



# DLA Piper Scotland Litigation & Regulatory Group

RESPONSE TO SCJC CALL FOR EVIDENCE ON GROUP PROCEDURE

29 January 2026



DLA Piper Scotland LLP is part of DLA Piper, a global law firm, operating through various separate and distinct legal entities. A list of offices and regulatory information can be found at [dlapiper.com](https://www.dlapiper.com)

# Contents

INTRODUCTION.....	1
Q1: What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act? .....	1
Q2: Are there areas of litigation which should be exempted from opt-out? .....	2
Q3: Should group procedure (opt-in or opt-out) apply to judicial reviews?.....	2
Q4: How should court procedures for opt-out differ from opt-in?.....	2
Q5: How should the certification process for opt-out operate? .....	3
Q6: What procedural steps are required to protect the rights of the group members in opt-out group proceedings?.....	3
Q7: Are there any particular measures that should apply to opt-out group procedure for the protection of defenders or respondents, in your view. (e.g. in relation to the ability of a group representative to meet adverse awards of expenses).....	3
Q8: Should pre-action protocols be a requirement in group proceedings in Scotland (opt-in or opt-out). If so, should these be voluntary or compulsory, and what should happen if they are not complied with? .....	4
Q9: If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award? .....	4
Q10: If the case is resolved by a settlement, what role should the court have in approving the settlement amount and its distribution? .....	4
Q11: Do you have any views on how unclaimed damages awards or settlement sums should be distributed?.....	5
Q12: What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)? .....	5
Q13: How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding arrangements, in your view? .....	6
Q14: What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?.....	6
Q15: Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings (opt-in or opt-out)?.....	6
Q16: Are there any aspects of substantive law which could be a barrier to group proceedings working effectively? .....	6
Q17: Are there any other points which you feel are relevant to: The procedures relating to the current opt-in regime; or may inform and shape a potential opt-out regime in Scotland .....	7
CONTACTS.....	8

## APPENDICES

APPENDIX 1 LETTER FROM DLA PIPER SCOTLAND TO SCOTTISH JUSTICE COUNCIL DATED 10 JULY 2015

# Introduction

DLA Piper is a global law firm with lawyers with over 90 offices across more than 40 countries, delivering integrated legal services to clients across all major sectors and jurisdictions. Our international footprint gives us direct insight into how collective redress mechanisms operate worldwide, including in mature opt-in and opt-out class action regimes in Europe, North America, Australia and Asia-Pacific. This experience allows us to assess proposed reforms in Scotland through an evidence-based and comparative lens, drawing on practical lessons from jurisdictions where collective procedures are more fully developed.

We are recognised as one of the few firms with a truly global class actions practice. Our dedicated class actions teams advise on the full lifecycle of multi-party litigation, from early risk assessment and case strategy to cross-border coordination, certification, trial, settlement, and administration of claims. We routinely act on behalf of major corporates, financial institutions, technology companies and public bodies facing complex group proceedings, including mass consumer claims, product liability actions, environmental and ESG-related litigation, securities class actions, data breach claims, and competition damages claims.

In Scotland, DLA Piper has been closely involved in the development and operation of the group procedure since its introduction in 2020. Our previous consultation response is appended. Our team has practical experience of high-value, complex disputes in Scotland as well as familiarity with collective procedures globally. This positions us to provide a balanced and informed view on how the Scottish regime can evolve in a principled, proportionate and evidence-driven manner.

Our response reflects this international perspective, combined with our experience of the early years of the Scottish group procedure. We support reforms that enhance access to justice while ensuring that any expansion of the regime, particularly through the introduction of opt-out proceedings, is grounded in robust evidence, appropriate safeguards, and structures capable of protecting all parties and the wider justice system.

## **Q1: What are your views on the introduction of opt-out group proceedings in accordance with Part 4 of the Act?**

The introduction of opt-out group proceedings would represent a significant change to Scottish civil procedure. In our view, such reform would be premature at this stage given the limited operational experience of group procedure since its introduction in 2020.

Only a small number of group proceedings have progressed beyond authorisation, and there is limited empirical evidence on outcomes, cost, court resource impact or settlement dynamics and on the behavioural effects of the current opt-in regime (for example, patterns in the raising of group proceedings, group-member recruitment activity and any settlement-pressure effects).

Practice also remains uneven, with the current opt-in rules and case-management tools not yet applied consistently across cases. This aligns with concerns we raised with the Scottish Civil Justice Council in our letter of 10 July 2025 (see Annex 1), namely the need for firmer application of the commonality threshold, rigorous testing of representative-party suitability and proper financial adequacy/funding safeguards under the current opt-in framework.

In the absence of that evidence, it is difficult to conclude that the current framework is failing to deliver access to justice to a degree that justifies structural change.

From a business perspective, opt-out group proceedings would materially alter the risk profile of civil litigation in Scotland by converting large numbers of potential claims into active proceedings without any positive step by individual group members. This significantly increases the scale and potential

value of proceedings at an early stage, often before liability, causation and individual loss have been determined. The result is an asymmetry of risk, particularly for consumer-facing and regulated businesses, as expense, case-management demands and reputational impact may escalate irrespective of the merits. Comparative experience suggests this can place substantial pressure on parties to resolve proceedings on a risk-management basis rather than by reference to legal entitlement.

Accordingly, we do not support the introduction of opt-out at this stage. The proportionate next step in our view is to refine, bed-in and evaluate the opt-in regime by reference to published data and the issues already raised with the Council, before any move to opt-out is contemplated. If, despite this, opt-out is pursued, it should be confined to a tightly scoped, time-limited pilot with enhanced safeguards and a formal review.

## **Q2: Are there areas of litigation which should be exempted from opt-out?**

We do not consider that opt-out proceedings, if introduced, should be restricted by blanket carve-outs: in many mature opt-out systems the regime is subject-matter neutral and courts apply a case-by-case suitability test (do common issues predominate; is the case manageable; is opt-in practical; and are funding, costs-protection and notice arrangements robust). However, moving to opt-out, or carving out categories, would not, of itself, cure the deficiencies in the current opt-in regime; any opt-out design should be developed in tandem with, and informed by, lessons from opt-in (permission/commonality, representative suitability and funding adequacy).

Applied to Scotland, the court should retain a subject-matter neutral framework and be expressly empowered to direct opt-in treatment where individual issues predominate, reserving opt-out only for cases where common issues genuinely predominate and the class can be managed fairly, proportionately and efficiently. By way of guidance, actions that typically require individual assessments of time-bar, causation and damage (including many personal injury/clinical negligence and professional negligence claims) will ordinarily be unsuitable for opt-out and should normally proceed on an opt-in basis. In all cases, including where opt-in is used to manage individualised issues, the court should apply a meaningful commonality threshold at permission to ensure genuinely common issues predominate and proceedings remain manageable.

## **Q3: Should group procedure (opt-in or opt-out) apply to judicial reviews?**

In our view group procedure should not apply to judicial review, whether opt-in or opt-out. Judicial review is a supervisory jurisdiction with tight time limits and bespoke remedies. Existing mechanisms (including test cases, interventions and protective expenses orders) already address systemic issues effectively. Extending group procedure risks distorting that constitutional role.

## **Q4: How should court procedures for opt-out differ from opt-in?**

Procedural controls should be more stringent in all group proceedings. For opt-out certain targeted enhancements are necessary because the judgment binds absent members. In particular:

- enhanced early judicial scrutiny of group definition and scope;
- robust notice and opt-out mechanisms;
- clear rules on group composition and cut-off dates;
- robust, transparent oversight of funding, expenses and any settlement across both regimes with additional opt-out scrutiny where appropriate (court-facing disclosure sufficient to test capital adequacy/ATE and any portfolio exposure); power to order staged/top-up security; duty to notify material changes; and

- mandatory court approval of settlements in opt-out, with express consideration of fairness and proportionality.

Comparative experience indicates that sustained judicial management is essential to avoid imbalance and unintended consequences.

### **Q5: How should the certification process for opt-out operate?**

Certification should operate as a meaningful filter, particularly given that opt-out proceedings bind absent parties by default. The same core filter should be applied and enforced in the opt-in regime; as set out in our letter of 10 July 2025, recent experience indicates the need for firmer application of the commonality test at permission, evidence-backed assessment of representative suitability, and court-facing scrutiny of funding/capital adequacy (including ATE),

For opt-out certification the court should be satisfied that:

- genuinely common issues arise;
- group proceedings are the most appropriate and proportionate vehicle;
- the group definition is clear and not artificially expansive;
- the representative party is suitable, adequately resourced and free from conflicts;
- funding arrangements are disclosed to the court on a confidential basis sufficient to test capital adequacy and ATE, are proportionate, and the court can order staged/top-up security for expenses where appropriate; and
- the proceedings can be managed fairly for all parties.

The certification threshold should be materially higher than for opt-in proceedings, reflecting the binding effect on absent members and the heightened system-risk associated with opt-out. The court should retain an explicit power to vary or revoke permission (including to direct opt-in treatment) if commonality, suitability or manageability falls away.

### **Q6: What procedural steps are required to protect the rights of the group members in opt-out group proceedings?**

We consider that key safeguards should include:

- clear and proportionate notice at certification, settlement and distribution stages;
- effective opt-out mechanisms with sufficient time to take advice;
- close judicial scrutiny of group definition; and
- ongoing court oversight to protect absent members' interests.

### **Q7: Are there any particular measures that should apply to opt-out group procedure for the protection of defenders or respondents, in your view. (e.g. in relation to the ability of a group representative to meet adverse awards of expenses)**

Yes. Additional safeguards should include:

- precise, objective group definition and an early cut-off date for inclusion set at certification;
- robust scrutiny of the representative party's suitability, independence and financial standing;
- confidential, court-facing disclosure of funding sufficient to test capital adequacy and ATE (including any relevant portfolio exposure), with calibrated disclosure to defenders where fairness requires; the power to order staged/top-up security for expenses where appropriate;
- a duty to notify the court and other parties of any material change to funding or ATE arrangements; and
- early and active judicial case management to prevent undue expansion of claims.

These measures align with our submission of 10 July 2025 and are consistent with recommendations in the Civil Justice Council's Review of Litigation Funding: Final Report (2 June 2025)

**Q8: Should pre-action protocols be a requirement in group proceedings in Scotland (opt-in or opt-out). If so, should these be voluntary or compulsory, and what should happen if they are not complied with?**

No. A class-specific pre-action protocol should not be required for group proceedings (whether opt-in or opt-out). While early engagement can assist defenders to understand the case and, where appropriate, explore resolution, those aims are better met by clear general pre-action expectations and robust early case management, rather than a bespoke protocol that risks front-loading expense and prompting satellite disputes, especially where putative classes may be large and often unidentified before authorisation or permission.

That said, we recognise recurring pre-action issues: ill-defined groups, weak management of the group register and thin specification of claim. In our view, these are better addressed at the permission stage, not by a class-specific pre-action protocol. We consider these materials to be integral to the permission threshold; where they are materially deficient, the court should ordinarily defer or refuse permission (with appropriate awards of expenses) rather than treat them as procedural submissions without substantive consequences.

For the avoidance of doubt, this approach to permission is distinct from any general pre-action expectations. Any pre-issue framework, if introduced, should be regime-neutral and light-touch, encouraging proportionate early engagement while allowing explicit carve-outs for urgency and proportionality. If any element of pre-action engagement is mandated, non-compliance should give rise to tailored case-management measures or expenses consequences, rather than dismissal of proceedings or refusal of permission to proceed.

**Q9: If the case is resolved by a decision of the court, what role should the court have in approving the distribution of the award?**

The court should approve any distribution scheme following judgment, including scrutiny of allocation methodology, deductions for expenses, funding/ATE and administration, and fairness across claimant categories. In opt-out cases, the court should approve a distribution scheme, appoint an administrator if appropriate, and determine the treatment of unclaimed sums. This approach aligns with the practice in more established class action regimes

**Q10: If the case is resolved by a settlement, what role should the court have in approving the settlement amount and its distribution?**

In opt-out proceedings court approval should be mandatory. Approval should include scrutiny of the settlement amount against litigation risks, the scope of releases, the proposed distribution plan,

funding and fee arrangements (including any proposed payments to funders or lawyers ahead of distributions), and notice and objection procedures for absent members. In opt-in proceedings, approval need not be mandatory, but the court should retain a discretion to require approval or make appropriate orders to safeguard group members' interests. Where appropriate, approval should also address any group-member registration steps and closure of the group register to support finality (with any limited exceptions the court allows, particularly in any opt-out pilot). It should also cover how any unclaimed sums will be handled, applying the same principles as in Q11. This aligns with established opt-out models internationally.

### **Q11: Do you have any views on how unclaimed damages awards or settlement sums should be distributed?**

Any unclaimed balance should be dealt with under a scheme approved by the court, guided by fairness, proportionality and avoiding windfalls.

Where the settlement figure was calculated per person or by categories of loss, and those who come forward are already paid in line with the approved schedule, any material remaining balance should ordinarily revert to the defenders.

Where the settlement is a "common fund" not closely tied to actual take-up, the court may instead approve:

- a short second distribution (if cost-effective) and
- if money remains, payment to an appropriate charity or public-interest body connected to the class or issues.

In every case, the court should approve the approach to any residue, with straightforward reporting to the court on take-up, administration and expenses. No part of any residue should go to funders or solicitors, beyond any fees and expenses already approved by the court. In applying these options, the court should have regard to any de minimis threshold (see Q17).

### **Q12: What do you regard as being the main issues for the funding of group proceedings in Scotland (whether opt-in or opt-out)?**

Key issues include transparency of funding terms, control of conflicts, proportionality of funder returns, and clarity on adverse expenses. These risks are heightened in opt-out proceedings, where most group members have limited awareness or influence.

Recent UK experience underscores the need to ensure the representative party has genuinely informed consent to the funding agreement, including a clear understanding of economic consequences and funder returns. The court should be satisfied at permission that the representative has received plain-language explanations, had a reasonable opportunity to take independent advice, and has confirmed informed, written consent.

Given current funder concentration in Scotland, the court should also have explicit controls to manage counterparty risk including:

- confidential disclosure to the court of key funding terms and the funder's relevant portfolio exposure;
- evidence of capital adequacy and adverse-expenses cover;
- power to order staged/top-up security for expenses; and

- a duty on the representative to notify the court and other parties of any material change to funding or ATE arrangements.

**Q13: How do you think that opt-out group proceedings should be funded and what protection measures should be put in place for group members regarding those funding arrangements, in your view?**

Funding should be subject to close court oversight. Protections should include confidential disclosure of funding terms to the court, proof of adverse expenses cover and capital adequacy, court powers to regulate disproportionate returns, clear explanation of funding implications to group members with confirmation of informed consent by the representative party, and court approval of any payments to funders or lawyers ahead of distributions. We do not support fixed caps or mandatory pricing structures set up-front; instead, the court should retain flexible supervision throughout, with the ability to revisit and, if necessary, adjust funder returns at approval or distribution where terms prove unfair or disproportionate considering case complexity, risk and outcomes. This approach reflects comparative practice (including Australia and Canada), facilitates complex claims without creating windfalls or undue settlement pressure, and is a justifiable, narrow evolution from Scotland's current opt-in position.

**Q14: What are your views on disclosure of funding arrangements and confidentiality around funding documents which are lodged with the court (whether opt-out or opt-in)?**

Funding arrangements should be disclosed to the court on a confidential basis. Disclosure should focus on economics, conflicts and costs protection (capital adequacy/ATE/security) and be accompanied by a brief certification that the funder has no control rights over the conduct of the litigation.

Defenders should receive a certificate of sufficiency (including capital adequacy) and confidential, redacted proof of adverse-expenses cover (e.g., ATE schedule, bank guarantee), with the court free to require fuller disclosure if fairness demands. This mirrors Canadian practice (confidential court review/approval; limited disclosure to defenders) and maintains proportionality and predictability.

**Q15: Do you have any views on whether there should be changes to the Taxation of Judicial Expenses Rules 2019 for group proceedings (opt-in or opt-out)?**

The existing Rules provide a sound framework and should not be fundamentally altered. Limited clarification may assist, including treatment of common costs incurred for the benefit of the group, funding and administration expenses, and avoidance of double recovery where proceedings overlap across UK fora. Any changes should be incremental and proportionate.

**Q16: Are there any aspects of substantive law which could be a barrier to group proceedings working effectively?**

Scots substantive law presents no inherent barriers, but many causes of action involve individualised issues of causation, reliance and loss, and fact-sensitive assessments. These are not defects but core principles of individual justice, and procedural reform should not override them. Clear guidance should confirm that group procedure is procedural, not substantive: it is not a vehicle to recast settled doctrines (for example, on causation, reliance, limitation or joint-and-several liability), and case-management considerations should not drive substantive innovation. A short Practice Note to that effect would promote consistency and predictability at the permission stages. Accordingly, where liability or quantum turns on such individualised assessments, opt-out will rarely be suitable and the court should ordinarily direct opt-in treatment.

**Q17: Are there any other points which you feel are relevant to: The procedures relating to the current opt-in regime; or may inform and shape a potential opt-out regime in Scotland**

Further development of the existing opt-in regime, supported by published data and judicial guidance, would provide a stronger evidential basis for future reform. On the current evidence, opt-out would be premature. If, despite this, an opt-out pilot is pursued, it should be tightly scoped and time-limited, with enhanced safeguards, clear evaluation metrics (outcomes, court resources, behavioural effects, administrative cost, settlement dynamics) and a formal post-pilot review before any wider roll-out.

To prevent token micro-payments and excess administration, the pilot should set a de minimis threshold and require a court-approved plan for any residue, applying proportionality and avoiding undue settlement pressure.

# Contacts

---

**Naomi Pryde**

Partner, Litigation & Regulatory Group, DLA  
Piper Scotland LLP  
T: +44 131 345 5114  
naomi.pryde@dlapiper.com

---

Naomi focuses on complex commercial litigation and arbitration. She represents clients across a broad range of sectors and markets, including Space, Industrials, Consumer Goods, Food and Retail, Real Estate, Infrastructure, Construction and Transport, Media, Sport and Entertainment, and Energy and Natural Resources.

The majority of Naomi's matters have an international element. She is a qualified solicitor in all four UK and Ireland jurisdictions and a Solicitor Advocate in both Scotland and England and Wales, making her "an attractive choice for cross-border mandates."

Naomi is recognised in legal directories for both commercial and real estate litigation. She has won numerous awards and has featured in several UK-wide business talent lists alongside eminent household names. She was recognised as Scotland's "Lawyer of the Year" in 2021 and has featured in Law.com's list of "the UK's top female lawyers under 40."

Naomi heads the firm's Litigation and Regulatory practice in Scotland and is DLA Piper's Global Co-Chair of Space Exploration and Innovation.

**Gavin Deeprise**

Senior Professional Support Lawyer,  
Litigation & Regulatory Group, DLA Piper  
Scotland LLP  
T: +44 131 242 5090  
gavin.deeprise@dlapiper.com

---

Gavin provides professional support to our Litigation & Regulatory practice across a diverse range of subject areas including commercial, property and regulatory disputes. He trains lawyers and clients on legal developments, creates and maintains litigation and other proformas for use and regularly authors subject matter articles for publication on the firm's website, newspapers, journals and online platforms. Gavin also works on global projects to enhance the quality of client service.

Gavin has a keen interest in pro bono work, and is the Pro Bono representative for DLA Piper's Scotland office.

# Appendix 1 Letter from DLA Piper Scotland to Scottish Justice Council dated 10 July 2015



DLA Piper Scotland LLP  
Collins House  
Rutland Square  
Edinburgh  
EH1 2AA  
DX: ED271 Edinburgh 1  
T: +44 (0) 20 7349 0296  
F: +44 (0) 131 242 5555  
dlapiper.com

FAO Graeme Welsh  
Scottish Civil Justice Council  
Parliament House  
Edinburgh  
EH1 1RQ

**Your reference**  
COS-GP8&9-24

**Our reference**

SM/PF/PT/420814/6-GB9  
UKM/206047608.1

10 July 2015

## SCJC Review Court Rules Relating to Group Procedure

### 1 Introduction

- 1.1 We refer to your letter dated 21 May 2015. We are instructed for the First, Second, Third and Fourth Defenders in COS-GP8-24 and COS-GP9-24. We have also been closely monitoring the progress of the other sets of Group Proceedings which are currently underway in the Court of Session. In addition to the aforementioned Group Proceedings, we are also instructed in a number of threatened future Group Proceedings, in relation to motor finance and medical product liability.
- 1.2 We are grateful to the SCJC for affording DLA Piper Scotland LLP ('**DLA Piper**') the opportunity to comment on the practical operation of the Scottish Group Proceeding Rules ('**Rules**').

### 2 Questions 1 and 2

**Are there parts of the rules that do not work well in practice and could be redrafted to make procedural improvements? If so, can you provide specifics on this, and detail what your suggested changes are please?**

**Are the rules missing or lacking detail in any area of procedure? If so, could you provide specifics on this and detail what your suggested changes are please?**

#### Commonality of the Claims

- 2.1 The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 prescribes, at Part 4, Section 10(6)(a), that the Court may give permission (for group proceedings to be brought) *"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."*

---

DLA Piper Scotland LLP is regulated by the Law Society of Scotland.

DLA Piper Scotland LLP is a limited liability partnership registered in Scotland (number SO300365) which is part of DLA Piper, a global law firm, operating through various separate and distinct legal entities.

A list of members is open for inspection at its registered office and principal place of business, Collins House, Rutland Square, Edinburgh EH1 2AA and at the address at the top of this letter. Partner denotes member of a limited liability partnership.

A list of offices and regulatory information can be found at [dlapiper.com](http://dlapiper.com).

**UK switchboard**  
+44 (0) 20 7349 0296

2.2 The Rules offer no equivalent support for this provision of the Enabling Act. We propose that this presents a risk, necessitating rectification through enhanced clarity in the Rules regarding which cases fail to meet the commonality test. The existing framework, along with the abstract interpretation of the Rules concerning commonality observed thus far, is likely to invite opportunistic litigations into the Scottish Courts. This may deter corporations from selecting Scotland as a business location, particularly where unmeritorious and disconnected Group Proceedings are allowed to proceed in our highest court.

#### **Suitability of the Representative Party**

2.3 We would firstly draw the SCJC's attention to Rule 26A.7(1), which prescribes that:

*"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".*

2.4 Rule 26A.7 fails to define what constitutes a "suitable person", leaving the test open to inconsistent interpretation. Whilst Rule 26A.7(2) provides a list of criteria which should be considered by the Lord Ordinary when deciding whether or not an applicant is a suitable person, in practice, the criteria appear to operate merely as guidance, rather than a firm test which requires to be met.

2.5 To what extent those "considerations" can be undertaken, where no vouching as to suitability is provided to the Court (which has been the approach of applicants in Scotland, to date), remains to be seen. The test is subject to the "satisfaction" of the Lord Ordinary. This discretionary approach gives rise to an immense inequity between the parties at the permission stage, for the reasons more fully particularised below.

2.6 While the onus is said to be placed on the applicant to demonstrate suitability (as is clear from the construction of the Rule), in practice, the Court has often proceeded without any substantive evidence being led on this point. In some, if not all sets of Scottish Group Proceedings, the Lord Ordinary has authorised for applicants to become representative parties in the absence of any positive demonstration of suitability.

2.7 Recent judicial commentary suggests a shift from a positive test of suitability to a negative one - namely, that an applicant is deemed suitable unless shown to be unsuitable (*Joseph MacKay v Nissan* [2025] CSIH 14 and *Steven Blair Milligan v Jaguar Land Rover* [2025] CSIH 16). Furthermore, neither suitability nor demonstrable unsuitability have been sufficiently stress-tested in practice, therefore despite the Court engaging at a high-level with the test, as envisaged by the Rule, it has not been enforced. This is problematic.

2.8 In *Joseph Mackay v Nissan Motor Co Ltd and others* [2024] CSOH 68, The Lord Ordinary observed "a possible concern as matters stand is that he [the representative party] might simply accept the advice given to him somewhat uncritically and possibly become a mere cipher for the solicitors in question" [48]. This underscores the need for the applicant to meet the suitability test, other than by virtue of appointing a solicitor. However, in practice, the appointment of a solicitor and independent Counsel has generally allowed the applicant to be certified as having met the suitability test. The initial appointment of Ms Rutherford in the JLR Group Proceedings, who was later revealed to be an undischarged bankrupt and an employee of a proposed defender, illustrates the risks of this lax approach.

2.9 Both the Court and agents for the respective applicants have also suggested that, in the event that a representative party is later shown to be unsuitable, they can be replaced. This is an

entirely suboptimal approach, given that defenders require to expend significant funds even at the permission stages, in answering the applications. To not expend sufficient effort, in determining whether the applicant is suitable, in the first instance, demonstrates an apathy towards the Rules and the counterparties to the dispute.

- 2.10 In practice, additional scrutiny should be exercised as to whether a proposed representative party meets the suitability criteria. We have also observed the Court's interest in the matter of who is controlling a Group Proceeding. We refer to paragraph 54 of the aforementioned JLR judgment, at which Lord Clark referenced the case of *Smyth v British Airways plc and others* [2024] EWHC 2173 (KB) and observed that "there were again negative factors brought to the court's attention, such as that someone other than the applicant would be the person who was really running the litigation [36]." In the recent Volvo Permission Hearing, Lord Sandison also called upon the Claimants' agents to confirm the extent to which the funder was able to exercise control over the direction of the litigation.
- 2.11 In order to give effect to the intention of the Rules, the following points should be considered by the agents for any prospective representative party, and vouching in respect of the same provided to the agents for the defenders, in the course of the permission stage of proceedings. Such guidance, as proposed to counter these concerns, may be embodied within the Rules or Practice Direction:-
- (a) What process was followed / implemented to choose the Applicant?
  - (b) Were the proposed Applicants assessed against a set of pre-determined criteria? If so, what criteria were they assessed against?
  - (c) How many people put themselves forward to apply to be the Representative Party?
  - (d) How was the chosen Applicant selected as the most suitable option of those who put themselves forward? What criteria was applied?
  - (e) What information was provided to the Applicant in order to determine whether they would be suitable to fulfil the role of Representative Party?
  - (f) How has the Applicant demonstrated suitability to fulfil the role of Representative Party?
  - (g) Has the Applicant produced a CV and/or an affidavit covering why they have accepted the role? Was there any particular reasoning behind that decision? What is the Applicant's motivation?
  - (h) Are there any contractual obligations or restrictions on the Applicant's actions or decision making?
  - (i) Is the Applicant obliged to accept / follow the legal advice they receive?
  - (j) How would any award be distributed? Does the Applicant understand their role in that?
  - (k) Is the Applicant aware of the issues that might arise if there are disagreements between the members of the group?

- (l) Does the Applicant understand their options in the event that they disagree with the advice given by the Applicant's instructed law firm? How will the Applicant deal with any conflicts of interest should they arise, between the Group Members and their solicitors?
  - (m) What would the position be if the Applicant wished to seek external advice or change solicitors or counsel?
  - (n) What agreements are in place between the Applicant and solicitors, third party litigation funders, insurers?
  - (o) Who has the power to give instructions in the litigation?
  - (p) How will disputes between the Applicant and the other members of the Group as to conduct of the litigation take place?
  - (q) Can the Applicant give instructions in relation to whether a settlement offer can be accepted in relation to other proposed group members?
  - (r) Does the funder have any right or power to direct, control or provide instructions on any matter connected with the conduct of the litigation?
  - (s) Is the instructed agent or the funder entitled to or in fact do attend or contribute to consultations with the Applicant?
  - (t) Does the funder have the right to any involvement in decisions on whether to accept settlement proposals.
  - (u) In what circumstances may the funder withdraw funding?
  - (v) Is there a minimum amount that must be recovered before the group members would receive any damages?
- 2.12 In terms of remedying these issues, we consider that the onus on the applicant to demonstrate suitability should be affirmed by the Rules, and that the wording (and enforcement) of Rule 26A.7(2) should reflect the intention set down by its preceding subsection.
- 2.13 We propose that Rule 26A.7(1) be amended to include a non-exhaustive list of factors that the Court **must** consider when assessing suitability, including:
- (a) The applicant's independence from the legal team and funders and the degree of control the funder may exercise over the litigation;
  - (b) Financial standing and absence of conflicts of interest;
  - (c) Capacity to understand and engage with the proceedings;
  - (d) Willingness and ability to act in the interests of the group as a whole.
- 2.14 Such a redraft would align the rule with the principles of transparency and procedural fairness, and ensure that the role of representative party is not reduced to a mere formality.
- Financial Adequacy**
- 2.15 We would also highlight the following concerns in relation to the implementation of Rule 26A.7(2)(f) in practice. This rule prescribes that the Lord Ordinary should, when deciding whether an applicant is a suitable person, consider:

*"the demonstration of sufficient competence by the applicant to litigate the claim properly, **including financial resources to meet any expenses awards** (the details of funding arrangements do not require to be disclosed)"*

- 2.16 Although the specific details of funding arrangements do not need to be disclosed, the rule places a positive obligation on the applicant to demonstrate sufficient financial resources to meet any expenses awards. This section of the suitability test has not been properly enforced in practice. To date, the only evidence produced to the court in this regard is an indemnity by Quantum Claims, the funder backing all sets of Scottish Group Proceedings. This indemnity is undermined by a complete absence of sufficient financial reserves, as demonstrated by Quantum Claims' unaudited financial accounts.
- 2.17 While the Inner House has affirmed Group Proceedings as a tool to facilitate access to justice, this objective is not served by the entirety of the Scottish Group Proceedings landscape being "funded" by a single funder. Quantum Claims has made no disclosure of its capital and insurance position, preventing the Court from properly interrogating the same. The potential for harm to the Scottish civil justice system is extraordinary, with Quantum Claims currently being a single point of failure for the entire concept of Group Proceedings in Scotland. The lack of financial and insurance disclosure only exacerbates these concerns.
- 2.18 In many of the Scottish Group Proceedings currently progressing through the courts, an extensive document recovery exercise has been required or ordered. It is not in the interest of parties to incur exorbitant costs that cannot be met by the applicant's funders.
- 2.19 The adverse expenses implications for Quantum Claims in relation to NOx group proceedings in Scotland clearly run to at least several tens of millions of pounds. Mr. Ellis KC for Vauxhall recently submitted to the court that preliminary disclosure alone would cost €1 million for just one manufacturer. Accordingly, if the court finds against the various pursuers in relation to the NOx group proceedings, and Quantum Claims cannot make good the adverse expenses, it will be insolvent and will leave enormous unfulfilled expenses awards. This event could irreparably harm the Group Proceedings mechanism and access to justice in Scotland.
- 2.20 Therefore, we recommend that the wording of Rule 26A.7(1)(f) is revisited, to ensure stricter enforcement of the requirement for applicants to demonstrate their capital adequacy. We refer to and rely upon the findings of the Civil Justice Council's Review of Litigation Funding (**'CJC Report'**), more specifically, the following Recommendations as set out therein:-
- (a) the development of regulations to make provision for funding to be subject to ongoing case-specific capital adequacy requirements. ATE insurance with robust anti-avoidance endorsements should be in place where the funding is provided for a non-commercial party or for collective or group proceedings (Recommendation 10);
  - (b) costs budgeting and costs management should be mandatory for all funded collective proceedings, representative actions and group actions (Recommendation 38); and
  - (c) The CPR should be amended to provide for security for costs to be required of litigation funders where, through no fault of the funded party, the funder fails to comply with the requirements specified in Recommendation 10 (Recommendation 44).
- 2.21 In respect of demonstrating capital adequacy, the CJC Report concludes that heightened scrutiny should apply to a funders' ability to fund a proposed litigation. The CJC Report prescribes that the surrounding regulations and rules should ensure that the provision of funding is subject to

ongoing case-specific capital adequacy requirements, and that without demonstrable capital adequacy, at the inception of a claim (and throughout), the related Legal Funding Agreement should be, or become, unenforceable.

- 2.22 The CJC Report suggests that the litigation funder and the funded party's legal representative must, jointly, certify to the court and any other party to the funded litigation that the funder has and maintains sufficient capital adequacy. The funding agreement must make provision for the steps which a funder should take, including notice to the court and other parties, if it reasonably believes that it will be unable to satisfy the capital adequacy requirements.
- 2.23 We would suggest that similar recommendations are adopted in Scotland.

### **Insurance**

- 2.24 In addition to ongoing review of a funder's capital adequacy position, the CJC Report advances numerous recommendations in relation to securing appropriate insurances – with specific recommendations arising in respect of group litigations.
- 2.25 The CJC Report advocates for funders to ensure that After the Event ('ATE') insurance, with robust anti-avoidance endorsements, are in place where funding is provided for a non-commercial party or for collective or group proceedings. Further, the CJC Report proposes that the litigation funder and the funded party's legal representative must certify to the court and other parties that such insurance is in place.
- 2.26 The CJC Report goes as far as to suggest that breach of the aforementioned certification requirements, by the party's legal representative, should render them subject to disciplinary proceedings by their regulatory body. From the funder's perspective, failure to comply with either the capital adequacy requirements or ATE insurance requirement should result in the funder being required to give security for costs. In the event that provision of security for costs is not possible, the LFA should be unenforceable as against the funded party and should render the funder liable for the funded party's costs and for adverse costs.
- 2.27 Certification of capital adequacy and appropriate ATE insurance is required to provide adequate protection for other parties to proceedings. The CJC Report suggests that such certification obviates the need for security for costs and the need for any disclosure of the terms of an LFA to other parties to proceedings.
- 2.28 As noted above, the CJC Report suggests that further regulatory requirements should apply where the funded party is a party to collective proceedings, a representative action or group action or is a consumer.
- (a) The litigation funder and funded party's legal representative should certify to the court, as part of the without-notice approval process, that they did not approach the funded party, either directly or indirectly, in respect of the claim. In other words, they must certify that the party sought funding and representation for their claim rather than the funder or legal representative seeking a party for litigation that they themselves sought to pursue; and
  - (b) The funded party should disclose the proposed funding agreement to the Court to enable the Court to decide whether to approve the agreement.

2.29 In terms of security for costs, the CJC Report suggests that the rules of Court should be amended to provide for security for costs to be required of litigation funders where, through no fault of the funded party, the funder fails to comply with the aforementioned capital adequacy and insurance requirements. In such circumstances, court rules should also provide that the funder should be liable for paying the costs of providing security.

2.30 We would suggest that similar recommendations are adopted in Scotland.

### 3 Questions 3 and 4

#### In your experience, are there any aspects of the rules that work well, and should not be changed?

3.1 DLA Piper appreciates the justice-driven policy of the Rules and observes that they have assisted in streamlining the Group Proceedings process in Scotland. Group Proceedings are now more efficiently managed, save as for the reservations, in relation to application of the Rules, as noted within this letter.

#### Do you have any views on the Practice Note (No. 2 of 2020) and would find it useful to have any additional or alternative information provided?

3.2 Paragraph 16 of the Practice Note states, in relation to the Application to be a Representative Party, that *"the averments in the application should address these matters in detail. It will not be enough merely to repeat the wording of rule 26A.7(2) in the application. Full supporting documentation must be lodged."* As highlighted above, this is not enforced in practice. To what extent "full supporting documentation" will be considered to have been lodged (and the test therefore met in evidence) should be clarified, so as to ensure consistency across the board.

3.3 The Practice Note would benefit from a section focussed on document recovery in group proceedings. The document-recovery process following the decision in *Batchelor against Vauxhall / Opel* [2025] CSOH 18 should be embodied and expanded on within the Practice Note, in order to make clear how the court's general powers to grant commission and diligence for the recovery of documents rest alongside the operation of Rule 26A.21(2)(b)(v).

### 4 Next Steps

4.1 In the event that it would be of assistance to discuss the issues raised in this letter in more depth, please do not hesitate to contact the DLA Piper Group Proceedings Team: Stuart Murdoch ([stuart.murdoch@dlapiper.com](mailto:stuart.murdoch@dlapiper.com)), Paddy Fulton ([patrick.fulton@dlapiper.com](mailto:patrick.fulton@dlapiper.com)) and Patricia Taylor ([patricia.taylor@dlapiper.com](mailto:patricia.taylor@dlapiper.com)).

Yours sincerely

DLA PIPER SCOTLAND LLP.

DLA Piper Scotland LLP

