EXPENSES AND FUNDING OF LITIGATION

MULTI- PARTY ACTIONS

Introduction

1. This paper sets out our draft proposals on multi-party actions to be included in primary legislation that will take forward recommendations made in Sheriff Principal Taylor's review of Expenses and Funding of Civil Litigation in Scotland (the Taylor Review).

Background

2. There is currently no multi-party procedure in Scotland and a number of reviews have made recommendations on developing such a procedure and how that procedure may be constructed. Most recently, the Scottish Civil Courts Review made recommendations on a multi-party action procedure and it was decided that this element of the recommendations would be taken forward as part of the Taylor Review rather than as part of the Civil Court reforms.

3. Sheriff Principal Taylor made a number of recommendations on the establishment of a multi-action procedure in the Scottish courts and the Scottish Government undertook to consider how best to move forward with these recommendations.

4. Multi–party actions was discussed with the Scottish Government's short life working group on Taylor and options for moving forward were consulted on in the subsequent public consultation that will underpin primary legislation.

5. From these it is clear that there is still support for the introduction of a multi-party action procedure but it remains a complex issue and the expectations of interested parties remain varied at best and at times conflicting. While the recommendations made in the past remain valid, the context in which these could be taken forward has changed considerably, and that change will continue in the foreseeable future as civil court reforms bed in. This changing context has been considered as part of our deliberations and in the solutions reached.

6. Proposals have also been developed to reflect other changes that this primary legislation will deliver; the proposals to introduce a qualified one way costs shifting regime in personal injury actions being particularly pertinent.

Proposed scheme

7. We think it is clear that the details of any scheme for multi-party actions will have to be considered in some detail, and possibly revised in light of experience. For this reason, we think that the detail of the scheme should be in secondary legislation – acts of sederunt in relation to the court procedure elements, and regulations as regards legal aid funding. The detailed consideration of necessary rules is something which the Scottish Civil Justice Council is best placed to consider.

8. This paper therefore sets out the broad outline of a proposed scheme for multi-party actions, and considers the extent to which this may be delivered under existing powers and the new provisions which we think might be required.

Opt-in only

9. We propose that any multi-party action regime should be on an "opt-in" only basis. The proceedings should only determine the rights of those who have opted to participate, and not those of non-participant third parties. Opting in could take place either at the time that the proceedings were raised, or by joining the action before a prescribed date or stage in the proceedings.

10. Opt-in proceedings would represent a significant advance over the current lack of multi-party procedure, while avoiding a number of difficulties with an opt-out scheme

Third-party representation possible

11. It should be possible for the representative pursuer to be a third party (such as a consumer rights organisation or other body) which does not itself have a claim against the defender but which the court certifies to be an appropriate person to conduct the litigation on behalf of the other parties.

Requirement for certification

12. The multi-party action procedure should be available only where the court grants an order certifying the appropriateness of the procedure. The details of the criteria to be applied should be set out in rules of court; but in accordance with the SCCR recommendation (Chapter 13, paragraph 65), we would expect the following criteria to apply:

> The court should be satisfied (a) that the applicant is either (i) one of a group of persons whose claims give rise to common or similar issues of fact or law, or (ii) represents such a group; (b) that the adoption of the multi-party action procedure is preferable to any other procedure for the fair, economic and expeditious determination of similar or common issues; and (c) that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to the applicant's financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues.

13. As criterion (b) suggests, the adoption of multi-party action procedure should be permitted only where the court is satisfied that there is no other method of resolving the dispute (including the use of Alternative Dispute Resolution and other administrative or regulatory remedies which are more practicable and/or economically viable for seeking collective redress) which would be more suitable.

Awards

14. Where the action seeks an award of damages, it should be competent for the court to award an aggregate or global amount of damages to be divided between the parties, and to direct the basis of apportionment, rather than considering the detailed value of each individual claim. (This would be imperative in the case of an "opt-out" system, where the number, identity and other details of claimants falling within the class were uncertain, but it could also be useful in an opt-in case.)

15. The court should have power to appoint an assessor to draw up a scheme of apportionment of any award between the parties that the court would subsequently approve.

Expenses

16. The court should retain its normal broad discretion in the award of expenses. That is, expenses should generally follow success. However, where the subject matter of the proceedings is one to which QOCS would otherwise apply, it should also apply to the multi-party proceedings.

17. In practice, it seems likely that expenses will only be awarded against the representative pursuer rather than against each individual party to the action, since the cost of recovering small sums of expenses from a multitude of parties would likely be disproportionate. But this is something for rules rather than for the Bill.

Funding

Interaction with success fee agreements

18. It should be competent for a multi-party action to be funded by a success fee agreement. Where this is done, the financial cap on the level of the success fee should be calculated by reference to the aggregate or global amount of damages awarded and not with respect to the amount of damages due to any individual pursuer.

Legal aid

19. Lord Gill recommended (recommendation 175) that there should also be a special funding regime for multi-party actions to be administered by the Scottish Legal Aid Board. It was envisaged that funding would take the form of a SLAS (Supplementary Legal Aid Scheme) rather than a CLAF (Contingent Legal Aid Fund.) Both of these are self-funding schemes in terms of which a levy is payable out of the proceeds of successful litigations funded by the scheme. A CLAF is an independent commercially run scheme that is intended to be fully self-financing although not necessarily for profit.[1] A SLAS is built onto or added onto an existing publicly funded legal aid scheme and administered by the relevant legal aid authority. The normal beneficiary of such a scheme is the claimant although it could also be used by a defender with a counterclaim.

[1] Scottish Law Commission stated (para 5.19, Scot Law Com No 154) that CLAF was not financially viable

20. In any given situation which may be susceptible to multi-party action procedure, individual action by any person potentially in the group would be possible. Some members of the group may qualify for legal aid under the current regime if they made an application on an individual basis but others may not. It is likely that the public funding arrangements for multi-party actions, however constituted, would have to look at the multi-party action as a whole and the membership of the group, and have regard, amongst other things, to the extent to which any shortfall in the case as a whole should be funded by public money.

21. There would have to be clear demarcation between public funding of individual cases (under the existing regime) and public funding of multi-party actions (under the new regime). Measures would be required to avoid "double-funding." This would be most likely to arise in a situation where a person commences an individual action at a time when the use of multi-party action procedure may not be indicated or obvious but then changes to multi-party action procedure when it becomes so.

22. Provision would also have to be made for the converse situation, where someone opts out of multi-party action procedure and wishes to proceed with an individual case. The public funding mechanisms will require to ensure that appropriate controls exist to ensure that the most cost effective approach, and only that approach, is funded publicly. There will also require to be appropriate measures to ensure multi-party action funding does not create adverse financial impacts for the legal aid budget overall.

23. It should be possible, in appropriate circumstances, for legal aid to be made available to a third party representative pursuer, whether that pursuer is a natural or a legal person.

24. The detail of the required provisions will have to be considered in light of the scheme for multi-party actions which is ultimately proposed by the SCJC. We therefore require a broad regulation-making power, inserted in the Legal Aid (Scotland) Act 1986, to make provision for legal aid in multi-party actions. As with legal aid for legal persons, we would expect this provision to be a mixture of free-standing provision and modification of existing provisions of the Act.

Forum and procedure

25. The SCCR recommended that multi-party actions should be restricted to the Court of Session. We think there is merit in this, but that we should not exclude the possibility of such actions being brought in the sheriff court if the SCJC should ultimately consider this appropriate. We think that it should be possible to frame any additional powers (beyond those already contained in sections 103 and 104 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act")) in a way which would allow rules to be prescribed for the Court of Session alone or for both the Court of Session and the sheriff court.

26. It is possible that a multi-party action may, at the time at which it is launched, have a value which would bring it within the exclusive competence of the sheriff court in terms of section 39 of the 2014 Act. We are not certain that the power in section 39(7) to make provision by act of sederunt for determining the value of an order or

orders for the purposes of that Act is sufficient to allow all multi-party actions, regardless of value, to come within the competence of the Court of Session, and think that it would be helpful to have express provision enabling the Court of Session by act of sederunt to provide that section 39 does not apply to such proceedings.

27. The procedure to be applied to multi-party actions should be determined by act of sederunt. Multi-party actions should not be jury actions by virtue of section 11 of the Court of Session Act 1988.

31. It should also be possible for rules to provide for existing proceedings to be transferred to multi-party procedure, either at the instance of parties or that of the court. In the case of proceedings in the sheriff court, this may involve the proceedings being remitted from the sheriff to the Court of Session. This is not a situation which is covered by the existing remit provisions in section 92 of the 2014 Act, and this section will need to be modified accordingly. There should also be provision allowing cases to be remitted from the multi-party procedure to the sheriff court, or to ordinary procedure in the Court of Session, as appropriate. This will require modification of section 93 of the 2014 Act.

Conclusion

28. The paper sets out the key elements of a proposed multi-action procedure and the powers we think the courts should have to operate the system. The means of providing these powers will be developed as drafting of provisions progresses.

29. At this stage, comments on the high level objectives of establishing a multi-party action procedure are welcomed, by **email to: John Thomson, Access to Justice Unit, John.Thomson@gov.scot** .

30. Further matters may arise as drafting develops and we may want to ask for further input from stakeholders to inform progress. Please let us know if you would be happy to provide further input as needs arise.

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