SQUIRE SANDERS

JUDICIAL FACTOR – FIT FOR PURPOSE, OR RIPE FOR REFORM?

This article explores whether the office of judicial factor is still of relevance and use in the 21st century, in particular:

- **What is the role of a judicial factor in an insolvency situation?**
- **What is the extent of his powers and in particular can he sell freehold property?**
- **What steps could or should be taken to reform the law in this area?**

One of the joys of being an insolvency practitioner is the breadth and variety of the work which we deal with, but how many of us have had experience of advising a judicial factor – after 25 years as an English insolvency lawyer, it was certainly a new experience for me.

So what, you may be asking, is a judicial factor?

Judicial factors are appointed by the Court of Session in Edinburgh, under the *Judicial Factors (Scotland) Act 1889* (as amended) and are supervised by the Accountant of Court, to manage and administer property in a range of different circumstances. The function of the judicial factor is to conserve and manage the estate under their charge, which estate does not vest in them. They will be appointed in cases where it is necessary to afford protection against potential loss or injustice which cannot be protected by other legal remedies.

Examples of circumstances where an appointment may be appropriate include:

- Trust estates (where there may have been misconduct by trustees)
- Intestate estates
- Insolvent deceased person's estates
- Partnership estates (if partnership in dispute)
- Estates of defaulting solicitors
- Limited companies – where there are allegations of illegal or dishonest conduct by directors
- Situations where there may be lack of capacity due to age or mental incapacity.

Anyone having an interest in the property which it is sought to have preserved, may petition the court for the appointment of a judicial factor, and the court may then appoint any natural person of full legal capacity if the court is satisfied that the person is suitable for the office. Generally speaking, judicial factors will ordinarily be qualified lawyers, chartered accountants or insolvency practitioners.

In the case in point, the judicial factor had been appointed following a petition to the Court of Session, by two executors of a deceased's estate, against which a large claim had been intimated. The estate is substantial, and whilst the claim appears spurious, if the claim was ultimately shown to have merit, then it could potentially render the estate insolvent.

On 14 June 2011, Mr William Cleghorn was appointed interim judicial factor to the estate and that appointment was made permanent on 30 September 2011. The Court of Session conferred on Mr Cleghorn:

> *"full powers to intromit with the said estate and, in particular, to do all that may reasonably be necessary to wind up the deceased's estate and to manage it and distribute it among the persons entitled to it either as creditors or as beneficiaries"*

On his appointment Mr Cleghorn stepped into the shoes of the executors with full powers to deal with the estate, realise assets and distribute as appropriate. The estate comprised a number of substantial property assets, the bulk of which were held in SPV's, but also a property known as "Calleva" in Henley on Thames which property was registered in the deceased's sole name.

A purchaser was duly found for the property and all parties wished to proceed to a swift completion, the purchaser was however concerned that the Land Registry would not raise requisitions regarding the judicial factor's capacity to pass good title to the property. Whilst the Scottish Lawyers were adamant that the Interlocutor appointing Mr Cleghorn gave him the power to sell the property situated in England, the Land Registry were still not prepared to give any assurance that they would not raise requisitions regarding Mr Cleghorn's capacity to sell.

The judicial factor and the former executors, had both previously been involved in sales of property in England, where the power to convey had not been questioned by the Land Registry. Despite this fact, on this occasion, the Land Registry were adamant that there were serious questions as to whether the judicial factor had power to sell and accordingly no assurances could be given that the transfer would ultimately be registered.

A thorough legal analysis was then undertaken – and the specific question posed – can a judicial factor sell property situate in England and Wales?

The starting point is section 13 Judicial Factors (Scotland) Act 1889 which states:

> *"An official certified copy interlocutor of the appointment of any judicial factor…shall have throughout the British Dominions, as well out of Scotland as in Scotland, the full force and effect of an assignment or transfer, executed in legal and appropriate form, of all funds, property, and effects situated or invested in any part of the British Dominions, and belonging or forming part of the estate under his charge; and all debtors and others holding any such funds, property, or effects shall be bound, on production of such official certified copy interlocutor to pay over, assign or transfer the same to such judicial factor, trustee, or other person."*

On the face of it section 13 would seem to provide the judicial factor with the power to transfer property outside of Scotland and within the British Dominions. Certainly section 13 appears to have been quoted historically to the Land Registry as evidence of the judicial factor's power to convey English property.

However, when you take into consideration the views expressed by the Scottish Law Commission in their Report on Judicial Factors in 2010,[1] they express serious doubt as to whether section 13 does in fact apply to land.

> *The expression "assignment or transfer" is odd, because an assignment (assignation) is one type of transfer, namely the transfer of incorporeal property. Possibly the section was intended only to apply to incorporeal property. On the other hand the expression "all funds, property, and effects" is unqualified. As far as we are aware, no reported case discusses the application of section 13 to land.*
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> *In* Inland Revenue v McMillan's Curator Bonis[2] *there was some brief but inconclusive discussion of the question. Lord Sorn asked Counsel:*[3] *"Is section 13 not intended to deal only with moveable property?" to which the answer was, "Its language certainly suggested moveable rather than heritable property, but it was submitted that it was general in its application." The point was not determined because the judicial factory seems in fact not to have involved any heritable property.*
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> *An additional puzzle is that the section's headnote reads: "Funds, &c, furth of Scotland to be paid to factor, &c on the production of official extract of appointment" that represents the section as dealing solely with non-Scottish assets.*
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> *An argument for the view that section 13 does not apply to heritable property is that if it does, then the special provisions mentioned above*[4] *would be otiose. Indeed, a parallel argument could be applied to moveables, for section 25 of the 1921 Act contemplates completion of title to moveables with the authority of the court, something that would seem pointless if section 13 of the 1889 Act applied to moveables."*

1 Scottish Law Commission – Discussion Paper on Judicial Factors December 2010
2 1956 SC142
3 Shearer QC (later Lord Avonside)
4 1868 Act, s 24, 1921 Act, s 25 and 1938 Act, s 1

The only case which appears to have dealt with the specific point is the Scottish case of Ayton's Judicial Factor[5] where a judicial factor for a trust estate wished to "complete title" to real property in England. He applied for and was granted leave to apply to the Chancery Division in England for "completion of title."

Given the fact that we had a willing purchaser for the property, somewhat of a novelty in the current economic climate, the option of trying to persuade the Land Registry to accept that the judicial factor had the necessary power to convey title, particularly given the Scottish Law Commissions own misgivings, seemed like a pointless exercise.

Despite the belief by the judicial factor and the former executors that the judicial factor should have power to convey title to English property the view was taken that the safest course would be to, in effect, register the Scottish interlocutor as a judgment in the English courts.

The solution:

An application was duly made to the Queen's Bench Division of the High Court in London seeking the registration of the interlocutor of the Court of Session in Edinburgh, as a judgment under section 18 of and Schedule 7 to the Civil Jurisdiction and Judgments Act 1982.

The application was heard and the necessary judgment obtained on short notice, whereby the Scottish interlocutor authorising Mr Cleghorn to do all that may be reasonably necessary to wind up the deceased's estate was duly registered in the High Court.

Following the granting of the order by the High Court, the prospective purchaser of "Calleva" felt sufficiently comfortable to complete the purchase. The Land Registry did not raise any requisitions with regard to the judicial factors capacity to sign the transfer on behalf of the deceased's estate or to convey good title.

So to return to the initial question – is the role of judicial factor – fit for purpose or ripe for reform?

Had the estate been situate in England and Wales, the obvious solution would have been to seek an order for relief under the Administration of Insolvent Deceased's Estate Order, which would have given the administrator sufficient powers sell all property comprised in the deceased's estate.

Given that the estate contains property in various jurisdictions this might have been a preferable alternative, but unfortunately was not an option open to the Scottish executors.

The Report by the Scottish Law Commission was set up on the basis that they considered that a radical overhaul of this area of the law is necessary.

In the course of their investigations, the Scottish Law Commission had discussions with the Accountant to Court, the Director of the Law Society of Scotland's Interventions Department and representatives of the Office of the Scottish Charity Regulator. As a result of those discussions the Commission determined that Judicial Factory is regarded as a cumbersome procedure involving expense which can be disproportionate to the benefit.

5 1937 SLT 86

The office of judicial factor has simply not moved with the times – when compared to the numerous legislative reforms which have taken place in England and Wales to provide greater flexibility and a variety of solutions to distressed situations.

At the time of the Scottish Law Commission's report there were approximately 115 live judicial factories with, on average, 12 new factories being granted each year, and in view of the relatively small number of cases, there was a query as to whether there is an argument for abolition of the office.

There will always be cases where assets need to be protected and safeguarded and administered by an independent and accountable person. The role of Judicial Factor does fulfil that role, and from my experience provides a high quality and very accountable function, given that the actions and costs of the judicial factor come under the close scrutiny of the court.

It is to be hoped that the Scottish Law Commission will be able to obtain legislative support to bring the role of the judicial factor into the twenty first century. In so doing, it needs to ensure that the office is granted the necessary express powers and receives cross border recognition to effectively carry out the intended role.

Conclusion:

- At present the role of judicial factor is arguably not fit for purpose, particularly in circumstances where real property needs to be realised.
- With appropriate reform, and statutory extension of the powers of judicial factors, the office could provide a really valuable tool to deal with those one off situations calling for specialist hands on supervision and protection, under the scrutiny of the courts.
- Failing that – one solution to deal with potentially or actually insolvent estates would be to extend the provisions of the Administration of Insolvent Estates of Deceased's Persons, to cover Scottish sequestrations or bankruptcies.

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