Group proceedings in Scotland.

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Introduction

Since 31 July 2020 a new form of proceedings, group proceedings, have been available in the Court of Session. A group for this purpose comprises two or more individuals who each have a separate claim in the subject matter. Litigation has begun. Considering the relative novelty of the scheme in Scotland and that cases have now been commenced under it, examination of the purposes of group proceedings, the law and rules governing them, the proceedings to-date and whether this new form of litigation appears set to address the mischief it was designed to counter is useful.

Background

Creating group proceedings in Scotland is the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. It gave effect to several recommendations made by Lord Gill in his Report of the Scottish Civil Courts Review in 2009, in chapter 13 in particular. The goal of the Review was to recommend ways to improve access to civil justice in Scotland, promote early resolution of disputes and the efficient use of resources. Guided by the principles of fairness, access to justice, swift resolution of disputes and efficient and proportionate use of resources, it considered the introduction of multi-party actions in Scotland. Lord Gill's Review built upon the previous work on the subject by the Scottish Consumer Council's Working Party in 1979 and the Scottish Law Commission (SLC) in 1996. The recommendations of the SLC for the introduction of formal procedures on multi-party actions were rejected by the Court of Session Rules Council in 2000 on the grounds that existing informal procedures were working well and that new rules would likely give rise to complex questions. The Review noted the shift in opinions on the introduction of formal rules on multi-party actions, viz. seventy-five percent of responses to the consultation on the subject supported the introduction of formal rules.

Both the SLC report and the consultation had noted the advantages of introducing formal rules on multiparty action in Scotland including the broadening of access to justice, avoidance of duplication of individual actions, cost and inconsistencies.

Current informal procedures were thought to be ineffective. Lord Gill's Review agreed with these assessments. Overall, it made 206 recommendations on the Scottish Civil Courts including a proposal that Scotland should have a special multi-party procedure. It broadly aligned with the SLC's earlier recommendations on the subject. Practice in Scotland is now generally in line with that of England and Wales, Australia, and Canada amongst other jurisdictions, albeit with notable differences.

Group Proceedings – The 2018 Act

Three sections of Part 4 of the 2018 Act make provision for group proceedings to be developed in Scotland. By s 20(1) the new procedure, a group procedure, is made available in the Court of Session. Section 20 then continues to set out the basic framework of the group procedure, relating to representation, permission, two types of group proceedings, opt-in and opt-out proceedings, and the claims a representative party may make. Section 20(2)-(4) provide that a representative may bring group proceedings on behalf of two or more persons each of whom has a separate claim which may be the subject of civil proceedings. That representative must be authorised by the Court and may or may not be a member of the group. There can be no more than one representative party in group proceedings. By s 20(5) group proceedings may be brought only with the permission of the Court. The criteria required for granting permission, by s 20(6), are that all the claims raise issues, of fact or law, which are the same as, similar or related to each other, that the representative party has made all reasonable efforts to identify and notify all potential members of the group of the proceedings, and it is otherwise in accordance with the rules made by the Court of Session on group proceedings.

An important issue in group proceedings is the mechanism by which a member of a group joins. Section 20(7) provides that opt-in, opt-out or either opt-in or opt-out proceedings are tenable. By s 20(8) opt-in proceedings are brought with the express consent of each member. Opt-out proceedings are brought on behalf of a group where each member has a claim described by the Court as eligible to be brought and, where domiciled in Scotland the member has not given notice that he does not consent or, where domiciled outside Scotland she has given express consent to the claim being brought. Finally, s 20(9) provides that the

representative party may make claims on behalf of the group and, subject to rules made by the Court of Session, do anything else in relation to those claims that the members would have been able to do had they made the claims in other civil proceedings.

The Court of Session may make rules about group procedure, under s 21(1). Those rules may relate to persons who may be authorised to be a representative party, action to be taken by a representative before or after the proceedings are brought, types of claim that may be brought, the circumstances in which permission to bring group proceedings can be refused and appeals against the granting or refusal of such proceedings. Section 22 provides that the Scottish Ministers may make further provision about group proceedings and in particular the circumstances in which a person is domiciled in Scotland for the purpose of s 20(8)(b), prescription or limitation of periods in relation to claims brought in group proceedings and the assessment, apportionment, and distribution of damages in connection with group proceedings.

Group Proceedings – the 2020 Rules

The Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020 SSI 2020/208 introduced a new chapter 26A into the Rules of the Court of Session 1994. They make further provision about group procedure. The Scottish Civil Justice Council, in designing the rules, sought to encourage the expeditious progress of group proceedings cases and make the most efficient use of court time. Judicial case management is emphasised. Interestingly, the rules only made provision for the opt-in procedure. This stems partly from reliance on practice across Europe, which overwhelmingly favour opt-in processes. There was also concern that an opt-out approach will introduce to the Scottish judicial system aspects of American litigation culture.

Group Proceedings – state of play

The Court of Session has certified three group proceedings. The first is the Celtic PLC Group Proceedings. This relates to sexual abuse victims of two former employees of Celtic FC. The second relates to diesel emissions and Volkswagen's alleged acts to mask them. The third is the James Finlay (Kenya) Ltd Group Proceedings (JFKL). To-date it is the JFKL case which is the most advanced, and accordingly has generated the greatest interest. JFKL, the defender company, is

a major player in the production and supply of tea worldwide. Although it has a major operation in Kenya, its registered office is in Scotland. The claimants in the case are over one thousand Kenyan nationals who claim to have suffered musculoskeletal injuries from working for the defender in Kenya. They allege that they have suffered loss, injuries, and damage through the breach of contract, fault, and negligence of the defender.

There have been several interim or preliminary proceedings in the JFKL case. The first two applications were brought before the Court of Session together. The first was for the appointment of the representative party pursuant to s 20(3)(b) of 2018 Act and under Rule 26A.5 of the Rules of Court. The second application was brought under Rule 26A.9 of the Rules of Court for permission to commence the group proceedings. Both applications came before Lord Weir. He was satisfied that the proceedings met the criteria outlined in the Act and the Rules of Court for group proceedings (see Thompsons Solicitors Scotland v James Finlay (Kenya) Ltd [2022] CSOH 12, paragraph 29) but had concerns with the suitability of the proposed representative party. This was because the firm acting for the potential claimants put itself forward to be appointed the representative party. Lord Weir had to answer "whether the firm acting for the claimants in group proceedings can, at the same time, be the representative party" (at para 21). In the absence of UK jurisprudence on the point, Lord Weir *inter alia* referred to the Canadian case of Kerr v Danier Leather Inc ([2001] OJ No 950). That decision established the general principle that it is inappropriate to appoint a member of a law firm that will act for the class in a class action as the class representative. Lord Weir was not persuaded that the appearance of conflict was not problematic, although he did not impute any wrongdoing or impropriety on the part of the firm. He refused the application but left the door opened for the application to be amended for further consideration.

A second judgment in the JFKL litigation followed an appeal to the Inner House challenging the grant of permission by the Lord Ordinary for group proceedings to commence. It was refused by the court (Campbell v James Finlay (Kenya) Ltd [2022] CSIH 29, 2022 S.L.T. 751). Whilst the appeal was pending before the Inner House, the representative party became aware of behaviour by the defender allegedly aimed to intimidate and threaten the claimants. A motion ex parte for interdict against the behavior filed by the representative party was granted in April

2022. The application was subsequently opposed by the defender but was eventually sisted in July 2022 after the defender gave an undertaking not to act in a manner contrary to the laws of Kenya and Scotland calculated to cause fear, alarm or distress to the employees who are parties to the group proceedings.

Notably, and perhaps an indication of practice in future group proceedings cases, JFKL commenced proceedings outside Scotland, in the Employment and Labour Relations Court in Kenya, *inter alia* an anti-suit injunction prohibiting the claimants from continuing the proceedings before the Scottish courts. The representative party, following these developments in the Kenyan court, applied to the Outer House for an interdict prohibiting the defender company from prosecuting the ongoing case before the Kenyan Employment and Labour Relations Court and from commencing any such proceeding in future. It also sought an order under section 46 of the Court of Session Act 1988 authorising JFKL to apply to the Kenyan court to vacate interim orders made in July 2022 which had prohibited the claimants from proceeding with the suit before the Scottish court.

As Lord Braid noted, this was an unusual application; it was an application for anti-suit interdict against an anti-suit proceeding in another jurisdiction (In the cause Hugh Hall Campbell [2022] CSOH 57 at para 1). After considering the parties' arguments, the application was granted on the grounds that the petitioners (the claimants in the group proceedings) had made a strong *prima facie* case for 'unconscionable, vexatious, or oppressive conduct by the respondent (defender in the group proceedings) in raising the Kenyan proceedings. In the meantime, the Kenyan court made further orders noting that the orders from the Scottish courts violated the Kenyan constitution and could therefore not be enforced in Kenya. Subsequently, unsuccessful attempts were made by JFKL to recall the anti-suit order.

Commentary

Relatively early indications of Scottish group proceedings are mixed. The novelty of the form of litigation has undoubtedly affected their progress. No doubt the applications have raised many interesting legal issues worth pondering such as who qualifies to be a representative party, criteria for admitting a member to group proceedings, anonymity of claimants where there is likelihood of harassment or threat by defenders, considerations for anti-suit interdicts etc..

However, there are indications that the volume of applications to the court are taking a toll on the court's efforts to manage the new proceedings. As these applications are likely to be a regular feature of group proceedings, parties will look to the ingenuity and experience of judges to manage these interim processes in a manner that allows cases to proceed expeditiously.

In JFKL, the transnational nature of the case is also undoubtedly relevant. There are difficult legal issues around the extent to which progress of the JFKL case through Scottish courts could be hampered by lack of jurisdiction over activities in Kenya, where the alleged wrongful or omissions occurred. Specifically, this may be the case in relation to enforcement of interim orders around the taking of evidence onsite in Kenya issued by Scottish courts. For instance, an attempt by Scottish health, tea and law experts to visit the defenders' tea plantations in Kenya pursuant to a locus inspection order issued by a Scottish court in 2018 was halted by the Employment and Labour Relations Tribunal on grounds of breach of Kenya's sovereignty. The decision of the Tribunal was subsequently affirmed by the Kenyan Court of Appeal and the Supreme Court (see Elly Nganga & 6 Ors v James Finlay (Kenya) Limited [2023] KESC 22 (KLR) (31 March 2023). Although the locus order issued by the Sheriff court in Scotland pre-dated the current group proceedings, it is unlikely that a different outcome will be reached if the current court issues a similar order. Then there is the related point of how other conflicting decisions by Kenyan courts are to be reconciled.

It remains to be seen whether the speed of group proceedings will stand out as being particularly slow. Related to this is the more important point of whether they will satisfy the purposes for which they were created - broadening of access to justice, avoidance of duplication of individual actions, cost and inconsistencies. Answer to this will ultimately determine whether group proceedings have been a beneficial addition to Scots law.