



Practice Note No 9 of 2010

Conduct of Group Proceedings

1. Introduction

- 1.1 This Practice Note commences on 1 January 2011. It applies to new and, so far as the circumstances permit, existing group proceedings. The Practice Note supplements Part 4A of the *Supreme Court Act 1986*, Order 18A of the *Supreme Court (General Civil Procedure) Rules 2005* and Practice Note No. 8 of 2010 ‘Management of Group Proceedings’. Words and expressions in this Practice Note that are defined in Part 4A have the meanings given to them in that Part.
- 1.2 The aim of this Practice Note is to clarify arrangements for the management of group proceedings. Group proceedings in the Commercial Court will be managed by the list judge to whom the proceeding is allocated and may follow this Practice Note as considered appropriate. A practitioner who anticipates problems in complying with this Practice Note is expected to raise the matter with the Court as early as is practicable.

2. Commencement

- 2.1 A group proceeding is to be commenced by writ in accordance with s 33H of the *Supreme Court Act 1986*. The endorsement on the writ must, in accordance with s 33H of the Act, (a) describe or otherwise identify the group members to whom the proceeding relates, (b) specify the nature of the claims made on behalf of the group members and the relief claimed, and (c) specify the common questions of law or fact to the claims of the group members.
- 2.2 The statement of claim should be drawn so that the Plaintiff’s personal claim can be used as the vehicle for determining the common questions in the action. Ordinarily the trial of the action will resolve all common questions together with any non-common questions raised by the Plaintiff’s personal claim (e.g. the Plaintiff’s individual claim for damages).

3. Case Management

- 3.1 An initial case management conference will be fixed by the judge to whom the proceeding is assigned (“the allocated Judge”) for a date within six weeks from the date on which the writ is filed.
- 3.2 The initial case management conference will take place before the allocated Judge.
- 3.3 The case management conference will, insofar as it is appropriate, be conducted along relatively informal lines. The emphasis will usually be on an “exchange” rather than having only counsel speaking and then only in a fixed sequence.

The solicitor with primary responsibility for the proceeding within the Plaintiff's and Defendant's law firms must attend.

- 3.4 At the initial case management conference the parties will be asked to outline the issues and facts that appear to be in dispute. Usually, the parties will also be asked to indicate whether the matter should be referred for alternative dispute resolution and, if so, a timetable within which the alternative dispute resolution might proceed.
- 3.5 In addition, the parties should be in a position to address the following:
- (a) any issues regarding the description of group members (see ss 33C(1) and 33H(2));
 - (b) any pleading issues;
 - (c) the timing and form of the opt out notice;
 - (d) discovery, including the utility of orders for the provision of affidavits by any party as to where relevant documents are stored, what types of documents exist (from high level down to particular), in what form they are held, and as to the costs of making discovery of particular categories of documents;
 - (e) evidence, including the utility of requiring that affidavits of lay or expert witnesses be filed at an early stage of the proceeding to enable a better understanding of the issues in dispute and the proper identification of individual and common questions;
 - (f) the joinder of additional parties;
 - (g) to the extent possible, the appropriateness of a split trial and the issues to be determined at a split trial;
 - (h) whether the Defendant proposes to seek an order for security for costs;
 - (i) the timetabling of any applications for resolving interlocutory matters;
 - (j) methods of communicating with unrepresented group members; and
 - (k) any need to relist or continue the case management conference on either the following day or at some other suitable time.
- 3.6 At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.
- 3.7 During the progress of the proceeding the Court will direct as necessary that there be further case management conferences.

4. Conferring by Lawyers

Before making any application relating to an interlocutory dispute the parties' representatives must confer and attempt in good faith to resolve the dispute.

5. Applications

- 5.1 The Court will fix dates as early as are practicable for the filing, service and return of any application which may include but is not limited to an application:

- challenging the commencement of the proceeding as a group proceeding (see ss 33C(1) and 33H);
 - seeking an order under s 33M or s 33N, or otherwise modifying or removing the group character of the action;
 - seeking summary dismissal under O 23 of the *Supreme Court Rules*;
 - seeking a striking out under O 23 of the *Supreme Court Rules*;
 - seeking an order that the Plaintiff provide security for costs;
 - seeking an order in relation to communication with group members by the parties;
 - seeking an order under s 33ZF;
 - seeking an order under s 48 or s 49 of the *Civil Procedure Act 2010*;
 - seeking an order for discovery; or
 - seeking an order in relation to the mode of trial and/or place of trial.
- 5.2 In respect of any such application, it will be necessary for a party to issue a summons. Return dates for summonses may be obtained from the Associate to the allocated Judge.
- 5.3 The Applicant must file any supporting material to the application, including affidavits, exhibits and outlines of argument, with the Court no later than 5.00pm seven clear business days before the return date.
- 5.4 The Respondent must file any response material, including affidavits, exhibits and outlines of argument, with the Court no later than 5.00pm three clear business days before the return date.
- 5.5 The Court will endeavour to give judgment on any application within 4 weeks of the hearing.
- 5.6 The allocated Judge may refer an application or class of applications in the proceeding to an Associate Judge.

6. Communications with Group Members

- 6.1 In an appropriate case the Court may make an order that the plaintiff's solicitors should inform the other parties whether group members are its clients. The Court may make orders concerning communications with group members who are not clients of the Plaintiff's solicitors.
- 6.2 In an appropriate case the Court may make orders establishing a protocol for communications between parties and such group members.

7. Opting Out

- 7.1 Group members may opt out of a group proceeding by giving a written opt out notice to the Court by a date which must be fixed for that purpose by the Court: see s 33J. The form of the opt out notice to be given by a group member is prescribed by the *Supreme Court Rules*: see O18A.04 and Form 18AB.
- 7.2 The Court must approve the form, content and manner of distribution of the notice to be given to group members informing them of the commencement of the group proceeding, and of their right to opt out of the proceeding by the date that the Court has fixed: see ss 33X(1)(a), 33X(2) and 33Y.

- 7.3 The usual practice is to send such notices to group members shortly after the close of pleadings. The Court will encourage the parties to discuss the appropriate form of the notice at the earliest opportunity.

8. Preliminary Questions and Summary Judgment

To narrow the scope of the dispute, at the earliest practicable date the Court may consider the utility of either:

- (a) determining any common question in the proceeding as a preliminary question; or
- (b) giving summary judgment on any common question in the proceeding .

9. Trial of Common Questions

- 9.1 In an appropriate case (and appropriateness will be determined by practical as well as legal considerations) the trial may be split so that common issues together with non-common issues concerning liability may be determined first.
- 9.2 In framing the issues to go to trial the parties' lawyers should consider whether there are issues common to subgroups which also might efficiently be addressed at the initial trial. Unless the Court makes orders under s 33Q or s 33R, group members whose claims are presented at a split trial will retain their status as group members for the purposes of s 33ZD.
- 9.3 Following a trial on issues of liability it will be necessary to decide whether the individual claims of group members will be determined within the existing proceeding (e.g. under s 33Q or s 33R) or determined in separate proceedings (s 33S).

10. Settlement

- 10.1 A group proceeding may not be settled or discontinued without the approval of the Court: s 33V(1). If the Court gives its approval to a settlement, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court: s 33V(2).
- 10.2 Unless the Court is satisfied that it is just to do so, it will not determine an application for approval of a settlement unless a notice, approved by the Court, has been given to the group members: see ss 33X(4), 33Y.

11. Court Approval of Settlement

- 11.1 When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:
- (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and
 - (b) the proposed settlement has been undertaken in the interests of group members, as well as those of the Plaintiff, and not just in the interests of the Plaintiff and the Defendant/s.
- 11.2 When applying for Court approval of a settlement the parties will usually be required to address at least the following factors:
- (a) the complexity and likely duration of the litigation;

- (b) the reaction of the group to the settlement;
- (c) the stage of the proceedings;
- (d) the risks of establishing liability;
- (e) the risks of establishing loss or damage;
- (f) the risks of maintaining a group proceeding;
- (g) the ability of the Defendant to withstand a greater judgment;
- (h) the range of reasonableness of the settlement in light of the best recovery;
- (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
- (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

11.3 A request for the Court's approval of a proposed settlement must be made by application. The orders which are commonly made on such an application include orders:

- (a) for the confidentiality of evidence;
- (b) for notice to group members of the proposed settlement;
- (c) approving any scheme for distribution of any settlement payment; and
- (d) disposing of the proceeding (e.g. by dismissing the application).

11.4 To the extent relevant, the affidavit or affidavits in support should address:

- (a) how the settlement complies with the criteria for approving a settlement;
- (b) why the proceedings have been settled on particular terms;
- (c) the effect of those terms on group members (i.e. the quantum of damages they are to receive in exchange for ceasing to pursue their claims and whether group members are treated the same or differently and why);
- (d) the means of distributing settlement funds;
- (e) the terms of fee and retainer agreements including the reasonableness of legal costs;
- (f) a response to any arguments against approval of settlement raised by group members;
- (g) any issues that the Court directs be addressed; and
- (h) a hearing of the application for settlement approval, including consideration of any group members' objections to the settlement and an order dealing with costs.

11.5 When it is appropriate that notice of the proposed settlement be given to group members, the notice should usually include the following:

- (a) a statement that the group members have legal rights that may be affected by the proposed settlement;
- (b) a statement that an individual group member may be affected by a decision whether or not to remain as a group member (where the opt-out date has not already passed or where there is a further opportunity to opt out);
- (c) a brief description of the factual circumstances giving rise to the litigation;
- (d) a description of the legal basis of the claims made in the proceedings and the nature of relief sought;

- (e) a description of the group on whose behalf the proceedings were commenced;
- (f) information on how a copy of the statement of claim and other legal documents may be obtained;
- (g) a summary of the terms of the proposed settlement;
- (h) information on how to obtain a copy of the settlement agreement;
- (i) an explanation of who will benefit from the settlement;
- (j) where all group members are not eligible for settlement benefits – an explanation of who will not be eligible and the reasons for such ineligibility;
- (k) an explanation of the Court settlement approval process;
- (l) details of when and where the Court hearing will be and a statement that the group member may attend the Court hearing;
- (m) an outline of how objections or expressions of support may be communicated, either in writing or by appearing in person or through a legal representative at the hearing;
- (n) an outline of any steps required to be taken by persons who wish to participate in the settlement (in the event that affirmative steps are required);
- (o) an outline of the steps required to be taken by persons wishing to opt out of the settlement if that is possible under the terms of the settlement; and
- (p) information on how to obtain legal advice and assistance.

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