.26)
111. That an Accountant who is of the view that there is diversity in terms of how judicial factory proceedings are dealt with in the sheriff court should report the matter to the Lord President of the Court of Session.(paragraph 8.28)

112. That the Lord President should deal with any such report in such a way as seems to him or her to be appropriate. (paragraph 8.28)
113. That the Accountant should be under a duty to make an annual review, in accordance with such requirements as may be set out in rules of court, and supplemented as the Accountant sees fit. (paragraph 8.29)