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SCOTTISH STATUTORY INSTRUMENTS

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**2020 No. 208**

**COURT OF SESSION**

**Act of Sederunt (Rules of the Court of Session  
1994 Amendment) (Group Proceedings) 2020**

<i>Made</i>	- - - -	<i>8th July 2020</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>9th July 2020</i>
<i>Coming into force</i>	- -	<i>31st July 2020</i>

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(1), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by section 103(1) of the Courts Reform (Scotland) Act 2014(2), section 21(1) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(3) and all other powers enabling it to do so.

**Citation and commencement, etc.**

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020.

(2) It comes into force on 31st July 2020.

(3) A certified copy is to be inserted in the Books of Sederunt.

**Amendment of the Rules of the Court of Session 1994**

2.—(1) The Rules of the Court of Session 1994(4) are amended in accordance with this paragraph.

(2) In rule 4.2(3) (signature of documents)(5), after sub-paragraph (b) insert—

“(bza) an application in Form 26A.5 or Form 26A.8 may be signed by the applicant or an agent;”.

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(1) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).

(2) 2014 asp 18.

(3) 2018 asp 10.

(4) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443), last amended by S.S.I. 2020/198.

(5) Rule 4.2(3) was last amended by S.S.I. 2019/293.

- (3) In rule 5.1 (orders against which caveats may be lodged)(6)—
- (a) in sub-paragraph (d), after “in which he has an interest;” omit “and”;
  - (b) in sub-paragraph (e), after “a petition for his sequestration” insert “; and”; and
  - (c) after sub-paragraph (e) insert—
    - “(f) an order permitting the bringing of group proceedings (within the meaning given in Chapter 26A)”.
- (4) In rule 13.2 (form of summonses)(7), after paragraph (1) insert—
- “(1A) A summons in an action to which Chapter 26A (group procedure) applies is to be in Form 13.2-AA.”.
- (5) After Chapter 26 (third party procedure)(8), insert—

## “CHAPTER 26A GROUP PROCEDURE

### PART 1

#### GENERAL PROVISIONS

##### **Interpretation and application of this Chapter**

**26A.1.**—(1) In this Chapter—

“the Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(9);

“group” has the meaning provided in section 20(2) of the Act;

“group member” means a person who, along with one or more other persons, expressly consents to the group proceedings to be brought on his or her behalf;

“group proceedings” has the meaning provided in section 20(1) of the Act;

“group register” is a record, in Form 26A.15, of those persons who are group members;

“representative party” has the meaning provided in section 20(2) of the Act.

(2) In rules 26A.6, 26A.7, 26A.9, 26A.11 and 26A.15 “applicant” has the meaning given in rule 26A.5(1).

(3) This Chapter applies to group proceedings as provided for by Part 4 of the Act.

##### **Disapplication of certain rules**

**26A.2.**—(1) The requirement in rule 4.1(4) (form, size, etc., of documents forming the process) for a step in process to be folded lengthwise does not apply in proceedings to which this Chapter applies.

(2) An open record is not to be made up in, and Chapter 22 (making up and closing records)(10) does not apply to, proceedings to which this Chapter applies unless otherwise ordered by the Lord Ordinary.

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(6) Rule 5.1 was amended by [S.S.I. 2001/92](#).

(7) Rule 13.2 was last amended by [S.S.I. 2008/349](#).

(8) Chapter 26 was last amended by [S.S.I. 2009/104](#).

(9) [2018 asp 10](#).

(10) Chapter 22 was last amended by [S.S.I. 2007/7](#).

- (3) The following rules do not apply to proceedings to which this Chapter applies—
- (a) rule 6.2 (fixing and allocation of diets in Outer House)(**11**);
  - (b) rule 36.3 (lodging productions).

### **Procedure in group proceedings**

**26A.3.**—(1) Subject to the other provisions of this Chapter, the procedure in proceedings to which this Chapter applies is to be such as the Lord Ordinary is to order or direct.

(2) All proceedings in the Outer House to which this Chapter applies are to be heard or determined on such dates and at such times as are fixed by the Lord Ordinary.

(3) The fixing of a hearing for a specified date and time in proceedings to which this Chapter applies does not affect the right of any party to apply by motion at any time under these rules.

### **Motions under this Chapter**

**26A.4.**—(1) Chapter 23 (motions)(**12**) applies to motions under this Chapter.

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

## *PART 2*

### *REPRESENTATIVE PARTY*

#### **Application to be a representative party**

**26A.5.**—(1) An application by a person (the “applicant”) under section 20(3)(b) of the Act to be a representative party to bring group proceedings is to be made by motion, in Form 26A.5.

(2) On a motion being enrolled under paragraph (1), the application is to be brought before a Lord Ordinary on the first available day after being made, for an order for—

- (a) intimation and service of the application on the defender and such other person as the Lord Ordinary thinks fit within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (b) such advertisement as the Lord Ordinary thinks fit to take place within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (c) any person on whom the application has been served, to lodge answers and any relevant documents, if so advised, within 21 days after the date of service, or within such other period as the Lord Ordinary thinks fit.

(3) A person served with the application who intends to participate in the decision as to whether authorisation should be given must lodge answers within the period ordered for the lodging of answers.

(4) Where answers are lodged under paragraph (2)(c) a hearing must be fixed.

(5) The applicant and any person who has lodged answers must be given at least 7 days’ notice of a hearing ordered under paragraph (4).

(6) Where application for permission to bring proceedings is being made under rule 26A.9(1) at the same time as an application is made under paragraph (1) then paragraphs (7) and (8) apply.

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(11) Rule 6.2 was last amended by [S.S.I. 2007/548](#).

(12) Chapter 23 was last amended by [S.S.I. 2017/414](#).

(7) The applicant must, at the same time as making the applications under this rule and rule 26A.9(1), lodge in the General Department—

- (a) the summons by which it is proposed to institute proceedings;
- (b) a group register in Form 26A.15; and
- (c) all relevant documents in the applicant's possession which are necessary for the court to determine whether or not to give permission.

(8) The applicant must, at the same time as lodging papers in the General Department under paragraph (7), serve those papers on the defender.

(9) Evidence of service in accordance with Chapter 16 must be provided to the General Department within 14 days from the date of service.

#### **Application by more than one person to be a representative party**

**26A.6.**—(1) This rule applies where—

- (a) more than one application made under rule 26A.5(1) is received by the court from more than one applicant in connection with the same issues (whether of fact or law) which may be subject to group proceedings; and
- (b) the Lord Ordinary has not determined the first received application at the point a subsequent application is received.

(2) A hearing on the applications must be fixed by the court.

(3) The applicants must be given at least 7 days' notice of a hearing fixed under paragraph (2).

#### **Determination of an application by a person to be a representative party**

**26A.7.**—(1) An applicant may be authorised under section 20(3)(b) of the Act to be a representative party in group proceedings only where the applicant has satisfied the Lord Ordinary that the applicant is a suitable person who can act in that capacity should such authorisation be given.

(2) The matters which are to be considered by the Lord Ordinary when deciding whether or not an applicant is a suitable person under paragraph (1) include—

- (a) the special abilities and relevant expertise of the applicant;
- (b) the applicant's own interest in the proceedings;
- (c) whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised;
- (d) confirmation that the applicant is independent from the defender;
- (e) demonstration that the applicant would act fairly and adequately in the interests of the group members as a whole, and that the applicant's own interests do not conflict with those of the group whom the applicant seeks to represent; and
- (f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed).

(3) The Lord Ordinary may refuse an application made by an applicant seeking authorisation to be given under section 20(3)(b) of the Act where the applicant has not satisfied the Lord Ordinary that the applicant is a suitable person, in terms of paragraphs (1) and (2), to act in that capacity.

(4) Authorisation given under paragraph (1) endures until the group proceedings finish or until permission is withdrawn.

### **Replacement of a representative party**

**26A.8.**—(1) A representative party may apply to the court, by motion in Form 26A.8, seeking the permission of the court to authorise, in place of that party, another person as the representative party, who may or may not be a group member.

(2) A group member may apply to the court, by motion in Form 26A.8, seeking the permission to authorise the replacement of the representative party with another person, who may or may not be a group member.

(3) On a motion being enrolled in terms of paragraph (1) or (2), the application is to be brought before a Lord Ordinary on the first available day after being made, for an order for—

- (a) intimation and service of the application on—
  - (i) the defender;
  - (ii) in the case of an application made under paragraph (2), the representative party;
  - (iii) the group members; and
  - (iv) such other person as the Lord Ordinary thinks fit,

in a manner which the Lord Ordinary thinks most appropriate in the circumstances, within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;

- (b) such advertisement as the Lord Ordinary thinks fit to take place within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (c) any person on whom the application has been served, to lodge answers and any relevant documents, if so advised, within 21 days after the date of service, or within such other period as the Lord Ordinary thinks fit.

(4) A person served with an application under this rule who intends to participate in the decision as to whether permission should be given must lodge answers within the period ordered for the lodging of answers.

(5) Subject to paragraphs (6) and (7), the Lord Ordinary may—

- (a) where satisfied it is appropriate to do so, decide to proceed without holding a hearing;
- (b) fix a date for the hearing of the application;
- (c) require further information from the representative party, the proposed replacement representative party or the group members before making any further order.

(6) Where—

- (a) in the case of an application made under paragraph (2), the representative party;
- (b) in the case of an application made under paragraph (1) or (2), a group member,

has lodged answers in opposition to the application then paragraph (7) applies.

(7) A hearing on the application and the answers lodged thereto must be fixed by the court.

(8) Where a hearing on the application is fixed by the court, it must give—

- (a) the applicant;
- (b) the defender;
- (c) the representative party;
- (d) the person who is to replace the representative party; and

(e) the group members,

an opportunity to be heard before considering whether to grant the application or not.

(9) Subject to paragraph (10), the Lord Ordinary may grant an application made under paragraph (2) only where it appears to the Lord Ordinary that the representative party is not able to represent the interests of the group members adequately.

(10) No application made under paragraph (1) or (2) may be granted unless the Lord Ordinary is satisfied that—

- (a) the person who is to replace the representative party is a suitable person who can act in that capacity should such authorisation be given, having regard to the matters mentioned in rule 26A.7(2); and
- (b) the best interests of the group members are met.

(11) Where the Lord Ordinary makes an order authorising a person to be a representative party under section 20(3)(b) of the Act in place of a person who had previously been so authorised, the newly authorised representative party must, as soon as practicable and no later than 14 days after the date on which the order is made, inform all other parties and the group members of the order.

(12) The Lord Ordinary may, when making an order under this rule, make any such order as the Lord Ordinary thinks fit.

### *PART 3*

## *PERMISSION TO BRING GROUP PROCEEDINGS*

### **Application for permission**

**26A.9.**—(1) An application for permission to bring group proceedings under section 20(5) of the Act is to be made by the representative party or, as the case may be, the applicant by motion, in Form 26A.9.

(2) On a motion being enrolled in terms of paragraph (1), the application is to be brought before a Lord Ordinary on the first available day after being made, for an order for—

- (a) intimation and service of the application on the defender and such other person as the Lord Ordinary thinks fit within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (b) such advertisement as the Lord Ordinary thinks fit to take place within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (c) any person on whom the application has been served, to lodge answers and any relevant documents, if so advised, within 21 days after the date of service, or within such other period as the Lord Ordinary thinks fit.

(3) The representative party or, as the case may be, the applicant must lodge in the General Department—

- (a) the summons by which it is proposed to institute proceedings;
- (b) a group register in Form 26A.15; and
- (c) all relevant documents in their possession which are necessary for the court to determine whether or not to give permission,

at the same time as making an application for permission under paragraph (1).

(4) The representative party or, as the case may be, the applicant must, at the same time as lodging papers in the General Department under paragraph (3), serve those papers on the defender.

(5) Evidence of service in accordance with Chapter 16 must be provided to the General Department within 14 days from the date of service.

(6) A person served with the application who intends to participate in the decision as to whether permission should be given must lodge answers within the period ordered for the lodging of answers.

#### **Application for permission: further provision**

**26A.10.**—(1) If a party seeks any of the orders mentioned in paragraph (3), that party must apply by motion.

(2) The Lord Ordinary must have regard to the need for the fair and efficient determination of the action when making any such order.

(3) The orders are—

- (a) dispensing with intimation, service or advertisement;
- (b) adjusting the period for intimation, service or advertisement;
- (c) adjusting the period for the lodging of answers and any relevant documents;
- (d) an interim order; or
- (e) a sist, on cause shown.

(4) A sist must be for no longer than 28 days, but can be renewed.

(5) The representative party must, within 7 days of the date of the interlocutor, notify the Scottish Legal Aid Board of a sist for legal aid.

#### **The permission stage**

**26A.11.**—(1) Within 14 days of the expiry of the period within which answers may be lodged the Lord Ordinary may—

- (a) if satisfied that it is appropriate to do so, make an order giving permission for group proceedings to be brought under section 20(5) of the Act without holding a hearing;
- (b) require further information from any of the parties before making any further order; or
- (c) fix a date and time for a hearing of the application for permission and of any answers thereto.

(2) The Keeper of the Rolls must notify—

- (a) the representative party or, as the case may be, the applicant; and
- (b) any person who has lodged answers,

of the date and time of any hearing fixed under paragraph (1)(c).

(3) The parties must be given at least 7 days' notice of a hearing fixed under paragraph (1)(c).

(4) At a hearing fixed under paragraph (1)(c), the Lord Ordinary may—

- (a) grant the application (including the giving of permission subject to conditions or only on particular grounds); or
- (b) refuse the application.

(5) The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—

- (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.

(6) Where permission is refused (or permission is granted subject to conditions or only on particular grounds), the Lord Ordinary must give reasons for the decision.

### **Grant of permission**

**26A.12.**—(1) Where the Lord Ordinary gives permission for group proceedings to be brought the Lord Ordinary is to make an order which—

- (a) states the name and designation of the representative party;
- (b) defines the group and the issues (whether of fact or law) which are the same as, or similar or related to, each other raised by the claims;
- (c) requires the lodging, by the representative party, of a group register;
- (d) specifies the procedure which must be followed for a person to be a group member;
- (e) specifies the period of time in which claims may be brought by persons in the group proceedings;
- (f) specifies that group members may withdraw their consent to being bound by the group proceedings;
- (g) specifies the procedure which must be followed by a group member to withdraw their claim from the group proceedings; and
- (h) requires such advertisement of the permission to bring group proceedings to take place—
  - (i) within 7 days of the date of the order; and
  - (ii) thereafter, within the period during which persons may opt-in to the proceedings,as the Lord Ordinary thinks fit.

(2) The Lord Ordinary may, when making an order under this rule, make any such order as the Lord Ordinary thinks fit.

### **The permission stage: appeals**

**26A.13.** An appeal against the granting or refusing of permission (including the granting of permission either subject to conditions or only on particular grounds) for group proceedings to be brought is made by reclaiming motion.

## *PART 4*

### *OPT-IN PROCEDURE*



### **Opt-in proceedings – notices**

**26A.14.**—(1) A person gives consent for their claim to be brought in group proceedings by sending notice to that effect to the representative party in Form 26A.14-A.

(2) A group member withdraws their consent for their claim to be brought in group proceedings by sending notice to that effect to the representative party in Form 26A.14-B.

(3) A notice under paragraph (1) or (2) may be sent either—

- (a) by first class post; or
- (b) where paragraph (4) applies, by email.

(4) This paragraph applies where the representative party has confirmed consent to—

- (a) a prospective group member;
- (b) a group member,

to receiving a notice under paragraph (1) or (2) by electronic means, and has provided an email address to such persons for that purpose.

(5) In this rule a “representative party” includes a person who has made or, as the case may be, is to make an application seeking the authorisation of the court under section 20(3)(b) of the Act to be a representative party in group proceedings.

### **Opt-in proceedings – group register**

**26A.15.**—(1) A group register is to be in Form 26A.15.

(2) Subject to paragraph (4), paragraph (3) applies where, following the lodging in the General Department and the service upon the defender of a group register under rule 26A.5(7) (b) and (8) or, as the case may be, rule 26A.9(3)(b) and (4), the membership of the group of persons on whose behalf proceedings are to be, or have been, brought changes following either, or both—

- (a) the addition into the group of a new group member;
- (b) the withdrawal from the group of a group member.

(3) The representative party or, as the case may be, the applicant must—

- (a) lodge in the General Department; and
- (b) at the same time, serve on the defender,

a revised group register, in Form 26A.15, as soon as possible and no later than 21 days following the representative party’s or, as the case may be, the applicant’s receipt of any notice made under rule 26A.14.

(4) Where the Lord Ordinary grants an application made under rule 26A.16(1) or 26A.17(1) the representative party must—

- (a) lodge in the General Department; and
- (b) at the same time, serve on the defender,

a revised group register, in Form 26A.15, as soon as possible and no later than 21 days following the grant of the application by the Lord Ordinary.

(5) The representative party or, as the case may be, the applicant must, at the same time as lodging in the General Department and serving on the defender a revised group register, inform all group members of the changes to the membership of the group of persons.

(6) The lodging of a group register in the General Department and the service on a defender under rule 26A.5(8), 26A.9(4) or paragraph (3) or (4) of this rule, may be by first class post or by electronic means.

(7) The group register is to be considered by the court at all hearings of the proceedings.

(8) Evidence of service in accordance with Chapter 16 must be provided to the General Department within 14 days from the date of service.

#### **Opt-in proceedings – late application**

**26A.16.**—(1) This rule applies where, following the allowance of proof, a person sends notice under rule 26A.14(1) in Form 26A.14-A, to the representative party seeking their claim to be brought in the group proceedings.

(2) Application is to be made by the representative party by motion in Form 26A.16.

(3) On a motion being enrolled under paragraph (2), the application is to be brought before the Lord Ordinary on the first available day after being made, for an order for—

- (a) intimation and service of the application on the defender and such other person as the Lord Ordinary thinks fit within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (b) such advertisement as the Lord Ordinary thinks fit to take place within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (c) any person on whom the application has been served, to lodge answers and any relevant documents, if so advised, within 14 days after the date of service, or within such other period as the Lord Ordinary thinks fit.

(3) A person served with an application made under paragraph (2) who intends to participate in the decision as to whether the application should be granted must lodge answers within the period ordered for the lodging of answers.

(4) A motion enrolled under paragraph (2) is to be granted only—

- (a) after giving the defender the opportunity to be heard;
- (b) on cause shown; and
- (c) on such conditions, if any, as to the expenses or otherwise as the Lord Ordinary thinks fit.

#### **Opt-in proceedings – late withdrawal of consent for a claim to be brought in the proceedings or where, following withdrawal, there would be less than two pursuers**

**26A.17.**—(1) This rule applies where a group member sends notice under rule 26A.14(2), in Form 26A.14-B, to the representative party either (or both)—

- (a) after the commencement of any proof;
- (b) where there would, should that person's claim not be brought in the proceedings, be less than two persons having a claim in the proceedings.

(2) Application is to be made by the representative party by motion in Form 26A.17.

(3) On a motion being enrolled in terms of paragraph (2), the application is to be brought before the Lord Ordinary on the first available day after being made, for an order for—

- (a) intimation and service of the application on the defender and such other person as the Lord Ordinary thinks fit within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;
- (b) such advertisement as the Lord Ordinary thinks fit to take place within 7 days of the date of the order, or within such other period as the Lord Ordinary thinks fit;

- (c) any person on whom the application has been served, to lodge answers and any relevant documents, if so advised, within 14 days after the date of service, or within such other period as the Lord Ordinary thinks fit.
- (4) A motion enrolled under paragraph (2) is to be granted only—
  - (a) after giving the defender an opportunity to be heard; and
  - (b) on such conditions, if any, as to expenses or otherwise as the Lord Ordinary thinks fit.

#### PART 5

### COMMENCEMENT OF GROUP PROCEEDINGS

#### Commencement of group proceedings

**26A.18.**—(1) The service upon a defender of a group register under either rule 26A.5(8) or rule 26A.9(4) amounts to the commencement of the proceedings in respect of those persons who are group members, and are recorded as such on the group register that is served.

(2) The lodging with the court of a group register, in revised form, under rule 26A.15(3)(a) amounts to the commencement of the proceedings in respect of any new group member who has, following the lodging and service of the group register under either rule 26A.5(7)(b) and (8) or rule 26A.9(3)(b) or (4), joined the group.

(3) Paragraph (4) applies where, following an application being made by the representative party under rule 26A.16(1), the Lord Ordinary grants the application allowing a claim for a person to which rule 26A.16(1) applies to be brought in the proceedings.

(4) The enrolment of a motion under rule 26A.16(2) in connection with an application made under rule 26A.16(1) amounts to the commencement of the proceedings in respect of a person to which rule 26A.16(1) applies.

#### PART 6

### SUMMONSES AND DEFENCES

#### Summons in group proceedings actions

**26A.19.**—(1) A summons in proceedings to which this Chapter applies is made in Form 13.2-AA.

- (2) A summons in proceedings to which this Chapter applies is to—
  - (a) specify, in the form of conclusions, the orders sought;
  - (b) identify the parties to the proceedings and the matters from which the proceedings arise;
  - (c) specify any special capacity in which the representative party is bringing the proceedings or any special capacity in which the proceedings are brought against the defender;
  - (d) summarise the circumstances out of which the proceedings arise; and
  - (e) set out the grounds on which the action proceeds.
- (3) There is to be appended to a summons in a group proceedings action a schedule listing the documents founded on or adopted as incorporated in the summons, which is also to be lodged as an inventory of productions.

## Defences

**26A.20.**—(1) Defences in proceedings to which this Chapter applies are to be in the form of answers to the summons with any additional statement of facts or legal grounds on which it is intended to rely.

(2) There is to be appended to the defences in proceedings to which this Chapter applies a schedule listing the documents founded on or adopted as incorporated in the defences, which must be lodged as an inventory of productions.

## PART 7

### PROCEDURE

#### Preliminary hearing

**26A.21.**—(1) An action in proceedings to which this Chapter applies is to call for a preliminary hearing within 14 days after defences have been lodged.

(2) At the preliminary hearing, the Lord Ordinary—

- (a) is to determine whether and to what extent and in what manner further specification of the claims and defences must be provided;
- (b) may make an order in respect of any of the following matters—
  - (i) detailed written pleadings to be made by a party either generally or restricted to particular claims or issues;
  - (ii) a statement of facts to be made by one or more parties either generally or restricted to particular claims or issues;
  - (iii) the allowing of an amendment by a party to their pleadings;
  - (iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the proceedings or authority to recover documents either generally or specifically;
  - (v) documents constituting, evidencing or relating to the subject-matter of the proceedings or any correspondence or similar documents relating to the proceedings to be lodged in process within a specified period;
  - (vi) each party to lodge in process, and send to every other party, a list of witnesses;
  - (vii) reports of skilled persons or witness statements to be lodged in process;
  - (viii) affidavits concerned with any of the issues in the proceedings to be lodged in process; and
  - (ix) to proceed to a hearing without any further preliminary procedure either in relation to the whole, or any particular aspect or any particular claim, of the proceedings;
- (c) may fix the period within which any such order is to be complied with;
- (d) may continue the preliminary hearing to a date to be appointed by the Lord Ordinary;
- (e) may make such other order as the Lord Ordinary thinks fit for the efficient determination of the proceedings.

(3) Where the Lord Ordinary makes an order under paragraph (2)(b)(i) or (ii) or (2)(c), the Lord Ordinary may ordain the representative party to—

- (a) make up a record; and
- (b) lodge that record in process within such period as the Lord Ordinary thinks fit.

(4) At the conclusion of the preliminary hearing, the Lord Ordinary must, unless the Lord Ordinary has made an order under paragraph (2)(b)(ix), fix a date for a case management hearing to determine further procedure.

(5) The date fixed under paragraph (4) for a case management hearing may be extended on cause shown by application to the court, by motion, not less than two days prior to the date fixed for the case management hearing.

(6) In paragraph (2)(b)(i) to (iii) “party” and “parties” may, where the Lord Ordinary so orders after being addressed on the matter, include a group member, group members or a subset of group members.

### **Case management hearing**

**26A.22.**—(1) Not less than 14 days, or such other period as may be prescribed by the Lord Ordinary at the preliminary hearing, before the date fixed under rule 26A.21(4) for the case management hearing, each party must—

- (a) lodge in process and, at the same time, send to every other party a written statement of proposals for further procedure which must state—
    - (i) whether the party seeks to have the proceedings appointed to debate or to have the proceedings sent to proof on the whole or any part of it;
    - (ii) what the issues are which the party considers should be sent to debate or proof; and
    - (iii) the estimated duration of any debate or proof;
  - (b) where it is sought to have the proceedings appointed to proof, lodge a list of the witnesses the party proposes to cite or call to give evidence, identifying the matters to which each witness is to speak;
  - (c) where it is sought to have the proceedings appointed to proof, lodge the reports of any skilled persons;
  - (d) where it is sought to have the proceedings appointed to debate, lodge a note of argument consisting of concise numbered paragraphs stating the legal propositions on which it is proposed to submit that any preliminary plea should be sustained or repelled with reference to the principal authorities and statutory provisions to be founded on; and
  - (e) send a copy of any such written statement, lists, reports or note of argument, as the case may be, to every other party.
- (2) At the case management hearing, the Lord Ordinary—
- (a) must determine whether the group proceedings are to be appointed to debate or sent to proof on—
    - (i) all or some of the claims;
    - (ii) all or some of the issues raised by the claims, made in the proceedings;
  - (b) where the proceedings are appointed to debate or sent to proof, may order that written arguments on any question of law must be submitted;
  - (c) where the proceedings are sent to proof, may determine whether evidence at the proof is to be by oral evidence, the production of documents or affidavits on any issue;
  - (d) where the proceedings are sent to proof, may direct that parties serve on one another, and lodge in process, signed witness statements or affidavits from each witness whose evidence they intend to adduce, setting out in full the evidence which it

is intended to take from that witness, and fix a timetable for the service (whether by exchange or otherwise) and lodging of such statements or affidavits as may be thought necessary;

- (e) may direct that such witness statements or affidavits are to stand as evidence in chief of the witness concerned, subject to such further questioning in chief as the Lord Ordinary may allow;
- (f) may determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue;
- (g) where the proceedings are sent to proof, may appoint parties to be heard at a pre-proof hearing under rule 26A.24;
- (h) may direct that skilled persons hold a meeting with a view to reaching agreement and identifying areas of disagreement, and may order them thereafter to produce a joint note, to be lodged in process by one of the parties, identifying areas of agreement and disagreement, and the basis of any disagreement;
- (i) without prejudice to Chapter 12 (assessors)(13), may appoint an expert to examine, on behalf of the court, any reports of skilled persons or other evidence submitted and to report to the court within such period as the Lord Ordinary may specify;
- (j) where the proceedings are sent to proof, may make an order fixing the time allowed for the examination and cross-examination of witnesses;
- (k) may, on the motion of a party, direct the proceedings to be determined on the basis of written submissions, or such other material, without any oral hearing;
- (l) may continue the case management hearing to a date to be appointed by the Lord Ordinary;
- (m) may make an order for parties to produce a joint bundle of productions arranged in chronological order or such other order as will assist in the efficient conduct of the proof;
- (n) may order and fix a date for a further case management hearing or fix a date for the hearing of any debate or proof;
- (o) may make such other order as the Lord Ordinary thinks fit.

## Debates

**26A.23.**—(1) Where a party seeks to have the proceedings appointed to debate, the application must include—

- (a) the legal argument on which any preliminary plea is to be sustained or repelled;
- (b) the principal authorities (including statutory provisions) on which the argument is founded.

(2) Following application being made to the court under paragraph (1), before determining whether the action is to be appointed to debate the Lord Ordinary is to hear from the parties with a view to ascertaining whether agreement can be reached on the points of law in contention.

(3) The Lord Ordinary, having heard the parties, is to determine whether the action is to be appointed to debate.

(4) Where the action is appointed to debate, the Lord Ordinary may order that written arguments on any question of law are to be submitted.

(5) With the exception of rule 28.1(3)(d) which is not to apply, Chapter 28 (procedure roll), applies to a debate ordered under rule 26A.22(2)(a) as it applies to a cause appointed to the Procedure Roll.

### **Pre-proof hearing**

**26A.24.** Not less than 2 days prior to any hearing appointed under rule 26A.22(2)(g), parties must lodge in process an estimated timetable for the conduct of the proof together with a note of any issues which are to be addressed prior to the proof.

### **Lodging of productions for proof**

**26A.25.—**(1) Unless an earlier date is specified by the Lord Ordinary, any document not previously lodged but required for any proof in proceedings to which this Chapter applies must be lodged as a production not less than 7 days before the date fixed for the proof.

(2) No document may be lodged as a production after the date referred to in paragraph (1), even by agreement of all parties, unless the court is satisfied that any document sought to be lodged could not with reasonable diligence have been lodged in time.

## *PART 8*

### *WITHDRAWAL FROM GROUP PROCEEDINGS*

#### **Withdrawal of claim from group proceedings**

**26A.26.** The lodging with the court of a group register, in revised form, under rule 26A.15(3)(a) or (4)(a), following the withdrawal from the group of a group member, amounts to the point at which the person concerned withdraws consent for their claim to be brought in the group proceedings.

## *PART 9*

### *ORDERS OF THE COURT*

#### **Power to make orders**

**26A.27.** At any time before final judgment, the Lord Ordinary may, at the Lord Ordinary's own instance or on the motion of any party, make such order as the Lord Ordinary thinks necessary to secure the fair and efficient determination of the proceedings.

#### **Effect of interlocutor given in group proceedings**

**26A.28.—**(1) Subject to paragraph (2), an interlocutor given in group proceedings—

- (a) must describe or otherwise identify the group members who will be affected by it; and
- (b) binds all such persons, other than any person who has, as at the date of the interlocutor, withdrawn their consent to their claim being brought in the proceedings.

(2) An interlocutor given in group proceedings prior to a person joining the group as a group member binds such a person, except where the Lord Ordinary, on cause shown, orders otherwise.

### Failure to comply with rule or order of Lord Ordinary

**26A.29.** Any failure by a party to comply timeously with a provision in these Rules or any order made by the Lord Ordinary in proceedings to which this Chapter applies entitles the Lord Ordinary, at his or her own instance—

- (a) to refuse to extend any period of compliance with a provision in these Rules or an order of the court;
- (b) to dismiss the action, as the case may be, in whole or in part;
- (c) to grant decree in respect of all or any of the conclusions of the summons, as the case may be; or
- (d) to make an award of expenses,

as the Lord Ordinary thinks fit.

## PART 10

### SETTLEMENT

#### Settlement of proceedings

**26A.30.** The representative party must consult with the group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed.”.

(6) For rule 38.3(3) (leave to reclaim etc. in certain cases)(**14**), substitute—

“(3) An interlocutor, other than an interlocutor—

- (a) deciding whether to give permission (including the giving of permission either subject to conditions or only on particular grounds) for group proceedings to be brought under Chapter 26A (group procedure);
- (b) deciding whether to grant permission for the application to proceed under section 27B(1) of the Act of 1988(**15**) or an interlocutor determining the application, pronounced under Chapter 58 (applications for judicial review)(**16**),

may be reclaimed against only with the leave of the Lord Ordinary within 14 days after the date on which the interlocutor was pronounced.”.

(7) In the appendix (forms)—

- (a) after Form 13.2-A (form of summons and backing)(**17**), insert Form 13.2-AA (form of summons and backing – actions subject to Chapter 26A Procedure (Group Procedure));
- (b) in Form 13.7 (form of citation of defender) after “(name of pursuer)”, on both occasions where it appears, insert “[or (name of lead pursuer, if any, in proceedings to which Chapter 26A applies)]”;
- (c) after Form 26.1-C (form of third party notice by third party), insert—
  - (i) Form 26A.5 (form of application under section 20(3)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 seeking authorisation to be a representative party);

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(14) Rule 38.3 was substituted by [S.S.I. 2010/30](#) and amended by [S.S.I. 2015/228](#).

(15) Section 27B was inserted by the Courts Reform (Scotland) Act 2014 ([asp 18](#)), section 89 and amended by [S.I. 2015/700](#).

(16) Chapter 58 was substituted by [S.S.I. 2015/228](#) and amended by [S.S.I. 2017/200](#).

(17) Form 13.2-A was last amended by [S.S.I. 2008/349](#).



- (ii) Form 26A.8 (form of application under 20(3)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 seeking the replacement of a representative party);
- (iii) Form 26A.9 (form of application under section 20(5) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 for permission for group proceedings to be brought);
- (iv) Form 26A.14-A (group proceedings under section 20(7)(a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – opt-in proceedings – form of notice of consent for a person’s claim to be brought in group proceedings);
- (v) Form 26A.14-B (group proceedings under section 20(7)(a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – opt-in proceedings – notice withdrawing consent for a person’s claim to be brought in group proceedings);
- (vi) Form 26A.15 (group proceedings under section 20(7)(a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – opt-in proceedings – the group register);
- (vii) Form 26A.16 (group proceedings under section 20(7)(a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – opt-in proceedings – late application); and
- (viii) Form 26A.17 (group proceedings under section 20(7)(a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – opt-in proceedings – withdrawal of consent for a claim to be brought in group proceedings).

Edinburgh  
8th July 2020

*CJM SUTHERLAND*  
Lord President  
I.P.D.

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

SCHEDULE

Paragraph 2(7)

Form 13.2-AA

Rule 13.2(1A)

**Form of Summons and backing – actions subject to Chapter 26A Procedure (Group Procedure)**



*(This space will contain the cause reference number assigned to the summons on being presented for signing and registration)*

**IN THE COURT OF SESSION**

**SUMMONS**

in the cause

[A.B.], Representative Party *(full name, designation and address)*

Representative Party for Pursuers

against

[C.D.] *(designation, statement of any special capacity in which the defender[s] is [are] being sued, and address)*

Defender

Elizabeth II, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith, to [C.D.].

By this summons, the court having authorised [A.B.] to be a representative party in group proceedings and having granted permission to [A.B.] to bring the proceedings, the representative party for the pursuers craves the Lords of our Council and Session to pronounce a decree against you in terms of the conclusions appended to this summons. If you have any good reason why a decree should not be pronounced, you must enter appearance at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh EH1 1RQ, within three days after the date of the calling of the summons in court. The summons shall not call in court earlier than [21] days after the date of service on you of this summons.

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## EXPLANATORY NOTE

*(This note is not part of the Act of Sederunt)*

This Act of Sederunt makes provision about group procedure, as provided by Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the Act”). Group procedure is a new form of proceedings available in the Court of Session. The instrument amends the Rules of the Court of Session (“the RCS”) by, among other matters, the insertion of new Chapter 26A by paragraph 2(5), and comes into force on 31st July 2020.

### *General Provisions*

Part 1 of Chapter 26A makes general provision. The procedural framework, as provided by rule 26A.3 and Part 7 of Chapter 26A, provides the court with flexibility as to how to deal with these new proceedings efficiently.

Numerous applications are made to the court under the new procedure, by motion. Rule 26A.4 provides that Chapter 23 (motions) of the RCS applies to motions made under Chapter 26A and that they may be intimated and enrolled by email.

### *Representative Party*

The Act provides that a person who is a representative party may bring group proceedings on behalf of a group of persons. Under section 20(3)(b) of the Act a person may be a representative party only if authorised by the court. Part 2 of Chapter 26A, and Forms 26A.5 and 26A.8, makes relevant provision for this.

### *Permission to bring Group Proceedings*

Under section 20(5) of the Act group proceedings may be brought only with the permission of the court. The court may give permission where it is satisfied that the criteria set out in section 20(6) (a) and (b) of the Act are met and, by section 20(6)(c), in accordance with provision made in Part 3 of Chapter 26A. The applicant must, together with an application, lodge the summons by which it is proposed to institute proceedings, a record of group members and relevant supporting documentation. Applications for permission are determined in accordance with rule 26A.11(5). Where the court gives permission for group proceedings to be brought under rule 26A.12, the Lord Ordinary makes an order which sets out certain specified matters about the group. Under rule 26A.13 an appeal against a decision of the court on an application for permission is made by reclaiming motion. By virtue of paragraph 2(6) of the Act of Sederunt leave to reclaim is not required in such appeals.

### *Opt-in Procedure*

The Act of Sederunt provides for group proceedings to be brought as opt-in proceedings under section 20(7)(a) of the Act. Part 4 of Chapter 26A, together with the accompanying Forms, make relevant provision. Under rule 26A.14, notices are sent by potential group members to the representative party (or the person who has applied, or is to apply, to be a representative party), who then records persons who are group members in a group register. Under rule 26A.15, the register must be lodged with the court and served on the defender. The representative party must be satisfied that the person may be a group member before they can record the person as a group member on the register. This includes an assessment of their claim and being satisfied that it raises issues (whether of fact or law) which are the same as, or similar or related, to each other and subject to the proceedings, and being satisfied that their claim has not prescribed before joining the register.

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

The membership of the group may change during the course of the group proceedings either by the joining of new group members or by the departure from the group of group members. Group members withdraw their consent to their claims being brought in group proceedings in the same way as persons join the group, by the sending of a notice in Form 26A.14-B, to the representative party.

The Act of Sederunt makes provision for the procedure that is to be followed in cases where a person seeks to join or leave a group late in the proceedings or, where their leaving results in there being less than two pursuers, by rules 26A.16 and 26A.17 respectively.

#### *Commencement of Group Proceedings*

Part 5 of Chapter 26A makes provision setting out when proceedings are deemed to have commenced by group members in a group proceeding action. It is the point at which the group register is served on the defender or, in the case of eligible persons who join the group proceedings at a later stage, the lodging with the court of a revised group register. Where application is made by a person to join the group proceedings late, and the court allows such application, then it is the point at which the application is made.

#### *Summonses and Defences*

Part 6 of Chapter 26A, and Form 13.2-AA, make provision for pleadings in group proceedings. Form 13.2-AA prescribes a new summons Form for these proceedings.

#### *Procedural Framework*

Part 7 of Chapter 26A sets out the procedural framework for group proceedings, which comprises preliminary hearings, case management hearings, debates, pre-proof hearings and the lodging of productions for proof.

#### *Withdrawal of Group Members from Group Proceedings*

Part 8 of Chapter 26A makes provision setting out the point in group proceedings at which a group member withdraws consent for their claim to be brought in the proceedings. It is the point at which the revised group register is lodged with the court.

#### *Orders of the Court*

Part 9 of Chapter 26A makes provision concerning orders of the court in group proceedings. Rule 26A.27 permits the Lord Ordinary to make such orders as are necessary to secure the fair and efficient determination of the proceedings. Provision is made by rule 26A.28 about interlocutors given in group proceedings, and their effect. Rule 26A.29 provides powers to the Lord Ordinary in connection with a failure by a party to comply with the RCS or with any order of the Lord Ordinary in group proceedings.

#### *Settlement*

Part 10 of Chapter 26A makes provision about settlement of group proceedings. Under rule 26A.30 the representative party must consult with group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed.

#### *Consequential Provision*

Consequential amendment of the RCS is made by paragraph 2(2) to (4) and (6) of the Act of Sederunt.

#### *Forms*

New Forms are inserted into the appendix to the RCS, and Form 13.7 is amended, by paragraph 2(7) of the Act of Sederunt.