Justice Committee

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Written submission from the Judges of the Court of Session

Introduction

1. This is a response from the Judges of the Court of Session to the Scottish Parliament Justice Committee's call for evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. We are grateful to the Committee for the opportunity to offer the following views.

2. We broadly welcome the provisions of this Bill which will give effect to key recommendations of the Taylor Report and to a number of the outstanding recommendations of the Gill Review. We have observations to advance on 2 areas of the Bill.

Sections 13-16 Auditors of Court

3. While the proposal to make the Auditor of the Court of Session a salaried post would remove scope for criticism regarding one area of potential conflict, we do not consider that he or she should be a salaried employee of the SCTS. In such a position the Auditor would be vulnerable to different criticisms if, for example, he or she required to deal with taxations in litigation involving his or her employer or the Scottish Government.

4. We consider that a mechanism could be found to retain the present system of tenure of the office but payment of a salary in the same manner as judges. This would be a return to the position prior to 1998 when we understand the current system of remuneration was introduced.

Sections 17-18 Group Proceedings

5. The inclusion in the Bill of measures providing for the establishment of a group procedure is welcome. Such a procedure has the potential to promote both wider access to justice, and the more efficient administration of justice.

6. There are three issues we wish to address in our evidence.

Expenses and funding

7. It is important that there should be clarity about the respective rights and obligations of the representative party and the members of the represented group, in relation to expenses and funding. All involved need to know what, if any, liability the group members have to contribute to the cost of funding the proceedings, and to contribute to the cost of indemnifying the representative party against any liability in expenses incurred in the proceedings. Any uncertainty or ambiguity regarding these matters has the potential to lead to disputes, and to discourage individuals and organisations from offering themselves up as a representative party.

8. There may be cases involving small, clearly-defined groups in which it is possible for this issue to have been addressed by way of agreement before permission to bring a group action is sought from the court. However, in cases where individual

claimants are joining the represented group after the permission stage, it appears necessary for there to be terms regulating such matters that either apply automatically as a consequence of membership of the group, or that have to be subscribed to as a condition of membership. Such matters would not fall within the scope of the current provisions of the Bill or within the scope of an Act of Sederunt under section 18(4) since this is a matter of the regulation of the rights and liabilities of the representative party and those joining after permission stage. It is therefore suggested that this is an area where further provision may be required.

Global settlements

9. While the principal function of a group procedure is to allow for the judicial determination of an issue that is common to multiple cases, it is important that the procedure should also be designed to facilitate settlement. By providing that the representative party may do anything in relation to the groups' claims that the group members would have been able to do had they made the claims in other proceedings, the Bill should generally allow this to be achieved. It will be left to court rules to determine whether, in the interests of the protection of those represented, the representative party should be required to seek the authority of the court before abandoning or compromising claims. Subject to that, the Bill provisions should allow for various models of settlement. Examples would include a settlement under which the defender is found liable to pay damages to each claimant based on an agreed percentage of full liability value or, where appropriate, a settlement under which all claimants would receive a flat rate of compensation.

10. However, we think it is important to draw to the Committee's attention that there are limits on the models of settlement that the Bill provisions would allow for. In the context of a group action it is conceivable that the only offer, or the best available offer, will be an offer of a global sum in full and final settlement of all claims. The effect of settling on those terms would be to leave the representative party holding an unallocated fund. It is our view that settlement on that basis would only be possible, either if all the represented claimants agreed on a scheme of division of the fund, or if the appropriate division of the fund was one that could be determined by the application of a relevant body of law.

11. The role of the representative party would be to act for, and in the interests of, all the claimants. In the event of such a settlement, and in the absence of unanimous agreement as to the division of the fund, we do not think it would be compatible with that role to expect the representative party to devise a scheme of division based on the exercise of discretion, and to impose it on the group.

12. Similarly, the court itself can only make such orders as are justified by the application of relevant rules of law or legal principles to the circumstances of the case in hand. If the appropriate division of the fund is one that can be determined through the application of such rules of law or legal principles, then procedures can be devised to allow that to be done. However, in the absence of applicable rules or principles, it cannot be the role of the court simply to apply its own discretion to determine a scheme of division.

Ancillary provision

13. Beyond the issues raised above, it is difficult at this stage to assess if the Bill, as introduced, makes all necessary legislative provision for the establishment of a fully effective group procedure. This may only become apparent once the Scottish Civil Justice Council embarks on the significant task of designing a procedural model and developing detailed court rules. However, it is possible to envisage circumstances in which further legislative provision may be required.

14. For example, under the law relating to the limitation of actions, which is a matter of substantive law rather than procedure, the question of whether or not proceedings are subject to limitation depends on when the action was commenced. The date of commencement has always been taken to be the date on which the defender is cited. However, the effect of this rule as it applies to an individual claimant in a group action may turn out to be unclear if the model adopted is one that allows individual claimants a period of time following the permission stage in which to subscribe to the group action. In that event it may be helpful for there to be legislative provision modifying the effect of the normal rule concerning when an action is deemed to have been commenced in order to provide clarity in this situation.

15. The effectiveness of group procedure may therefore be dependent, not just on the rules that are developed by the Scottish Civil Justice Council, but also on the appropriate exercise by Scottish Ministers of the power to make ancillary provision provided for in section 20 of the Bill.

Judges of the Court of Session
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