

In answer to your particular questions we would advise as follows:

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?

(a) Initial Application Process

Whilst it is appreciated why there are two separate distinct processes, one in respect of the representative party and one in respect of the group proceedings, the way that the current application works can be quite burdensome and also increases expense to applicants at a very early stage.

Both applications, in reality, are prepared, lodged and served together and are heard at the same hearings. However, two court processes with two court references are created. This causes duplication of work – the same, or very similar, motions for service, duplication of key documents such as the Group Register and draft Summons – but it also creates duplication of court dues. It may be that a single court process or even a single application process would be more efficient for all parties.

As currently drafted the rules suggest that an applicant requires, in practice, to serve the application documentation on the defenders twice. ROC26A.5 provides that when a motion is enrolled an order for intimation and service of the defender requires to be made. ROC26A.8 provides that when the applicant enrolls the motion they must also serve the papers on the defender. This means that service is required to allow the applications to be lodged with the court and they require to be re-served once a first orders interlocutor is pronounced.

In reality there can be no objection by the defenders to the initial motion seeking first orders so it does not appear to make much sense to retain a service requirement at this stage (apart from the fact that service of the Group Register beats any potential time bar for the members of that particular Group Register).

It has been our experience that the requirement to serve twice, particularly in cases where defenders are based furth of the jurisdiction, creates a lot of unnecessary delay and, of course, expense.

In the same vein the rules requires service in accordance with Chapter 16 of the rules. There are various instances where defenders have Scottish agents instructed to deal with the litigations but they are expressly instructed not to accept service of the proceedings. We know of one recent case where the Lord Ordinary has been asked to dispense with service abroad, and this has been granted, but perhaps an addition to the rules to expressly provide such a discretion might be considered.

These aspects of the rules have been used by some defenders, in our view, as a mechanism to delay matters, increase costs and perhaps also to run down the clock on an imminent time bar.

(b) Application to Appoint a Representative Party

We did have some commentary to make about this process but we think that the Inner House

Opinions, issued recently, in both *Joseph Mackay Nissan Motor Co Ltd & Ors* and *Steven Blair Milligan v Jaguar Land Rover Automotive Plc & Ors* have usefully clarified a lot of issues that agents had been grappling with.

With these decisions in mind we suggest that a revision to the rule might be considered which would confirm that suitability is the applicable test and that although the matters at RCS 26A.7(2) are considerations that might be taken into account by the Lord Ordinary there is no absolute requirement for each factor to be satisfied.

Financial resources has been, and continues to be, something that has been raised by defenders in opposition to applications for the appointment of a representative party. Details of funding arrangements, insurance policies, and fee agreements entered into with individual members of the group proceedings have been sought. We are aware of only one litigation funder, at the moment, in Scotland who are prepared to fund these sorts of cases. Imposing unrealistic obligations in respect of disclosure by funders of these sorts of commercially sensitive arrangements are likely to discourage funding in these types of cases which would create a massive problem in respect of access to justice.

Qualified one way cost shifting might be an area that is looked at in group proceedings in respect of personal injury matters, at the very least, as currently the financial burden on would be pursuers is much more than the ordinary pursuer bring his/her claim. If each of the pursuers in a group action brought their claim individually they would be afforded the benefit of QOWCS but those who require to bring their case by way of joining a Group Register are not.

(c) Permission to Bring Group Proceedings

Again, we had some commentary to make about this process but, again, we think that the clarification provided in the most recent Inner House decisions address most of our concerns.

(d) Reclaiming

As above we also had some commentary to make about the process and different interpretations of the rules in respect of reclaiming however, these have, again, been clarified by the Inner House.

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

(a) One area that might be of assistance to look at is the ongoing curation of the Group Register while a reclaiming motion is dealt with. Although in the case that we are involved the motion to allow this to happen was unopposed, we are aware that it was opposed in another case. It may be useful to have an express provision in the rules to deal with this situation to ensure that ongoing curation is a given without the need for a motion/motion hearing.

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

In the main we are of the view that the rules work well and have done what they were intended to do. Group proceedings afford greater access to justice for the general public to pursue claims which they might not have been able to do otherwise. It avoids the clogging up

of the court system with thousands of similar claims. As more group proceedings are raised and progress to various stages practices and procedures will develop and grow.

(a) Wide Discretion of the Lord Ordinary

Encompassing a wide discretion into the rules has been an excellent tool particularly in proceedings, the process of which, is in its infancy. The the discretion afforded to the Lord Ordinary has also allowed him to make decisions in unusual circumstances which have arisen on a case by case basis.

Our view is that this is a vital part of the rules to ensure that there is flexibility and an ability to adapt to new situations as they arise.

(b) Group Register

The service of the Group Register being taken to be the commencement of proceedings and beating the time bar is also a vital part of the rules. The clarity that this provides is useful when dealing with tight time bars and any potential delays in hearings being assigned to deal with the substantive applications.

The rules only require the Group Register to narrate the name, address and date of birth of the member. Again, we submit that this should stay the same for the time being. In reality, and certainly in the Group Proceedings that we have been involved, the representative party does also provide a list of “additional information” to the defenders when serving the registers. However, it can take time for this information to be collected. It is helpful to have a more limited requirement in the initial stages to get the claim intimated and commenced.

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?

As mentioned above we think the recent two Inner House Opinions have clarified a lot in respect of how the rules are to be applied in Group Proceedings. It might be useful for the Practice Note to be updated to reflect these most recent observations to ensure that all practitioners practicing in this area are aware of the guidance.

Otherwise we think the Practice Note is very helpful and should simply be updated as group proceedings develop within the court system.

Thank you again for the opportunity to provide our thoughts. Please let us know if we can assist any further.