OUTER HOUSE, COURT OF SESSION

[2022] CSOH 12

GP2/21 & GP3/21

OPINION OF LORD WEIR

In the Group Proceedings Applications brought by

THOMPSONS SOLICITORS SCOTLAND

Applicant

against

JAMES FINLAY (KENYA) LIMITED

Defender

Applicant: Smith QC; Thompsons Solicitors Scotland
Defenders: J G Thomson; BLM

2 February 2022

Introduction

[1] There are two applications before the court. The first application is submitted under rule 26A.5 of the Rules of Court. It is an application in terms of section 20(3)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, seeking the court's permission for the applicant to be a representative party to bring group proceedings against the defender. The second application is submitted under rule 26A.9 of the Rules of Court. It is an application in terms of section 20(5) of the 2018 Act, seeking the court's permission to bring group proceedings against the defender in respect of allegedly unsafe working

practices, conditions and systems of work at Kenyan tea plantations which are said to have given rise to musculoskeletal injuries amongst current and former employees.

Procedural background

[2] On 7 October 2021 I pronounced interlocutors granting warrant for service of both applications, appointing advertisement of the applications and appointing the defender to lodge answers within a period of 21 days. Answers having been lodged, and there being opposition at least to the application for authority to bring group proceedings, I appointed a hearing in both applications, and heard argument on 22 December 2021. Having done so, I invited further representations to be submitted on behalf of the applicant on the matter of whether, as agent instructed on behalf of many of the prospective pursuers, it was appropriate that they should be putting themselves forward for appointment as a representative party. I should observe that the defender did not advance any opposition to the authorisation of the applicant as a representative party.

Legal framework

[3] Both applications are made under chapter 26A of the Rules of Court. The rules contained in chapter 26A were made following the enactment of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the 2018 Act"). So far as relevant to these applications, section 20 of the 2018 Act provides as follows:

> "**20 Group proceedings**
> (1) There is to be a form of procedure in the Court of Session known as 'group procedure', and proceedings subject to that procedure are to be known as 'group proceedings'.
> (2) A person (a 'representative party') may bring group proceedings on behalf of two or more persons (a 'group') each of whom has a separate claim which may be the subject of civil proceedings.

(3) A person may be a representative party in group proceedings—
  (a) whether or not the person is a member of the group on whose behalf the proceedings are brought,
  (b) only if so authorised by the Court.
(4) There is to be no more than one representative party in group proceedings.
(5) Group proceedings may be brought only with the permission of the Court.
(6) The Court may give permission—
  (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
  (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
  (c) in accordance with provision made in an Act of Sederunt under section 21(1)…"

[4] Part 2 of chapter 26A is concerned with applications to be a representative party to bring group proceedings.

[5] Rule 26A.7 is in the following terms:

"26A.7. - (1) An applicant may be authorised under section 20(3)(b) of [the 2018 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 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…"

[6] Part 3 of chapter 26A is concerned with applications for permission to bring group proceedings. Rule 26A.11 envisages that, where answers are lodged to an application, a

hearing will be fixed to determine the question of permission. In that respect, rule 26A.11(5) provides as follows:

> "(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 2018 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."

The hearing on 22 December 2021

[7] Senior counsel addressed both the suitability of the applicant to be a representative party and the question whether permission should be granted for group proceedings to be brought.

[8] On the first matter, it was submitted that the court could be satisfied, by reference to the list of considerations in rule 26A.7, that permission should be granted. The applicant was a long-established firm which handled almost exclusively pursuers' personal injury litigation. It had already acquired experience in group litigation. To the extent that there might be any concern around its own interest in the prospective group proceedings as agent for the pursuers the applicant was bound by professional rules relating to conflicts of interest and client management, and had its own professional responsibilities to the court. There ought not to be any concern about the applicant's ability to meet any expenses awards. In circumstances in which qualified one-way costs shifting would now apply there was little likelihood of any such finding of expenses. In any event, as a firm, the applicant had a solid financial base and one which allowed it to absorb unsuccessful cases and any associated awards of expenses against pursuers. The applicant's standing and financial

resources, and the absence of any conflict of interest with the pursuers to any group proceedings, were addressed in a statement by Mr McGuire, which had been lodged for the assistance of the court.

[9] Turning to the second application the senior counsel submitted that the court should avoid engaging in a disproportionate exercise of micro-examination of the pursuers' claims. The issues for determination in the prospective claims all concerned (i) the existence and content of the defender's duty of care (it being noted, without pleading any Kenyan law, that there was an admission that certain duties were incumbent on the defender), and (ii) whether the employees were exposed to common working practices which created a foreseeable risk of injury. The issues were "the same, similar or related" for the purposes of section 20(6)(a) of the 2018 Act. The applicants had placed material before the court from which it was clear that substantial efforts had been made to identify and notify all potential group members. The test for a *prima facie* case in rule 26A.11(5)(b) was in effect the same as the test for interim interdict (*Toynar* v *Whitbread & Company plc* 1988 SLT 433). It was a low threshold, especially in the context of the defenders' admission that certain duties were incumbent on them. Nor could it be said that there were no reasonable prospects of success. To the extent that *forum non conveniens* was advanced as a ground for refusing permission that should not interfere with progress at this stage. If permission was granted the matter could still be raised as potentially a common issue. Finally, there were a host of practical reasons why it would be better for the administration of justice if the numerous claims were raised as a group rather than individually.

[10] In response, the defender did not submit that the applicant was unsuitable to be authorised as a party representative. Counsel instead submitted that there were circumstances in which permission to bring group proceedings should be refused. The first

consideration was one of limitation, which fell to be determined according to the law of Kenya. Limitation potentially accounted for the overwhelming majority of the claims identified in the Group Register lodged with the summons. A case raised out of time did not have real prospects of success. *Prima facie* case, efficient administration of justice and real prospects of success were linked considerations. If there was no *prima facie* case then there were no real prospects of success, and the administration of justice would be affected by parties' attempts to deal with the difficulty. Quite apart from limitation it could not be said that all of the claimants were engaged in similar work. Counsel illustrated this by distinguishing between employees who may have been engaged in shear plucking and hand plucking. In any event the summons provided little more than a generic description for its underlying factual basis. He queried whether it was in the nature of a repetitive strain case or whether it encompassed claims arising from single events. In the absence of proper focus the court was not in a position to assess whether there were real prospects of success. Finally, counsel acknowledged that the issue of *forum non conveniens* was not one which assisted in addressing the issue of permission at this stage.

[11] In the course of his submissions on behalf of the applicant, the court raised with senior counsel the question whether it was appropriate for the solicitors who were instructed in the case to put themselves forward as the proposed representative party. The issue having potential relevance to a consideration of the question whether the test in rule 26A.7(2) was met, even although the application was not opposed, I invited senior counsel to submit further submissions in writing under reference to any relevant authorities (including within Commonwealth jurisdictions), and continued the hearing for that purpose.

[12] I was subsequently furnished with further submissions, helpfully accompanied by (i) a copy of the decision of the Ontario Supreme Court in *Kerr* v *Danier Leather Inc* [2001] OJ No 950; (ii) a letter from a Canadian attorney, Mr Michael J Peerless, of McKenzie Lake Lawyers LLP, Ontario, containing a commentary on the authority just mentioned, and an insightful summary of the position regarding class actions in the other provinces of Canada, and (iii) relevant extracts from the Taylor Review on Expenses and Funding of Civil Litigation in Scotland, and the Scottish Civil Courts Review (2009). To the suggestion that *Kerr* v *Danier Leather Inc* provided authority for the proposition that claimants' solicitors were not permitted to be a representative in a class action, senior counsel relied on the advice received which was to the effect that the decision would not be considered determinative even in Canada, there being different approaches discernible in other cases and in different provinces of Canada. Moreover, there was no discussion in the Taylor report which assisted in resolving the issue. Nothing in the Scottish Civil Courts Review precluded the applicant from acting as a representative party where the conditions for it doing so otherwise existed.

[13] Accordingly, I was invited to grant both applications. If the court was not satisfied on the matter of the representative party application I was invited to continue the hearing further to allow for consideration of an alternative or substitute application.

Analysis and decision

[14] I will address myself first to the representative party application. It logically precedes the granting of the group proceedings application, not least because the summons in the latter application reflects the applicant's designation as representative party for the

pursuers in the instance. The application for authorisation as a representative party was not opposed by the defender.

[15] Neither the 2018 Act nor the Rules of Court define who may, or may not, be authorised to be a representative party in group proceedings. Rule 26A.7(3) provides that the court may refuse an application made by an applicant seeking authorisation to be given where the applicant has not satisfied it that the applicant is a suitable person to act in that capacity. It is, therefore, clear that it is for the court to be satisfied as to the matters set out in rule 26A.7(2).

[16] The Scottish Civil Courts Review considered that there should be a procedure for certifying an action as suitable for multi-party proceedings. It recommended that the procedure should involve the court in certifying that an action was suitable for group proceedings. Pursuers should be required to demonstrate a *prima facie* cause of action. The Review group also recommended that the procedure should be designed to be usable by "representative bodies" who have standing (volume 1, chapter 2, paragraph 70).

[17] It is clear, from its later consideration of "multi-party actions" that the Review group anticipated that the category of persons authorised to act as representative party in such proceedings might be broader than a "pursuer" in the traditional sense. Endorsing (volume 2, chapter 13, paragraph 69) the Scottish Law Commission's recommendation that the court should be satisfied that the representative pursuer was an appropriate person, the Review group said this:

> "In some jurisdictions the pursuer need not be a natural person but can be an 'ideological' pursuer, generally a representative body. For example…the Australian Competition and Consumer Association has power to bring representative actions in certain circumstances. We do not think that it would be appropriate for the legislation that will be necessary to implement our recommendations to seek to specify the type of bodies that might be permitted to bring proceedings on a representative basis. That issue is under consideration at present, and there may

> be further developments at European level. However, should representative bodies, either generally or those specifically authorised, be given standing to bring proceedings on behalf of consumers or other groups whom they represent, we think that the multi-party procedure should be designed in such a way as to permit those bodies with standing to make use of it."

[18] From the information provided in Mr Peerless's helpful review of the class proceedings regimes across the provinces of Canada it is clear that the rules as to who can be a representative plaintiff vary, and that the common law requirements of a representative plaintiff, laid down in the decision of the Supreme Court of Canada in the case of *Dutton*, 2001 SCC 46, do not expressly require that a representative plaintiff be a member of the class proceedings. That said, all of the provinces, save three, appear to require the representative plaintiff to be a member of the class of plaintiffs, subject only to the proviso (excluding Ontario and the Federal Court of Canada) that the court may appoint a person who is not a member of the class as the representative party for the class action where it is necessary to do so in order to avoid substantial injustice to the class.

[19] That review is instructive in as much as it lends emphasis to the importance which most provinces appear to attach to the representative plaintiff being a class member.

[20] However, consistent with the passage from the Scottish Civil Courts Review I have just quoted, the 2018 Act and chapter 26A of the Rules of Court have not been constructed so as to restrict representative party applications in group proceedings to persons who have claims in those proceedings. Indeed, section 20(3)(a) of the 2018 Act makes it clear that a person may apply for authorisation to be a representative party whether or not that person is a member of the group on whose behalf the proceedings are to be brought.

[21] But, the question raised by the present application is a different one. It is whether the firm acting for the claimants in group proceedings can, at the same time, be the representative party.

[22] In that respect, the applicants contend that they should be authorised as a representative party because they fall within the description of an "ideological" pursuer, and that they fulfil the criteria for authorisation in rule 26A.7(2). There is no Scottish authority to assist in this matter. In the Ontario Supreme Court decision of *Kerr* v *Danier Leather Inc* the defendants argued that Mr and Ms Kerr, who were spouses, would be inappropriate representative plaintiffs because Ms Kerr was a partner at the proposed class counsel's law firm. Cumming J concluded that "the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety". He approved a third proposed representative with no close familial bond to proposed class counsel as the sole representative plaintiff.

[23] Mr Peerless's note identified other cases in which *Kerr* has been considered. Perhaps the most pertinent authority to which he drew attention was *Roach* v *Canada (Attorney General)* [2009] OJ No 737. Mr Roach was proposed as class counsel. *Kerr* was cited as authority that, as a general rule, it is not appropriate to appoint as a representative plaintiff a member, or associate, of a law firm that would act as class counsel. Despite this general rule Cullity J of the Ontario Superior Court of Justice stated that if the certification requirements for class proceedings were otherwise satisfied (which they were not), he would not have seen any objection to the appointment of Mr Roach as representative plaintiff. He found that

> "Mr Roach [had] been the moving force behind the proceeding in his personal capacity, and [that] his involvement in the case and the earlier proceeding - together with his legal knowledge and experience and his strong commitment to enforcing the rights of the class members…[made] him eminently qualified to perform the responsibilities of a representative plaintiff".

[24] I am not persuaded that the circumstances in *Roach*, the full report of which I have now studied, bear comparison with the present application, in which it is not suggested that

any such personal connection to the proceedings exists. Other authorities specifically mentioned in Mr Peerless's note have tended to concentrate on the issue of whether a close connection between the proposed representative plaintiff and class counsel rendered the proposed representative plaintiff unsuitable. *Kerr* has been considered, or referred to, in eleven Canadian authorities. As a statement of the general principle (that it is not appropriate to appoint, as a class representative, a member of a law firm that would act, for the class, in class proceedings) it has not, as far as I can see, been disapproved. None of the authorities, to which Mr Peerless's note refer, replicate the circumstances of the instant application. In short, I have been referred to no authority, in any jurisdiction, where permission has been granted for the same firm to be both the representative party and instructed agent (or lead agent) for the claimants in class or group proceedings.

[25] The Scottish scheme for group proceedings provides for the court to consider the suitability of the proposed representative party by reference to a non-exhaustive list of matters which are narrated in rule 26A.7(2). Those matters include consideration of the applicant's own interest in the proceedings, and the absence of any conflict between the applicant's interests and those of the group whom it seeks to represent (rule 26A.7(2)(b) and (e)). The inclusion of those matters in rule 26A.7(2) reflect a theme which is, in my view, discernible in some of the Canadian cases referred to by Mr Peerless. In particular, I refer to the concern of the court about the potential for conflict of interest, and the appearance of impropriety, arising from the possibility that decisions made by a representative party in group proceedings would be influenced by their financial interest as a member of the firm acting in those proceedings. Implicit in that concern would seem to be a recognition that, all things being equal, the positions of representative plaintiff in class proceedings and "class counsel" are, and should be, separate and distinct.

[26] I wish to make it clear that I impute absolutely no impropriety on the part of the applicant in putting itself forward as a representative party. Far from it. But the broader concern I have mentioned is legitimate, and no less relevant, to group proceedings in this jurisdiction, which are themselves in their procedural infancy. The concern arises, in the circumstances of this application, from the apparent blurring of the distinction between a party and its advisors, and the improbable consequence that the applicant would be issuing instructions, as representative party, to itself on matters relating to the progress of the group proceedings. I take leave to doubt whether that was what the Scottish Civil Courts Review had in mind in its consideration of a role for "representative bodies" in group proceedings.

[27] More immediately, the fact that the funding arrangements for the proposed group proceedings are also speculative, and subject to success fees of a kind referred to in Mr McGuire's statement, serves only to emphasise the potential for conflict - or the appearance of it - to arise in circumstances where a global settlement might be proposed to the representative party (or a competitive tender lodged in process). It does not seem to me that, in the constitutional arrangements proposed for these proceedings, that difficulty would be elided by the obligation on the part of the representative party, in terms of rule 26A.30, to consult with group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed.

[28] In these circumstances, for the purposes of rule 26A.7(3), I am not persuaded that the applicant is a suitable person to act in the capacity of representative party in the contemplated group proceedings.

[29] I can deal with the group proceedings application more briefly because, in principle, and subject to satisfactory resolution of the representative party application, I am satisfied that the criteria for granting that application are met. In particular, while the pleadings are

in abbreviated form, the averments adequately identify issues arising from common working practices, allegedly giving rise to musculoskeletal injuries, and the content of the defender's duty of care in that context, which not only give rise at least to a *prima facie* case but which are also sufficiently similar to justify the granting of permission. No issue was taken over the identification of potential group members.

[30] I am also satisfied that the practical issues touched on in senior counsel for the applicant's submissions justify the view that it would be "a more efficient administration of justice" for the claims to be brought as group proceedings rather than by separate individual proceedings. For example, both *forum non conveniens* and the matter of limitation were raised in the course of discussion. Either of those issues might be thought to be common to all claims and have the potential significantly to impact on the duration of the proceedings and/or the number of claims within them.

Disposal

[31] I am, however, conscious that the group proceedings application is bound up with the identity of the representative party, not least because the summons would require amendment to reflect a final decision on that matter. Accordingly, and subject to any submissions parties wish to make on immediate further procedure, I am prepared to continue both applications to a further hearing to enable the applicant to consider proposing, by amendment, an alternative representative party (as I was requested to do in the applicant's supplementary note of proposals for further procedure).