

RESPONSE TO CONSULTATION

Subject: Brodies Response to Scottish Civil Justice Council
Consultation: Group Proceedings Rules Review
Date: 4 July 2025



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 please?

Reclaiming

- 1.1 The recent Inner House decisions in both *Mackay v Nissan Motor Co Ltd & Ors* [2025] CSIH 14 and *Milligan v Jaguar Land Rover Automotive Plc & Ors* [2025] CSIH 16 demonstrated that the application of existing rules on reclaiming interlocutors pronounced in group proceedings has caused both agents and counsel difficulty.
- 1.2 The rules on reclaiming, reclaiming days and the need for leave to reclaim have been problematic for many years. We are aware that, following a targeted consultation, the Scottish Civil Justice Council are looking to simplify all the existing rules on reclaiming. That may help clarify matters but no timescale has yet been identified.
- 1.3 We would suggest that the rules on reclaiming should be amended to make specific provision in relation to interlocutors pronounced in group proceedings in the same way that specific provision is already made for commercial actions in RCS 38.3(6).
- 1.4 The amended rules should expressly state the applicable number of reclaiming days and whether or not leave to reclaim is required for:
- (a) interlocutors granting or refusing an application to be a representative party;
 - (b) interlocutors granting or refusing permission to bring group proceedings; or
 - (c) any other interlocutor pronounced in group proceedings.
- 1.5 We note that the current group proceedings Practice Note No. 2 of 2020 makes reference at para. 58 to RCS 38.3(6). We assume this is an error since, as noted above, that rule applies only to an interlocutor pronounced on the commercial roll. Presumably the intention was to make reference in para. 58 to RCS 38.3(3)(a).
- 1.6 Part of the current difficulty in applying the existing rules on reclaiming is that it is unclear how interlocutors granting or refusing an application to be a representative party or granting or refusing permission to bring group proceedings are to be categorised.

- 1.7 As presently worded RCS 38.3(3)(a) suggests that all interlocutors pronounced in Chapter 26A proceedings require to be reclaimed within 14 days and that leave of the Lord Ordinary is required. The only exception is an interlocutor deciding whether to give permission for group proceedings to be brought. But it is not clear which reclaiming rule is then to be applied to interlocutors which decide whether to give permission.
- 1.8 The author of the annotation to the rule in Parliament House Book Volume 8 suggests that it will be covered by existing RCS 38.2(6). That is the default rule for all interlocutors not covered elsewhere in RCS 38.2 or which are specifically provided for in RCS 38.3. But RCS 38.2(6) also imposes a requirement for leave and requires reclaiming within 14 days.
- 1.9 We assume that it cannot have been the intention to exclude an interlocutor granting permission from the general RCS 38.3(3)(a) provision only to re-impose exactly the same requirements under a separate rule.
- 1.10 Similarly, we assume that it cannot have been the intention to require leave to be sought against an interlocutor pronounced in group proceedings dealing with the whole subject matter or whole merits of the cause. But that appears to be the effect of the current wording of RCS 38.3(3)(a).
- 1.11 The position is complicated further by comments of the Inner House in *Milligan*. In that case the Court treated an application for appointment as a representative party as having been made in separate preliminary proceedings (we discuss that issue further below). The defenders should have enrolled a separate reclaiming motion in that court process in respect of the appointment. But at para. 59 of the court's opinion the court appears to accept the defenders' argument that a reclaiming motion against that interlocutor could have been enrolled by the defenders of right without the need for leave. That is presumably on the basis that the interlocutor disposed of the whole subject matter of the appointment application and reclaiming would be governed by RCS 38.2.
- 1.12 The same argument might apply in relation to an application for permission to bring proceedings. An interlocutor granting or refusing permission would dispose of the whole subject matter of that application. It too might therefore be thought to be covered by RCS 38.2.
- 1.13 However, we note that this categorisation of such interlocutors as falling within RCS 38.2 does not sit easily with the express terms of RCS 38.3(3)(a) and RCS 38.2(6).
- 1.14 Finally, we note that RCS 26A.13 makes specific provision for an appeal against the grant or refusal of permission to bring group proceedings to be by way of reclaiming motion. No similar provision is made in relation to grant or refusal of an application to be a representative party although it appears from the recent Inner House decisions that a reclaiming motion is also the appropriate way to appeal. The fact that the rules seem to draw a distinction between the two is therefore misleading.

Creation of separate processes for applications

- 1.15 The Inner House decisions in the cases of *Milligan* and *Mackay* also highlight the impact of the decision to create two separate court processes for representative party applications and permission

to bring group proceedings applications, and a third separate court process for the core group proceedings.

- 1.16 The Practice Note does not deal with this administrative aspect although inevitably practitioners involved in group proceedings have become aware of the court's practice. We think it is fair to say however that few practitioners would have foreseen the impact that administrative decision would have when seeking to reclaim decisions.
- 1.17 We cannot recall there being any prior publicity about the decision to create separate processes or any explanation as to why group proceedings need to result in the creation of more than one court process.
- 1.18 We assume it must relate to the nature of these applications which are made prior to the signing of a summons. (We do touch on the nature of these applications later in this response when commenting on motions procedure at question 2).
- 1.19 Our preference would be to avoid having separate processes and court references particularly since the Inner House have confirmed that the existing arrangements can have a significant impact on procedure.
- 1.20 If separate processes cannot be avoided, then it would be helpful for the arrangements and their impact to be formally set out in the rules themselves combined with clear guidance given in a Practice Note.

Permission Stage Test

- 1.21 Under RCS 26A.11(5), the Lord Ordinary may refuse permission to bring group proceedings if:
- “(a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met;*
- (b) it has not been demonstrated that there is a prima facie case;*
- (c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings;*
- (d) it has not been demonstrated that the proposed proceedings have any real prospects of success.”*
- 1.22 It seems odd that this significant rule is expressed as a power to refuse permission rather than as a power to grant permission. The latter approach is adopted in s.20 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 although we appreciate that the Court of Session's powers to make rules detailed in s.21 of the same Act are said to include provision for or about *“(e) circumstances in which permission to bring group proceedings may be refused.”*

Prima facie case and real prospects of success

- 1.23 It is unclear to us why it was necessary to include both the need to demonstrate that the applicant has a prima facie case and that the proceedings have a real prospect of success. Our experience is that

the courts have struggled with the application of these aspects of the test. They are generally considered together by the court. As a result, the need for a prima facie case is not treated as a “threshold” test, whereby the Lord Ordinary would first consider whether there was a prima facie case, and only thereafter consider whether the proposed proceedings had any real prospects of success.

- 1.24 We consider that as a matter of logic a case could not be found to have any real prospect of success unless a prima facie case had been made out. Our view is that the need for a prima facie case is therefore superfluous and could be removed without weakening the test overall.
- 1.25 If the test is to remain in its current form then it would be helpful to have some clarity as to the role of each element in the test, and how the court is to approach consideration of each element.

Document recovery and production orders under RCS 26A.21(b)(iv) & (v)

- 1.26 RCS 26A.21(2)(b) provides that at the preliminary hearing, the Lord Ordinary may make an order in respect of a range of matters.
- 1.27 In particular, under paragraph (iv) the Lord Ordinary may order disclosure of the existence and nature of documents relating to the proceedings, or authority to recover documents either generally or specifically; and under paragraph (v), for documents to be lodged in process within a specified period.
- 1.28 The wording of RCS 26A.21 largely matches the wording in RCS 47.11 under Chapter 47 procedure for commercial actions. However, perhaps due to the nature of group proceedings, our experience has been that RCS 26A.21 is being applied on a much broader basis than RCS 47.11. It is currently difficult to advise clients in relation to the likely parameters for recovery/lodging.
- 1.29 It would be helpful to have a clear statement from the court to confirm the approach to be adopted when making recovery orders, to explain the extent to which such orders may differ from those made in commercial actions. We have noted the following examples of the differences in approach between Chapter 26A and Chapter 47:
- **Scope of documents:** In commercial actions, the list of documents sought is ordinarily narrow in scope, relating to documents referred to in parties’ pleadings but not produced. In contrast, in our experience the court is applying RCS 26A.21 as an alternative to commission and diligence procedure, to recover a broad scope of documents which have often been created over a lengthy period of time.
 - **Expenses:** Historically recovery under commission and diligence has allowed a haver to require the recovering party to meet the costs of providing the documents listed. There is no equivalent provision in respect of RCS 26A.21 and the position on expenses for this procedure is unclear. Recently, in *Batchelor v Opel Automobile GmbH* [2025] CSOH 18 the Lord Ordinary expressed doubt as to whether there is any general rule of law, even in the context of the grant of commission and diligence, that a party to an action is entitled in the first instance to payment or

security from his opponent in respect of the costs of complying with an order for the recovery of documents.

Given the potential breadth of recovery orders under RCS 26A.21 and the costs involved in responding to orders we consider that further thought needs to be given to the extent to which havers in group proceedings (whether or not they are a party to those proceedings) should be able to recover costs incurred.

- **Volume of documents:** As indicated above, the legal and factual basis of group proceedings may be extremely complex, and the volume of documents sought under RCS 26A.21 may be significant. In our experience, the disclosing party has been asked to produce all documents to the recovering party, and, in addition, to provide the documents directly to the court. Providing documents to the court has caused practical difficulties in terms of uploading a large volume of documents onto Objective Connect, which does not accept zip files.

It is also unclear whether documents ordered to be produced under the RCS 26A.21 procedure are always to be provided to the court in that way, or whether for example documents should sometimes be lodged as an inventory of productions, or made available to parties and the court via a central data room. While the latter route may make sense, there are issues as to who incurs the costs of the setting up and maintaining the service, uploading documents etc. It appears this is being dealt with on a case by case basis.

- **Confidentiality:** Ordinarily in commission and diligence, it is only if confidentiality is claimed that documents are lodged in process by the disclosing party. They are lodged in a confidential envelope.

In group proceedings, we have been advised by the court that, in order to claim confidentiality, the disclosing party requires to lodge documents in a confidential envelope; but that unlike commission and diligence procedure, no motion to open the envelope will be required by the recovering party. Instead, it is assumed that the recovering party wishes to have sight of all documents unless they state otherwise, and all documents are therefore passed to the commissioner to produce a report. This departs from the established procedure for commission and diligence and is not provided for in either the rules or Practice Note.

- **Procedure:** Commission and diligence procedure is very well established and provides for interrogation of both the terms of the specification and the pleadings or expert reports to justify recovery of documents. In contrast our experience has been that there tends to be a less structured approach to orders under RCS 26A.21 and a move towards a presumption in favour of disclosure. If the court considers that a change in approach to recovery is appropriate in group proceedings then additional rules or guidance would assist.

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

RCS Chapter 23: Clarification of the application of motions procedure in group proceedings

2.1 RCS 26A.4(1) confirms that the procedure for intimation, opposition and enrolment of motions in group proceedings is to be governed by RCS Chapter 23. But RCS 26A.4(2) goes on to state (emphasis added):

*“(2) Motions under this Chapter **may** be intimated and enrolled in accordance with Part 2 of Chapter 23...”*

2.2 It is not clear what paragraph (2) is intended to achieve. Use of email motion procedure under Part 2 of Chapter 23 is the default motion procedure so is automatically applicable in group proceedings unless otherwise excluded by the provisions of Chapter 23.

2.3 RCS 23.1A currently provides for use of Part 2 email motion procedure where a cause has been initiated by summons, is proceeding in the Outer House and is not a commercial action provided that each party to the cause has provided to the Deputy Principal Clerk an email address for the purpose of transacting motion business.

2.4 Ordinarily however, Part 2 email motion procedure is not used for motions which do not require intimation; for example, where defenders have not yet entered appearance (such as motions before Calling or motions for decree in absence). This was confirmed to us in correspondence with the Depute in Charge in February 2023. In those situations, the traditional Part 3 motions procedure and forms are used instead.

2.5 It may be that the intention is to permit use of the email motion procedure under Chapter 23 Part 2 at all stages of group proceedings even though the cause may not yet have been initiated by summons, or if parties have not yet registered an email address with the DPCS. It would be helpful if the terms of RCS 26A.4 and, if necessary, RCS Chapter 23 could be clarified.

Enrolment of motions

2.6 Chapter 26A envisages the use of email motion procedure but Practice Note No. 2 of 2020 provides that motions in Form 23.1C and any accompanying opposition Form 23.1D have to be emailed to gcs@scotcourts.gov.uk. That is not the court email address normally used for Chapter 23 email motions procedure and, for consistency, it would be helpful for practitioners if motions could be enrolled instead to the standard email motions address: courtofsession.motions@scotcourts.gov.uk. The current hybrid of the two systems makes mistakes by practitioners more likely.

Applications treated as motions

2.7 The rules of court explicitly state that applications to be a representative party and applications for permission to bring group proceedings are to be made by enrolling a motion (RCS 26A.5 and RCS 26A.9). In reality, no motion is enrolled.

- 2.8 Instead, the application is made by lodging Form 26A.5 and Form 29A.9 respectively and a procedure more akin to that applied to a Minute is used, which involves an order for service/intimation followed by a period for the lodging of Answers. A hearing is then held.
- 2.9 To ensure that the rules reflect current practice and to avoid confusion about the procedure to be followed, it would be helpful to avoid referring to these applications as motions.
- 2.10 That change would be consistent with the very similar procedure and wording adopted for applications for permission to appeal to the Supreme Court set out in RCS Chapter 41A. That rule explicitly states that the application is made by the lodging of Form 41A.2 "*without a motion being enrolled*".

Time limits in RCS Chapter 26A

- 2.11 The author of the annotations to RCS Chapter 26A published in Parliament House Book Volume 8 has drawn attention to the language used in the group proceedings rules in relation to time limits (see annotation RCS 26A.5.5). Expressions used in Chapter 26A include "*Within 7 Days Of*", "*Within 21 Days After*", and "*Within 14 Days From*".
- 2.12 We agree with the author that the use of a mix of different expressions is unhelpful.
- 2.13 We note that a similar mixture of phrases was adopted when drafting RCS Chapter 41A and the phrases are sometimes used elsewhere in the rules of court.
- 2.14 If the different phrases used are intended to have the same practical effect then there seems no reason to use different wording. On the other hand, if different meanings and effects on the calculation of the relevant time limits are intentional it would be helpful if clear guidance could be provided.

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

- 3.1 Aspects of the group proceedings procedure in Chapter 26A which have sought to duplicate the commercial action procedure and case management in Chapter 47 have generally worked well.

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?

Inconsistencies between the court rules and Practice Note No. 2 of 2020

- 4.1 As a new procedure, parties are heavily reliant on the court rules and Practice Note on group proceedings to understand the correct procedure, anticipate action required and advise clients. In practice, we have found there are sometimes tensions between the court rules, the terms of Practice Note No. 2 of 2020, and the approach taken by judges using their discretionary powers under RCS 26A.3. This can lead to uncertainty and can make it difficult to advise clients about the likely next steps and what they can expect the court to require parties to do. Some examples are noted below:

- **Hearings:** RCS 26A.22(1)(a) requires parties to lodge a statement of proposals for further procedure prior to the case management hearing. This is confirmed in para. 35 of Practice Note No. 2 of 2020. In our experience parties have been ordered to lodge this alongside the statement of issues ahead of the preliminary hearing under RCS 26A.21. It was unclear whether a case management hearing would be fixed but several continued preliminary hearings and disclosure hearings did take place.
- **Representative party:** RCS 26A.7(2) lists matters which are to be considered by the Lord Ordinary when deciding whether or not an applicant is a suitable person to be a representative party. In *Milligan*, the Inner House appear to have approved the approach of the Lord Ordinary in considering all the elements of RCS 26A.7. That is not an approach which has been adopted in every case however. In at least one case it has been stated that not all questions listed require to be answered. This included RCS 26A.7(2)(f), regarding financial resources to meet any expenses awards and at present there is no requirement for funding arrangements to be disclosed.

Lack of financial details causes particular difficulty for defenders as they are not able to fully comment or respond to whether a person is suitable to be a representative party, without information as to their financial resources and ability to meet any award of expenses.

5 Further feedback

- 5.1 There is currently very limited experience of group proceedings in Scotland and due to the small number of cases handled under Chapter 26A procedure, there is unlikely to be a substantial body of reported cases for practitioners to rely upon and understand how the Rules will be implemented.
- 5.2 It is therefore important that the rules, Practice Note and any additional guidance are both clear and detailed. It would be of assistance to practitioners if, as far as possible, the court could adopt a consistent approach to interpretation and application of the rules and guidance to ensure parties can fully understand and engage with the procedure.
- 5.3 We are still in the early days of group proceedings and relatively few practitioners will have direct experience or involvement in these types of cases. It would be useful if judges handling group proceedings could be encouraged to write on even uncontroversial case management decisions taken by the court setting out their reasoning and explaining the purpose behind orders that are made. It may also be helpful if the court would consider participating in conferences focusing on group proceedings, to disseminate information to counsel and practitioners as has previously taken place with commercial procedure.
- 5.4 We hope that the above comments are of assistance. We would welcome the opportunity to assist and to provide further input or feedback at a later stage.
- 5.5 If you require any further information or clarification in relation to this response, please contact our Practice Development Lawyers, Douglas McGregor (douglas.mcgregor@brodies.com) and Alison Waddell (alison.waddell@brodies.com) who will be happy to assist.