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Review of RCS Chapter 26A

Thank you for your correspondence of 13th March 2025 asking for our views on the practice and procedure associated with group proceedings in the Court of Session.

The solicitors and court department team involved with the NOx Emissions, James Finlay (Kenya) Ltd, and Celtic PLC group proceedings have discussed our experiences and prepared the following summary of views.

Our overarching view is that the procedure for group proceedings has done precisely what it was introduced to do in that it has made it possible to pursue important groups of claims which would have been administratively impossible without the introduction of Group Procedure. There are some features of the rules and practice which have, in our experience, presented some problems – our detailed responses to the questions posed address these matters – but we consider that for the most part the rules and practice work well.

Question 1: Are there parts of the rules that do not work well in practice and could be redrafted to make procedural improvements? If so, can you provide specifics on this, and detail what your suggested changes are?

1.1 Dual Application Process

While there are two distinct questions of the suitability of the representative party and the suitability of the cause for group proceedings, the operation of the dual application process provided for by current practice can be burdensome.

In practice the applications are prepared, lodged, served and heard at the same time. Proceedings cannot begin without both applications succeeding. There are however two court processes created at application stage, necessitating two almost identical initial motions and duplication of the documents (in particular the group register and draft summons) to be lodged. This duplication of documents and processes continues in the service of the applications and in any pre-permission motions to vary or sist the timetable of the applications.

We have found this process to cause an unnecessary administrative burden. We would suggest that the applications could be dealt with under a single court process with the applications being enrolled together, requiring only one copy of the draft summons, one copy of the group register and one inventory of documents to support the applications. Should matters require to be separated out in any way, the wide power of the court to make orders should be capable of dealing with any situation arising. From our experience of the current rules, a single court process or even a single application process to address both authorisation of the representative party and permission for group proceedings would be more efficient for all parties.

1.2 Determination of Application to be a Representative Party (Rule 26A.7)

It is our experience that this rule has been difficult to interpret and has accordingly caused procedural delay in some cases. Judgements issued to date support the position that the matters listed are simply matters to be considered by the Lord Ordinary, rather than a checklist to be satisfied. However, the matter is not settled and has recently been considered by the Inner House.

It is our view that the spirit of the primary legislation is to increase access to justice in group litigation situations, and accordingly the rules should not impose too high a bar on the ordinary person attempting to pursue litigation. Regardless of the intention of listing the various considerations at RCS 26A.7(2) it would be helpful if the rule were to be clearer on any absolute requirement compared to a matter which the Lord Ordinary must consider but may then disregard as irrelevant to suitability in the particular case. On the assumption that the interpretation applied by the court to date is correct, we would suggest that the rule could be amended to state that suitability is the applicable test and that no factor listed is intended as an automatic bar to the authorisation of an applicant.

The potentially high barrier to litigation set by RCS 26A.7(1)(f) is of particular concern. We would suggest that the reference to financial resources to meet expenses awards adds nothing in respect of the suitability of a potential representative party and should be removed. The current wording of RCS 26A.7(1)(f) creates a potentially insurmountable and disproportionate hurdle to commencing group proceedings. Litigation funding in Scotland remains in its relative infancy compared to other jurisdictions. It is contrary to the purpose of the Group Proceedings to exclude the average group of claimants, when they would not have faced a financial hurdle to commencing more traditional proceedings. We assume that this rule attempts to balance protection of defenders' interests in respect of the unrecoverable costs of vexatious claims with the efficiency of group proceedings, but we do not consider it is necessary to achieve this balance. Sufficient protection is afforded by all group members being jointly and severally liable for defenders' costs and there remains the usual mechanism of seeking caution where the criteria are satisfied. We consider that these existing protections are proportionate but appear to have been overlooked by the rule. In relation to personal injury cases, the rule also ignores the norms and effect of Qualified One Way Cost Shifting and imposes a burden on would be pursuers which is at odds with the general approach to litigation of personal injury claims in Scotland.

1.3 Permission for Group Proceedings (Rule 26.11)

There has also been a lack of clarity and connected procedural delay as a result of difficulty interpreting what is required to establish that RCS 26A.11(5)(b) and (d) do not apply. What is required to establish that there is a prima facie case is presumably less than required to demonstrate real prospects of success. Depending on the interpretation of what is required, these rules can either overlap or prove contradictory. The phrase "real prospects of success" also

causes us concern as we have seen attempts from defenders to impose a standard of relevancy and specification akin to that expected at the stage of a debate.

It is our view that a single, and low, test ought to be applied if there is to be any consideration of the merits of the case at the stage of granting permission. There is of course an interest in preventing vexatious litigation, but we consider that it would be unfair to expect the representative party to be capable of producing draft pleadings of a standard which meets the relevancy and specification required for a debate, before there has been any opportunity to consider defences, adjust pleadings or recover documents.

In cases of the type suitable for Group Proceedings, there is often an inequality of information between the pursuers and defenders at the outset. This has been demonstrated in the NOx emissions cases where there has been a significant focus on document recovery, and subsequent adjustment, post-permission stage. A group of pursuers can have a relevant and stateable case which they ought to be able to pursue, but require access to matters such as technical documentation, which are in the defenders' hands only, before it is possible to formulate pleadings which stand up to a level of scrutiny which would ordinarily come at a later stage of litigation. While the NOx emissions claims have, so far, been granted permission to proceed, it has not been without lengthy argument.

The importance of allowing time for litigation processes to balance out an inequality of information, was also demonstrated in the Celtic PLC group proceedings. This case turned on whether Celtic Football Club was vicariously responsible for acts of volunteers at Celtic Boys Club, which was a separate and free-standing legal persona to the football club. The extent to which the football club financed and exercised control over the Boys Club were key issues to determining the dispute. The football club maintained the Boys Club was an entirely separate entity. Through the recovery process Board Minutes of Celtic Football Club were released that showed the extent of control that the football club excerpted over the Boys Club along with HMRC records. Indeed, the release of these minutes & employment records is what led to settlement negotiations. That vital evidence was not available in the public at the time proceedings were issued. Had there been too high a bar set in demonstrating prospects at the outset, access to justice would have been denied.

While there is a lack of clarity to this aspect of the rule, and the potential for the bar to be set too high, there are concerns about access to justice. The interpretation of "prima facie case" and "real prospects of success" have been heard by the Inner House, but we consider that the rule could be made clearer on the intended standard.

1.4 Procedural Delay – Potential Time Bar Implications

Taking the rules at face value, there should be a relatively short period between the service of the application and a decision on permission. However, in practice, there can be significant delay between commencing group proceedings (as defined at RCS 26A.18) and a final decision that the substantive case can proceed.

A combination of factors stemming from the rules themselves and the practice which has developed have led to situations in which over a year has passed between service of the applications and finality on the question of permission. The issues set out at 1.2 and 1.3 contribute to the possibility of delay. For a period of time, there were also significant delays in fixing hearings but we have noted that this has improved recently.

The difficulty posed by delay is the possibility that the applications may end up being refused, on a potentially remediable basis such as the particular representative party proposed requiring to be substituted, in which time claims have prescribed and the time bar protection of the initial service is lost. In practice, the court have seemed willing to substitute the representative party and find ways to avoid a fresh application when this has arisen.

We are concerned that the lack of clarity described at 1.2 and 1.3 draws out the process and when the potential to force a case into time bar is considered, incentivises appeal. It seems to be an anomaly of Group Proceedings that a defender can, as a matter of strategy, draw out the initial stages and put the pursuers in a position whereby it is possible to lose the time bar protection of the initial commencement of proceedings.

We consider that this type of risk can be mitigated against to some extent if the issues noted at 1.2 and 1.3 are addressed. However, amendment of the rules or a Practice Note to enshrine the common sense approach which seems to be taken to matters such as putting forward an alternative applicant for representative party, without fresh applications, would further reduce the risk. Of course, if there is no suitable representative party or the matter is inherently unsuitable for Group Proceedings, we accept that the application would fail and time bar protection would be lost. However, it is our view that the rules and practice should not allow a situation in which the opportunity for the substantive case to proceed timeously, can be lost on a remediable point of the application process, and as a consequence of delay in reaching a final decision on permission.

Question 2: Are the rules missing or lacking detail in any area of procedure? If so, could you provide specific examples on this and detail what your suggested changes are please?

2.1 Subsuming Claims Raised Outside of Group Proceedings

The rules are silent on any mechanism by which pursuers who have raised connected actions prior to the commencement of Group Proceedings may join the Group Register. There are a number of situations in which this may arise, including when an individual action has been

raised by those unaware Group Proceedings are in contemplation, or when an action is raised before a larger group of claims becomes known.

At present, there seems to be no mechanism for the pursuers of individual actions to join the Group Proceedings without first abandoning the initial action. In many cases, there would be time bar implications to doing so, particularly in the case of a prescriptive period in respect of which there can be no discretion. The solution to this has been to sist connected actions, but that appears to us to be a clumsier process than otherwise envisioned.

It would be helpful if a procedure could be established to enable a claim, raised separately in Scotland, to be subsumed by the Group Proceedings where the pursuer's claim would come within the definition of the group.

2.2 Concluding Group Proceedings

Whist we appreciate that the conclusion of all forms of actions will differ and it is therefore difficult to be perspective on how this part of the process is best managed, we do consider that brief guidance would be useful to all parties, and indeed the court. For example, we would welcome confirmation that only one Joint Minute should be required and also specification of the process to remove cases from the group and allow them to proceed as individual actions, should a group member wish to do so.

Question 3: In your experience, are there any aspects of the rules that work well, and should not be changed?

3.1 Commencement of Proceedings

The rules are very clear, at RCS 26A.18, as to the date of commencement proceedings. Tying this date to the initial service of the group register, and having a specific rule to make this clear, provides certainty for any matters of prescription or limitation.

The procedural steps needed ahead of the initial service of the register are relatively simple and tend to result in relatively quick service. We consider this works well and ensures there are no delays at a particularly critical point from a time bar perspective.

Similarly, the ability to add new group members to the action simply by lodging and intimating an updated register works very efficiently and with no doubt as to when an individual joined the action.

3.2 Flexibility and Wide Power of the Court

The rules provide for the Lord Ordinary to have a wide discretion to make orders as needed to deal with the circumstances which arise, particularly in terms of RCS 26A.27. In our experience, this power has been exercised to deal with a variety of novel situations, from issues with service to document recovery and further procedure. It is our view that the flexibility provided for in the rules is hugely effective for handling the array of case types and group sizes which may arise.

As a firm, we have handled mass litigations prior to Group Proceedings and the efficiency which can now be achieved when utilising the case management process and power of the court to make orders set out in the rules is a dramatic improvement on the pre-Chapter 26A position.

Question 4: Do you have any views on the Practice Note (No. 2 of 2020) and would find it useful to have any additional or alternative information provided?

Generally, the Practice Note has provided very helpful clarification on the practical administration of the procedure.

4.1 Additional Information

In terms of the issues covered in the Practice Note, the one point on which we consider additional clarification may be helpful is the question of service and lodging of applications. It is not entirely clear if, at the same time the applications are lodged with the court seeking an order for service, they also require to be sent to the defender, or if this is done only after the order for service has been issued.

As noted at 1.4 above, direction in a Practice Note could supplement the rules to enshrine a sensible process which avoids applications for permission failing, potentially after the expiry of the relevant prescriptive period, on a remediable point such as the particular individual suitable to be the representative party.

4.2 Approach to Litigation

At paragraph 28 of the Practice Note, reference is made to the possibility of "taking forward a test case or cases". It is our understanding that this is at odds with the model underlying the introduction of Group Proceedings in Scotland. It is not efficient for the court to hear a test case or test cases from start to finish, rather than focussing on issues which will be determinative for the group. The "Australian model" of identifying a list of issues applicable to all group members and dealing with them sequentially is the model for which the Scottish court has already indicated a preference and around which we understand the rules to have developed. Under this model, the common issues are either determined in favour of the pursuers, so as to have effect across the whole group (or sub-group if applicable), or proceedings will fail. This model is efficient and provides certainty for a whole group of claims. We do not consider that it is appropriate for the "test cases" model to be referenced in the Practice Note as this detracts from the core premise of having a procedure for group actions. To proceed with test cases reflects the

flawed, piecemeal approach to group litigation which was adopted prior to any formal Group Proceedings procedure. An example of the "common issues" approach working is in the James Finlay (Kenya) Ltd proceedings, where an early proof on jurisdiction and forum non conveniens was possible to determine this issue for the whole group.

We are grateful to have been given an opportunity to share our experience and views on the rules and practice. Should we be able to offer any further assistance please do not hesitate to contact us.

Yours faithfully

THOMPSONS