

CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Group Proceedings

Section 20 – Group proceedings

37. **Section 20** provides for a new court procedure known as “group procedure” that will be available only in the Court of Session. Group proceedings are similar to what is known as “multi-party actions” or “class actions” in other jurisdictions. Group procedure is intended to be available for both private law and public law (judicial review) proceedings.
38. By virtue of subsection (7) and section 21, group procedure rules may provide for group proceedings to be brought on an “opt-in” basis, an “opt-out” basis, or both. These terms are defined in subsection (8). By virtue of section 21(2)(c) group procedure rules may set out in more detail precisely how parties are to opt-in or opt-out of a group, as appropriate. It should be noted that the definition of “opt-out proceedings” provides that where parties are not domiciled in Scotland, they must always opt-in to proceedings even in “opt-out” procedure. Section 22(2)(a) makes provision for domicile to be defined for this purpose.
39. Subsection (2) sets out the circumstances in which a representative party may bring group proceedings. Although there is no upper limit on the numbers in the group, there must be at least two people within the group. Each member must have a separate claim in the proceedings.
40. Subsection (3) provides that the representative party may or may not be a member of the group. In other words, the representative party may be a public interest body that does not directly have a claim in the proceedings. A person must, however, be authorised by the Court as the representative party and further provision may be made about this in rules made by act of sederunt under section 21(1) and (2)(a). Subsection 4 of Section 20 also details that there may only be one representative party.
41. Subsection (5) requires that group proceedings may only be brought with the permission of the Court. Subsection (6) provides that permission will only be given if the claims made in the proceedings are related to each other and all reasonable efforts have been made by the representative party to make potential group members aware of the proceedings (which will include making them aware of their right to opt-in or opt-out as appropriate). An act of sederunt under section 21(1) may make further provision about circumstances in which permission may be refused. It should also be noted that in the case of opt-out proceedings only, subsection (8)(b) requires the Court to designate a group description.
42. Subsection (9) confers authority on the representative party to represent each member in the group and make decisions in group proceedings on those members’ behalf. This

These notes relate to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp 10) which received Royal Assent on 5th June 2018

is subject to any limiting provision in the agreement between the group or in an act of sederunt under section 21(1).

43. Subsection (10) provides that group proceedings will not be jury actions by virtue of section 11 of the Court of Session Act 1988.

Section 21 – Group procedure: rules

44. **Section 21** gives the Court of Session the power to make provision by an act of sederunt about group procedure. By virtue of section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010, acts of sederunt are subject to “laid only” procedure in the Scottish Parliament.
45. Subsection (2) gives non-exhaustive examples of things about which provision may be made. This list includes:
- who can bring proceedings on behalf of the group;
 - what actions are to be taken by a representative party, for example, whether they must draw up a scheme of division for damages claimed or other documentation;
 - the types of claims that are excluded from group procedure;
 - rules about refusal of permission to bring group proceedings and appeal against a decision to grant or refuse permission;
 - rules about group proceedings not being subject to the exclusive competence limit in the sheriff court, as provided for in section 39 of the Courts Reform (Scotland) Act 2014. Under this section, a case of a value of £100,000 or less must be heard in the sheriff court unless permission is granted for the case to be heard in the Court of Session. As group proceedings are confined to the Court of Session, section 39 may need to be modified or disapplied in relation to them;
 - rules about adding claims to or removing claims from group proceedings after they have been commenced; and
 - what actions taken by the representative party will need the Court’s permission.
46. Subsection (3) ensures that any rules made under an act of sederunt will not contradict the requirements of section 20. Subsection (4) makes provision about ancillary matters which may be incorporated in the rules and allows the rules to modify enactments and to make different provision for different purposes. Subsection (5) clarifies that this section does not affect any other power the Court has to regulate its practice and procedure.

Section 22 – Group proceedings: further provision

47. **Section 22** confers powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to make further provision about group procedure. While the delegated power in section 21 provides for the modification of procedural law, the section 22 power allows for the modification of points of substantive law such as those mentioned in subsection (2)(b) and (c). Subsection (3) provides that the power extends to the modification of Acts.