

COURT OF SESSION

PRACTICE NOTE

No. 2 of 2020

Group Proceedings under Chapter 26A

1. This Practice Note has effect from 28th September 2020.
2. This Practice Note applies to proceedings to which Chapter 26A (Group Procedure) of the Rules of the Court of Session applies.
3. The Lord Ordinary may disapply any provision of this Practice Note on the motion of any party, or of the Lord Ordinary's own accord, in respect of any particular group proceedings.
4. The Rules of the Court of Session applicable to ordinary actions proceeding by way of summons apply to proceedings to which Chapter 26A applies unless specifically excluded under rule 26A.2, or excluded by implication because of a provision in Chapter 26A.
5. Arrangements will be made to ensure that (save in exceptional circumstances) at all appearances of a group proceedings action the same judge will preside at all hearings fixed under Chapter 26A. All proceedings in a group proceedings action which concerns a transaction or dispute of a commercial or business nature, whether contractual or not, shall, save in exceptional circumstances, be heard before a judge nominated by the Lord President as a commercial judge.
6. Parties are expected to arrange that counsel, or solicitors having rights of audience, who are principally instructed, are authorised to take any necessary decision on questions both of substance and procedure and are available and appear at hearings fixed under Chapter 26A. Practitioners are expected to liaise with each other and with the Keeper in order to facilitate, so far as possible, the appearance by counsel or solicitors having rights of audience, principally instructed, at all hearings, including procedural hearings in any reclaiming motion.

7. It is recognised that in some actions, where for example there are very many group members and a number of legal firms are instructed, it may be agreed between the pursuers' agents for one agent to be designated as the lead. It is expected that this would be the solicitor or agent acting for the representative party, given that this agent has duties under the rules.

Chapter 26A generally

8. Chapter 26A of the Rules of the Court of Session applies to group proceedings (also known as multi-party or class actions in other jurisdictions), in which there are two or more persons (a "group") each with separate claims which raise issues (whether of fact or law) which are the same as, or similar or related to, each other and which may be the subject of civil proceedings. A group may only raise such proceedings where the court has authorised a person to be the group's representative party and given permission for the proceedings to be brought.
9. The introduction of Chapter 26A allows group proceedings to be brought as opt-in proceedings, i.e. with the express consent of each member of the group on whose behalf they are brought. The Group Register is the means by which those persons who form the group is recorded. Membership of the group may change, by the addition of new members into the group and the withdrawal of members from the group, during the course of the proceedings. The group register, a key component central to the procedure, is considered by the court at every hearing. It is crucial to the parties and all group members that this operates well, particularly with regard to prescription and limitation matters, so its administration by the representative party, or agent for the representative party, in accordance with the rules is key to the success of the procedure.
10. The procedural framework which is, in parts, based upon the commercial actions model, provides the court with flexibility about how best to manage group proceedings. It allows for the early intervention and case management by the court to deal with what could be potentially complex litigation. The procedure in, and progress of, group proceedings is under the direct control of the Lord Ordinary, and the court will take a pro-active approach.

Applications by motion

11. Applications made by a person to be a representative party and for permission to bring group proceedings are made by motion in Form 26A.5 and 26A.9 respectively. These applications will be treated as before calling

motions and will be allocated by the Keeper and diarised. Chapter 23 of the Rules of the Court of Session apply to these applications and other motions under Chapter 26A, and they may (but do not require to) be intimated and enrolled by email.

12. Registration fees will be charged. Where answers are lodged in response to either application a first appearance fee will be charged.

Service of applications

13. Under rule 26A.5(2)(a) an application made by a person to be a representative party is brought before a Lord Ordinary for an order for intimation and service. This is separate and distinct to the service on the defender of other papers under the rules. Where an application for permission to bring group proceedings is made, the applicant must lodge further papers (to include the group register) under rule 26A.5(7) or 26A.9(3). The applicant must, when lodging such further papers, serve them on the defender under rule 26A.5(8) or 26A.9(4). The commencement of proceedings, set out in paragraph 25 below, is connected to this matter.
14. A schedule of service must be appended to an application made by a person to be a representative party and for permission for group proceedings to be brought. Evidence of service of these applications must be lodged in accordance with rule 16.1.

Advertisement

15. The Lord Ordinary has to consider what advertisement is required for applications to be a representative party and for permission to bring group proceedings under rules 26A.5(2)(b) and 26A.9(2)(b). In order that the Lord Ordinary is in a position to do so, the applicant should aver in detail what advertising has been undertaken, the reason why the applicant submits that no further advertising is required, or alternatively the applicant's proposals as to what further advertising would be appropriate. Full supporting documentation must be lodged.

Application to be a representative party

16. The Lord Ordinary has to be satisfied of the suitability of an applicant to be a representative party under rule 26A.7(1), and is required to consider the matters in rule 26A.7(2). The averments in the application should address these matters in detail. It will not be enough merely to repeat the wording of

rule 26A.7(2) in the application. Full supporting documentation must be lodged.

Application for permission to bring proceedings

17. The Lord Ordinary may refuse a group proceedings application on the grounds set out in rule 26A.11(5). The averments in a group proceedings application should address these grounds, and the further issues as set out in paragraph 6 of Form 26A.9, in detail. It will not be enough merely to repeat the wording of rule 26A.11(5). Full supporting documentation must be lodged, as required by rule 26A.9(3)(c).

Pleadings

Summons

18. The summons will run in the name of the representative party for the group, designed as acting in that capacity and will be formally served on the defender where permission to bring the proceedings has been given by the court. In the unlikely event that a party litigant applies to be a representative party and to bring group proceedings, the order giving permission for proceedings to be brought under rule 26A.12 will give permission for the party litigant to sign the summons. The principal summons must be lodged for signeting no later than 7 days after the date on which permission to bring group proceedings has been given.
19. Pleadings in traditional form are not normally required or encouraged in a group proceedings action. The default position is that pleadings should be in abbreviated form. Parties are expected to be aware of each other's position before proceedings are commenced. The overriding requirement is one of fair notice: the purpose of the pleadings is to give notice of the essential elements of the case to the court and to the other parties to the action. It is recognised, however, that the nature of some actions will be such that abbreviated pleadings will not be appropriate. The rules allow for detailed written pleadings to be made in such cases, either generally or restricted to particular claims or issues. Where the pursuers' position on any matter is contained in another document, such as an expert report, it is permissible to adopt the document, or a specified part thereof, as part of the pursuers' case. Where damages are sought, a summary statement of the claim or a statement in the form of an account will normally be sufficient.

20. Rule 26A.19(3) is intended to require a party to produce with its summons the core or essential documents to establish the matter with which the cause is concerned. Under rule 27.1(1)(a) documents founded on or adopted as incorporated in a summons must be lodged at the time the summons is lodged for calling.

Defences

21. As with the summons, it is not necessary for defences to follow the traditional form of pleading. In the first instance, detailed averments are not required in the answers any more than in the articles of condescendence. In particular, it is *not* necessary that each averment in the summons should be admitted, not known or denied, provided that the extent of the dispute is reasonably well identified. One of the objectives of the procedure is to make the extent of written pleadings subject to the control of the court. What is said in paragraphs 19 and 20 regarding the content of a summons, including the overriding requirement of fair notice, applies *mutatis mutandis* to defences.
22. Under rule 27.1(1)(b), documents founded on or adopted as incorporated in a defence must be lodged at the time the defences are lodged. Defences must be lodged within 7 days after the summons has called: rule 18.1(2).

Adjustment of pleadings

23. Where any pleadings or other documents are to be adjusted, the party proposing adjustment shall do so by preparing a new copy of the document as adjusted in which the new material is indicated using track changes or strikethrough or a different font.

Counterclaims and Third Party Notices

24. No counterclaim or the convening of a third party may be pursued without an order from the Lord Ordinary.

The Group Register

Commencement of Proceedings

25. Persons must be designated as group members on a group register before their claim may be brought in the proceedings. Where an application for permission to bring proceedings is made, the applicant (the representative party or the proposed representative party) must lodge with the court, and

serve on the defender, the group register, the summons by which it is proposed to institute proceedings and any further supporting information. In respect of persons listed as group members in the group register at that stage, group proceedings commence by reference to the service of the group register on the defender under rule 26A.5(8) or 26A.9(4). It is recognised that there may be cases where subsequent to that an application for permission is either refused, or is granted and then following appeal is refused, in which case the proceedings cannot be brought and will not have been commenced. Following any revisions being made to the register on account of a new member joining the group, group proceedings commence in respect of such persons when the register, in revised form, is lodged with the court.

Lodging of the Group Register

26. The rules allow the group register to be lodged with the court, and served on the defender, by first class post or by electronic means. The court has a preference for the group register to be lodged in electronic form, in pdf format. It is recognised that sensitive information may be included in a group register. The court accordingly expects the solicitor or agent for the representative party (or, as the case may be, proposed representative party) to apply the requisite data protection measures to the register. It is expected that standard practice would be for the solicitor or agent to use a secure email address, but where this is not the case the court expects additional security measures to be applied to the group register, whether that be password protection or encryption, where it is lodged and served electronically.

Change in membership of the Group

27. A revised group register must be in full form in that it must contain details of all of the members of the group following changes made to the group's membership. For this reason it is expected that it would be more suitable for the representative party's agent to lodge the register in electronic form.

Preliminary hearing

28. Parties are expected to arrive at the preliminary hearing with clear, fully formed, views about how the issues which are the subject of the proceedings can be litigated in the most efficient way, and address the court on this. The aim is for the proceedings to be determined as efficiently as possible. It is considered that if the parties can arrive at a preliminary hearing with an agreed view of the best way to approach the litigation – perhaps by, for example, taking forward a test case or test cases, or restricting the

proceedings, at least initially, to particular claims or issues – then that will be for the benefit of all.

29. The preliminary hearing is not designed to give parties the opportunity to formulate their claim and response thereto. Adjustment of pleadings will not always be necessary and it should not be assumed that an order allowing a period of adjustment will be made. Any adjustment allowed will normally be restricted to clarification of a party's position in response to averments or requests for further explanation by another party.
30. Prior to the preliminary hearing parties should lodge all correspondence and other documents which set out their material contentions of fact and law. These provisions are supplementary to the provisions of rule 26A.19(3).
31. Motions for continuations of preliminary hearings which are sought simply to enable information to be obtained, which could and should have been obtained prior to the preliminary hearing, are likely to be refused.
32. Prior to the preliminary hearing parties should be in a position to lodge a document setting out in concise form the issues which they contend require judicial determination. The statement of issues should be lodged by 4.00 pm two working days before the hearing, and, where possible, be set out in an agreed document.
33. In applying rule 26A.21, the court will set realistic deadlines which are expected to be adhered to. It is likely that extensions will only be granted if reasonable cause is shown. At the preliminary hearing parties will be expected to address the court and provide detailed and accurate information to ensure that appropriate deadlines are fixed.

Case management hearing

34. At the case management hearing parties will be expected to be in a position to discuss realistically the issues involved in the action and the method of disposing of them. Parties will be expected to be able to advise the court on the steps that have been taken to date to achieve an extra-judicial settlement and on the likelihood of such a settlement being achieved. They will be asked to express a view on the stage at which any joint meeting between parties ought to be ordered to take place. The court will ascertain from parties whether there are any further steps that could be taken by the court to assist in the resolution of the dispute.

35. Prior to the case management hearing parties must lodge a note of proposals for further procedure setting out their position as to the future progress of the case and, in particular, whether a diet of debate or proof is sought.
36. At the case management hearing it is anticipated that the court will fix a substantive hearing along with an appropriate timetable or, if necessary, a further case management hearing to allow any outstanding matters to be resolved. Where a diet of proof is allowed, the timetable may include provision for the preparation and lodging of a statement of agreed facts.

Motions by email

37. Requests to move or discharge hearings or to extend or vary time limits may be made by email. Any such request should be copied to the agents for all other parties so that they may confirm their consent or lack of opposition. Requesting parties will be charged a motion fee for such requests.
38. Motions in Form 23.1C and notices of opposition in Form 23.1D may be enrolled by emailing the completed form to gcs@scotcourts.gov.uk. Where any documents bear a signature, e.g. joint minutes, a scanned copy of the signed document, or a document which has been signed digitally, should be emailed to the General Department of the Offices of Court. In the case of documents for which a scanned copy has been provided, the hard copy original document should be available for production on request by the General Department or by order of the court.

Debates

39. The provisions of Chapter 28 of the rules (Procedure Roll) apply to a debate in a group proceedings action.

Lodging of productions

40. Before any hearing at which reference is to be made to documents, parties should, as well as lodging their productions, prepare for the use of the court a working bundle in which the documents are arranged chronologically or in another appropriate order without multiple copies of the same document. The bundle for a motion hearing should be prepared by the party enrolling the motion; otherwise, unless there is agreement to the contrary, the bundle should be prepared by the pursuer.

Documentary productions in electronic format

41. Productions need only be lodged in electronic format. Inventories listing productions should be lodged in electronic format but may require to be lodged also in hard copy.

Notes of argument

42. Where a cause has been appointed to a debate, each party should lodge a note of argument.
43. Where a cause has been appointed to a proof, each party should consider whether or not it will be necessary to lodge a note of argument having regard to the issues in the case. They should either lodge such a note or a joint statement as to why a note of argument is not necessary.
44. The note of argument or joint statement should be lodged at least 10 days before a debate, and at least 21 days prior to a proof.
45. A note of argument should comply with the following general principles:
 - a. It should be a concise summary of the submissions the party intends to develop at the hearing;
 - b. It should contain an executive summary of the points which the party wishes to make, set out as subparagraphs within a single paragraph;
 - c. It should be set out in numbered paragraphs;
 - d. It should not contain detailed legal argument;
 - e. It should be as brief as the issues allow and not more than eight A4 pages, or, where the relevant hearing is a proof, twelve A4 pages. It should be double spaced, font size 12;
 - f. Each point should be followed by a reference to any evidence or document on which the party wishes to rely. The relevant passages in the document should be identified;
 - g. It should state, in respect of each authority cited:
 - (i) the proposition of law that the authority demonstrates; and
 - (ii) the passages of the authority (identified by page or paragraph) which support the proposition;

- h. More than one authority should not be cited in support of a given proposition.
46. Except on cause shown, no submission will be permitted to be advanced and no authority will be allowed to be referred to at the relevant hearing which is not included in the note of argument.
47. Where the note of argument has been lodged and a party subsequently becomes aware that an argument will no longer be insisted upon, that party should inform the other parties and the court of that fact as soon as practicable.

Joint bundle of authorities

48. When a group proceedings action has been appointed to a debate, the party at whose instance the debate has been fixed should, after consultation with the other parties, lodge a joint bundle containing copies of the authorities upon which each party will rely at the hearing.
49. The bundle of authorities should, in general:
- a. Not include authorities for propositions not in dispute; and
 - b. Not include more than 10 authorities (in addition to any relevant statutory provisions), unless on cause shown permission of the court to include a greater number has been obtained.
50. Authorities which have been reported in Session Cases, or in the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, should be cited from those sources. Where a case is not reported in Session Cases or the Law Reports, references to other recognised reports may be given. Unreported judgments should only be cited when they contain an authoritative statement of a relevant principle of law not to be found in a reported case or when they are necessary for the understanding of some other authority.
51. The bundle of authorities should be lodged by the date specified in the interlocutor.
52. Bundles of authorities which do not conform to this Practice Note may be rejected by the court, which may also find that no expenses are payable in respect of the cost of making up and lodging the bundle. The court may also

find that no expenses are payable, or may modify any award of expenses, where authorities are included unnecessarily.

53. Parties are encouraged to produce bundles of authorities in electronic format only. Where authorities produced electronically are contained within a folder, they should be identified by tab number and citation, e.g. "012 T (formerly H) v Nugent Care Society (formerly Catholic Social Services) [2004] EWCA Civ 51". The tab numbering should restart in each folder. If a party intends to use hard copy documents at the hearing, their folder and tab numbers should correspond to the electronic folder and tab numbers.

Joint meetings of parties

54. The group proceedings judge has power, in terms of rules 26A.21(2)(e) and 26A.22(2)(o), to order parties to hold a joint meeting with a view to exploring whether the dispute is capable of extra-judicial settlement or, alternatively, whether the issues requiring judicial determination can be restricted. Such an order will not be made as a matter of course but it is likely that a joint meeting will be ordered in most cases. The stage of the proceedings at which the meeting will be ordered will vary from case to case, and will depend upon when the court considers that such a meeting is most likely to be productive of substantial progress.

Pre-proof by order hearing

55. When a proof, or proof before answer, has been allowed, the court will normally fix a pre-proof by order hearing to take place in advance of the proof diet. The general purpose of such a hearing is to ascertain parties' state of preparation for the proof and to review the estimated duration of that hearing. Without prejudice to the foregoing generality, the following matters may be dealt with at the pre-proof by order hearing:
 - a. Consideration of any joint minute of admissions agreed by parties, which should be lodged no later than two days prior to the pre-proof by order hearing.
 - b. A review of the documents, or other productions, which parties consider will be relied upon at the proof hearing. Any such document should be lodged no later than two days prior to the pre-proof by order hearing.
 - c. The up-to-date position with regard to any expert reports which are to be relied upon. Parties should be in a position to advise the court of what

consultation, if any, has taken place between their respective experts with a view to reaching agreement about any points held in common and what matters remain truly in dispute between them.

56. Not less than two days prior to a pre-proof by order hearing parties should lodge an estimated timetable for the conduct of the proof.

Hearings for further procedure

57. The Lord Ordinary may at any time before final judgment, at his or her own instance or at the request of a party, have a group proceedings action put out for a hearing for further procedure to deal with a procedural or other matter which has arisen for which provision has not been made.

Reclaiming

58. An interlocutor pronounced in a group proceedings action, other than an interlocutor concerning permission to bring proceedings or a final interlocutor, may be reclaimed against only with leave of the Lord Ordinary within 14 days after the date of the interlocutor: rule 38.3(6).

Failure to comply with rule or order of the Lord Ordinary

59. The purpose of rule 26A.29 is to provide for discipline to ensure effective supervision of case management. Any failure of a party to comply with a provision in the rules or a court order may result in a refusal to extend deadlines, dismissal of the action, decree in terms of the conclusions of the summons or a finding of expenses.

CJM Sutherland
Lord President
Edinburgh
24th September 2020