FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 16
GP2/24 & GP3/24

Lord President
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LORD CLARK

in the reclaiming motion

STEVEN BLAIR MILLIGAN

Applicant and Respondent

against

(FIRST) JAGUAR LAND ROVER AUTOMOTIVE PLC; (SECOND) JAGUAR LAND ROVER LIMITED; (THIRD) CA AUTO FINANCE UK LIMITED; (FOURTH) BLACK HORSE LIMITED; and (FIFTH) LEX AUTOLEASE LIMITED;

Defenders and Reclaimers

Applicant and Respondent: A Smith KC, Milligan KC, Middleton KC, Black; Drummond Miller LLP
Defenders and Reclaimers: Lord Davidson of Glen Clova KC, Boffey; CMS Cameron McKenna Nabarro Olswang LLP

27 May 2025

Introduction

[1] Group proceedings in Scotland can be raised only if two separate preliminary applications are granted in advance. The first is an application to appoint a representative party and the second is an application for permission to bring the proposed group

proceedings. These two applications were made and came before the Lord Ordinary. Each application was opposed by the defenders. The Lord Ordinary granted the applications.

[2] The defenders are all Jaguar companies, including the vehicle manufacturers and related finance companies. They seek to challenge the Lord Ordinary's decision in respect of each application. In the first application, it is argued that the Lord Ordinary erred in finding that the applicant, Mr Steven Milligan, had demonstrated that he was a suitable person to be appointed as a representative party. In the second one, the contention is that the Lord Ordinary erred in granting permission for the proposed group proceedings, because the applicant (i) did not have a *prima facie* case and (ii) had not demonstrated that the proceedings had any real prospect of success. The applicant argues that the Lord Ordinary did not err on these matters and, furthermore, as the defenders did not seek leave to reclaim against the Lord Ordinary's decision to appoint the applicant as the representative party, a reclaiming motion on that issue is incompetent.

[3] The summar roll hearing took place on the day after the court heard a reclaiming motion on similar issues in *Mackay* v *Nissan Motor Co Ltd and others* [2025] CSIH 14. The Opinion of the Court, delivered by the Lord President (Pentland), provides important guidance about the approach to be taken to preliminary applications in group proceedings, which is adopted and applied in this reclaiming motion.

Applications

Authorisation as the representative party

[4] The original applicant to be the representative party was a Ms Rutherford. The defenders opposed that application. In response, Ms Rutherford sought to amend it, as well as the application for the grant of permission, and the draft summons, by substituting

Mr Milligan in her place. The amendments were allowed by the Lord Ordinary, who noted that if the applications had not been amended, and the objections averred in the defenders' answers been proved, he would have refused both applications. He explained his reasons as to why that would have been the result.

[5] The applicant applied under section 20(3)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 for authorisation by the court to be a representative party to bring group proceedings against the Jaguar companies. The application set out his own claim in respect of three cars. A description of the group of persons on whose behalf proceedings are intended to be brought was given. It comprised 6,465 pursuers, who have purchased, owned or leased Jaguar or Land Rover vehicles containing Euro 5 or Euro 6 diesel engines.

[6] In the application, the averments include the following:

> "(b) Diesel engines produce a range of polluting emissions. Under normal road use conditions, the relevant diesel engines within said vehicles failed to comply with EU and UK regulatory standards as regards harmful NOx emissions. Accordingly, Jaguar Land Rover Automotive Plc and Jaguar Land Rover Limited unlawfully designed, manufactured and installed prohibited defeat devices into said vehicles, which detected when said diesel engines and their emissions levels were being tested for compliance with said regulatory standards and turned on full emissions controls for the duration of such testing. The use of said defeat devices enabled said diesel engines to comply with the regulatory standards as to NOx emissions during testing, but which permitted the continued emission of excessive and harmful levels of NOx during normal, on-road driving conditions…
>
> (c) …Jaguar Land Rover Automotive Plc and Jaguar Land Rover Limited unlawfully obtained type-approval for their vehicles by failing to disclose the use of prohibited defeat devices. Thereafter, Jaguar Land Rover Limited issued COCs [Certificates of Conformity] for the Jaguar and Land Rover vehicles, which were invalid *inter alia* on the basis of that type-approval.
>
> (d) …Jaguar Land Rover Automotive PLC and Jaguar Land Rover Limited fraudulently, which failing, negligently, misrepresented to the Applicant and to the other group members that their vehicles and their Euro 5 or Euro 6 diesel engines had been tested and complied (without unlawful modification) with EU and UK statutory requirements…In situations where the vehicles were purchased with

> finance supplied by CA Auto finance UK Limited, Black Horse Limited or Lex Autolease Limited, those entities were in breach *inter alia* of the contractual terms…"

[7] The steps taken by the applicant to identify and notify all potential members of the group about the group proceedings are stated in the application. It also mentions the firm of solicitors who represent the applicant and the group members, and the steering group of agents which comprises that firm and five other firms. The agents had taken substantial steps to identify and notify all potential members of the group about the proceedings. They had carried out a significant amount of advertising on UK television and online.

[8] The applicant is said to be an appropriate and suitable person who can fairly and adequately represent the interests of the group, should authorisation be given by the court. In terms of his own abilities and expertise, it is fair to say that he has none, other than his own experience with his own vehicles. But while he personally does not have any special ability or expertise, the legal representatives and funders have such characteristics. The firm representing the applicant has the relevant ability, competence, expertise and funds properly to prosecute the group proceedings on behalf of all the members. In relation to the applicant's own interest in the proceedings, it is for the potential award of damages. The granting of the current application *per se* will not confer any potential or particular benefit (financial or otherwise) upon the applicant. His only potential benefit, in common with the other members of the group, is his own claim for damages.

[9] It is confirmed that the applicant is independent of the defenders. He is a nominal representative for the entire group. The day-to-day running of the group proceedings will be the responsibility of the agents comprising the steering group and of the independent counsel instructed. In terms of the funding arrangement in place, all group members are obliged to co-operate with their respective agents, not to deliberately mislead them and to accept their *bona fide* professional legal opinions. In return, the agents have undertaken to

perform all necessary work in pursuing group members' claims and to abide by legal professional standards. The applicant's own interests are entirely aligned and do not conflict with those of the other members of group whom he seeks to represent. The applicant and all of the group members are funded by Quantum Claims Compensation Specialists Limited ("Quantum Claims"), who confirm that they will indemnify their clients in respect of any adverse awards of expenses made against them.

Permission to bring group proceedings

[10] In the application for permission to bring the group proceedings it is said that all of the claims raise issues of fact and law that are either the same as, or are similar or related to, each other. Reference is made again to the firm of solicitors and the steering group. The applicant and the group members have at least a *prima facie* case against all of the proposed defenders. It is more efficient for the administration of justice for the claims to be brought as group proceedings, rather than as separate individual proceedings. The raising of group proceedings will make enormous savings in terms of expense and the time and effort of agents, counsel and, in particular, the court. To refuse this application and to require each group member to raise individual actions (even if conjoined or to run procedurally in tandem) would impose an inordinate and unnecessary burden of multiplication on the group members, the defenders, their legal advisors, and the court.

[11] The proposed group proceedings have substantial and very real prospects of success. There are proceedings regarding the same issues in other jurisdictions. There are 6,465 group members. Any further advertisement may increase that number. There may be smaller groups whose characteristics are defined by issues such as different models of vehicle; different engine size; whether the vehicle was owned or leased; whether the

vehicle was new or second-hand; different periods of ownership/leasing; and therefore different values of claims. A list of persons who have consented to being members of the group on whose behalf group proceedings are proposed to be brought is attached to the application.

The Lord Ordinary's decision and reasons

[12] The application for authorisation to be a representative party was opposed by the first, second and third defenders and the application for permission to bring group proceedings was opposed by all defenders. Both applications were dealt with at a hearing.

[13] Two separate interlocutors were issued by the Lord Ordinary on 29 October 2024. In one interlocutor, he authorised the applicant to be the representative party in the proposed group proceedings against the Jaguar companies, and ordered that the authorisation was to endure until the group proceedings finished or until permission was withdrawn. In the other interlocutor, the Lord Ordinary granted permission to bring group proceedings under section 20(5) of the 2018 Act and in terms of Rule of Court 26A.12 made several orders, defining the group and the issues as:

> "Claims arising from NOx emissions issues affecting Jaguar Land Rover diesel engines manufactured to [E]uro 5 or [E]uro 6 emissions standards";

The Lord Ordinary made a number of further orders in that interlocutor, including service of the summons, lodging of defences, lodging the group register, stating that the procedure was sufficient to permit any individual to become a group member or to withdraw consent as a group member, fixing further procedure and requiring the applicant to advertise the granting of permission.

[14] On the question of authorising a representative party, regard was had to all of the matters set out in Rule 26A.7(2). The applicant was a member of the group and satisfies the

abilities and expertise required. His interest in the proceedings, and his financial benefit, was the same as any other group member. He was independent of the defenders. He could be expected to act fairly and adequately in the interests of the group as a whole and would be advised by a firm of solicitors acting in accordance with its legal and professional obligations, (including its professional obligations in respect of success fee agreements) and so there was no conflict of interest.

[15] In relation to the funding position, Quantum Claims had given an undertaking to the court that it would indemnify the applicant and group members in respect of awards of expenses made against them in the course of the group proceedings. In light of the undertaking, and the underlying strength of Quantum Claims' balance sheet, the applicant had sufficient financial resources to meet any expenses. As to the defenders' concerns that Quantum Claims has overextended itself in respect that it is funding a number of diesel emission cases, if the financial position of the applicant or Quantum Claims changed during the course of litigation, then it would be open to the defenders to seek caution for expenses.

[16] The first to third defenders raised the issue of *dominus litis*. In Scots law, expenses may be awarded against a person who is not a party to the action if that person has an interest in the subject matter of the action and controls and directs the litigation (*Cairns* v *McGregor* 1931 SC 84, at p 89). The expenses of an action can be recovered from the *dominus litis*. So, if, for example, due to changes in circumstances neither the applicant nor Quantum Claims ultimately had the financial resources to meet an award of expenses and if there was a *dominus litis*, expenses could be recoverable from that *dominus litis* instead. It was premature to address the question of *dominus litis*. On the basis of the undertaking granted by Quantum Claims, the applicant had the financial resources to meet any expenses awards.

[17] On the application to bring group proceedings, the first point of challenge by the defenders was that the issues require to be the same as, or similar or related to each other. Counsel submitted that as there was a very large number of different makes, models and versions of cars produced over a long period of time, and differences in the claimants' acquisition of these cars as to whether they were purchased, leased, hire-purchased, purchased new or purchased second hand, the statutory requirement was not satisfied. The central issue, as set out in the first conclusion sought in the summons, was whether:

> "diesel engines purportedly manufactured to Euro 5 and Euro 6 emissions standards, which are the subject matter of these group proceedings, incorporated prohibited and unlawful defeat devices, the purpose of which was unlawfully to control nitrogen oxide emissions levels during regulatory engine testing, for the purposes of obtaining EC type-approval under EU Directive 2007/46/EC"

It made no difference if this issue arose over various models and purchase methods. The whole point of group proceedings was to allow claims such as this to be brought together rather than thousands of individual claims having to be made. The statutory test under section 20(6)(a) was satisfied.

[18] On the defenders' contention that there was a lack of a *prima facie* case, there had been various criticisms of the drafting of the summons, including that the pleadings were not of the necessary specificity required for fraud (*Marine & Offshore (Scotland) Limited* v *Hill* 2018 SLT 239, at para [16]). At this stage in the proceedings, the court did not require the pleadings to be fully developed. All that was required was a *prima facie* case. Once permission was granted, the summons would be served, answers lodged and parties would be given a period of adjustment in which to finalise their pleadings. If, by the end of that period of adjustment, the pleadings were inadequate, whether in respect of specificity of fraud or for other reasons, the defenders could seek to have the summons dismissed, or parts of it excluded. The draft summons set out a *prima facie* case. Whether it was robust

enough to survive debate after both parties had fully pled their cases was not a matter for this stage of proceedings.

[19] The defenders submitted that it was not in the efficient administration of justice to grant permission for group proceedings to proceed where the proposed group register revealed the duplicate nature of many of the claims being brought. Had the claims been raised individually, it was more likely than not that the duplication and proliferation of repeat claims would not have happened. However, it was in the efficient administration of justice for claims involving large numbers of claimants to proceed by group proceedings rather than individual cases. If the defenders' argument were to be accepted, some 6,500 individual claims would be brought instead of this one. If there were duplications or other errors in the group register, the remedy for that was for the applicant to correct the group register, rather than to prevent the group proceedings proceeding at all.

[20] The test of real prospects of success was not a high one. The defenders had submitted that if the applicant had a sound evidential basis for his averments, it ought to have been produced. The court would have to consider (1) the unclear nature of the loss suffered by any group member; (2) the effect of section 5(A4) off the European Union (Withdrawal) Act 2018 on the applicant's reliance on EU case law; and (3) prescription. All of these matters fell to be dealt with once the summons was served and answers lodged. To require evidence to be lodged at the permission stage and to require legal argument on those issues, would be to turn the preliminary certification stage into a full hearing on the substance of the case. All that was required at this stage was that the averments demonstrated a real prospect of success. The test was not to be interpreted as creating an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course: there required to be a prospect which was less than

probable success, but which was real and had substance (*Wightman* v *Advocate General* 2018 SC 388 at para [9]; *Mackay* v *Nissan Motor Co Ltd and others* [2024] CSOH 68, at para [46]). The test had been met in this case.

[21] In the course of his reasoning the Lord Ordinary referred, on occasions, to a previous case he had decided (*Bridgehouse* v *Bayerische Motoren Werke AG* 2024 SLT 116).

Submissions for the reclaimers

Appointment of the representative party

[22] The Lord Ordinary erred in his interpretation, and application, of RCS 26A.7. The office of representative party was one of considerable importance and responsibility. The onus was on the applicant. Supporting evidence and vouching required to be lodged and tested. No attempt to do so had been made by the applicant. Reference was made to *Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd* 2022 SLT 731 (paras [25]-[27]). The inherent conflicts of interest between the solicitors/funders/insurers and the group members (and indeed within sub-groups of members) were myriad. The Lord Ordinary had nothing before him that might sensibly be seen as a "demonstration" of how the applicant might act, particularly in the management of those conflicts of interest.

[23] The Lord Ordinary's approach in *Bridgehouse* was incorrect. Equiparating the representative party to being "in a similar position to any litigant, in that he takes advice from and gives instructions to his lawyers" denuded the statutory role of its intended effect. In this context, the issue of *dominus litis* became acute, going far beyond the limited perspective employed by the Lord Ordinary regarding possible expenses awards.

[24] There was a significant number of group proceedings involving diesel car manufacturers, with the same apparent indemnifier, Quantum Claims, pending before the

court. The current litigation was unlikely to confine itself to the sums revealed in the accounts of Quantum Claims. The latest statutory accounts to 30 April 2024, now publicly available, suggested a worsening cash position. Access to justice was prayed in aid to treat the applicant benignly, but justice necessarily also included treatment of the defenders. On any view, the material before the court on the financial standing of Quantum Claims was inadequate. If all of the so-called "diesel emissions claims" against 18 manufacturers in Scotland were to fail, it was unlikely that the balance sheet of Quantum Claims would cope. That the defenders could seek caution for expenses was not an answer.

[25] Plainly, the applicant was not *dominus litis*. His lack of mastery or control of the cause went to the heart of the court's consideration of whether to authorise him as representative party. As for any question of a *dominus litis* being assessed, the Lord Ordinary considered that could be left to "the end of the day" (at para [28]) when *ex hypothesi* Quantum Claims could not meet an expenses award. By then, it would be too late to begin a search for a *dominus litis*. It was not access to justice, properly understood, if one party having identified the financial weakness of the other party was obliged nonetheless by the court to take the risk of very substantial unmet awards of expenses. The demonstration of financial resources to the Lord Ordinary, required by RCS 26A.7(2)(f), was not sufficient, properly vouched or assessed by reference to the financial risks facing the identified funder.

[26] The approach taken also risked leaving Scotland, as a jurisdiction, out of step with prevailing practice elsewhere in the United Kingdom, where considerably more scrutiny appears to be applied (*Riefa* v *Apple Inc and others* [2025] CAT 5 and *Smyth* v *British Airways plc and others* [2024] EWHC 2173 (KB).

Permission to bring group proceedings

[27] The Lord Ordinary erred in finding that the representative party had demonstrated a *prima facie* case. The draft summons which accompanied the application for permission was wholly lacking in relevancy and specification. The Lord Ordinary erred in considering that the pleadings need not be tested until the end of a period of adjustment. To the extent that he tested the pleadings at all, his conclusion that a *prima facie* case was set out was wrong. *A fortiori,* it had not been demonstrated that the proceedings had any real prospects of success.

[28] The proposed proceedings were framed as a "copycat" of the VW Group allegations concerning cycle recognition devices. Bald averments were made, in essence, equiparating the reclaimers to other manufacturers in the industry. There was, and remained, no basis for that. The Department for Transport Report of April 2016 relied upon by the applicant expressly concluded that no manufacturer tested in that report, other than those belonging to the VW Group, were found to use cycle recognition devices. There was no evidence produced by the applicant to support his allegation that the proposed group members' vehicles contained or contain cycle recognition devices. Allegations of fraud required a responsible basis for so pleading. An "off the peg" effort of copying/pasting pleadings directed against other manufacturers, without considering the responsible basis for directing such averments against these defenders, was an approach which ought not to result in a *prima facie* case being established. To hold unspecific allegations to amount to revealing a *prima facie* case of fraud by the defenders was plainly wrong. The defenders were entitled to be protected by the court from unspecific, content-free accusations of fraud. Simply proceeding under the group procedure rules, broadly equivalent to commercial procedure, did not absolve the applicant of the requirement to aver pleadings of the necessary degree of

specificity required for fraud (*Marine & Offshore (Scotland) Ltd* v *Hill*, per Lord President (Carloway), at para [16]).

Competency of the challenge to appointment of the representative party

[29] The applicant's challenge to the competency of this part of the reclaiming motion was misconceived. No note of objection in terms of RCS 38.12 was made timeously by the applicant. The appeal was against an interlocutor falling squarely within the ambit of RCS 38.3(3)(a). That the two applications were allocated different process numbers by the court appeared to be an administrative step, rather than reflecting any substantive practice or procedure. Analogy could be drawn with the court's management of liquidations, where a multitude of different applications require to be made by note in a single liquidation cause over its lifecycle before the court, all of which are allocated separate process numbers. Here, the two applications arose in a single group procedure cause. The Lord Ordinary had, sensibly, issued one opinion, dealing with both issues. He reflected his decision in the interlocutor of 29 October 2024, which both granted permission for the group proceedings, and also stated at paragraph 2 of that interlocutor that the applicant was to be the representative party. The appeal was against that interlocutor.

[30] In any event, by virtue of RCS 38.6, the effect of reclaiming was to submit to review all previous interlocutors in the cause. Plainly, the two applications formed part of a single cause. To treat them as separate made little procedural sense, arising as they did in the context of one single group proceeding. Even if that approach was incorrect, if the application for representation was a separate cause, a final decision on it was reached by the Lord Ordinary and that could therefore be reclaimed without leave.

Submissions for the applicant

Appointment of the representative party

[31] In the event that the court considered that it could competently review the decision to appoint the applicant, the Lord Ordinary did not err in finding that the applicant was a suitable person to be appointed. Rule 26A.7(2) only requires the Lord Ordinary to consider the factors stated, which are neither mandatory nor exhaustive. The only mandatory requirement is that the applicant is a suitable person, which simply means that the proposed representative party will prosecute the action efficiently and effectively. It is only if the applicant is clearly unsuitable that the application should be refused (such as *Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd*) where there was an impression of a conflict of interest). This approach had been taken in many cases. The bar to appointment was and should be low. It would be an impediment to access to justice if the bar was high. The rules provide safeguards for members of the group in respect of the representative party. First, any member can challenge the representative party and seek to be appointed in his place (Rule 26A.8(2)). Second, any settlement must be achieved only after consultation with the other group members (Part 10, Rule 26A.30).

[32] While the onus to satisfy the court that the applicant was a suitable person to act in the capacity of representative party was plainly on the applicant, which had been the Lord Ordinary's approach, how could the applicant demonstrate suitability other than by recording an absence of factors indicative of unsuitability? The reclaimers appeared to envisage a more exacting standard be applied to suitability, although did not indicate what they considered the representative party required to demonstrate and how he should do that. Insofar as the Lord Ordinary referred to and placed reliance upon his decision in *Bridgehouse*, he was correct to do so.

[33] The applicant in this case was in essence an ordinary and willing member of the group. There was an experienced legal team, including three senior and junior counsel, a team of solicitors from a large firm, and other Scottish firms who are part of a steering group of agents. All have worked in multi-party litigation in Scotland. There were no factors pointing away from suitability (and the reclaimers appeared not to found upon any). The absence of special abilities and relevant expertise (which was accepted) was not a determinative matter, but merely one of the issues which the Lord Ordinary required to consider in determining suitability.

[34] The reclaimers' assertion that the applicant as representative party was plainly not *dominus litis* was unfounded. In any event, the Lord Ordinary was correct (at paras [27]-[29]) to note that the question of *dominus litis* was a matter which was in any event premature and of little relevance to the issues which he required to address at the stage of determining suitability.

[35] In relation to funding, all that was required was for the nature of the applicant's financial resources to meet any award of expenses to be explained, i.e. whether they were self-funding or receiving third party financial support. Where the pursuer relied on funding from a third party (as here), the details of the funding arrangements need not be disclosed. The representative party had confirmed that Quantum Claims were providing funding to him and the group members. An undertaking had been provided on behalf of Quantum Claims to that end. Quantum Claims had been operating as litigation funders in Scotland for around 35 years. They had been responsible for funding many litigations, both on behalf of individuals and multi-party actions. They had never failed to meet any award of expenses in their history. The provision of funding by Quantum Claims was apt to demonstrate that the applicant had sufficient financial resources to meet any adverse

expenses awards. Their public accounts had been available to the Lord Ordinary and disclosed cash in hand of over £3.9m and net assets of £8.9m. If that was not adequate to demonstrate financial suitability, then access to justice would scarcely be available in Scotland for cases of this nature.

[36] The general principle was that even an impecunious litigant was entitled to advance a stateable case other than in exceptional circumstance (*McTear's Executrix* v *Imperial Tobacco Ltd* 1996 SC 514). In any event, assessing the applicant as suitable did nothing to prejudice the reclaimer's ability to apply to the court to require him to find caution, should that be considered to be a step capable of justification.

Permission for group proceedings

[37] At this stage the court was not adjudicating on the merits of the issues in dispute. All that was required to satisfy the requirement of a *prima facie* case was that the representative party had demonstrated that there was a case to state and a case to answer. The requirement for real prospects of success had broadly the same meaning as in the test for permission to bring a judicial review, namely that prospects were real, i.e. genuine rather than fanciful or speculative. The test was not one of *probabilis causa* (*Wightman* v *Advocate General for Scotland*, at para [9]).

[38] The purpose of the rules was to filter out obviously unmeritorious claims and no more. Having regard to the details provided in the application for permission, the summons as drafted, and the material lodged in support, the applicant had demonstrated a *prima facie* case and real prospects of success to the Lord Ordinary, and consequently the Lord Ordinary's determination was without fault. Further questions as to the substantive

merit or otherwise of the representative party's averments, including relevancy and specification, were for a later date.

[39] Similar submissions to those made in *Mackay* v *Nissan Motor Co Ltd and others* about delay and there being an unfortunate proliferation of protracted procedure at the appointment and permission stages of group proceedings were also advanced.

Competency of the challenge to appointment of the representative party

[40] While it was correct that the applicant had not marked an objection to the competency of the reclaiming motion, that was because it was not known until the grounds of appeal were presented that the reclaimers sought to bring under review the decision to appoint the representative party. Nevertheless, it was still open to the representative party to raise the matter of competency (*AB and CD, Petrs,* 1992 SLT 1064).

[41] The rules of court envisage that the applications will be dealt with sequentially, and there must be a representative party appointed before an order for proceedings to be brought can be pronounced. The summons which informs the application for permission was framed in the name of the representative party (*Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd,* para [14]). There could be no successful application for permission to bring group proceedings without an appointed representative party. Refusal of an application by an applicant to be a representative party was, therefore, a practical barrier to a grant of permission to bring group proceedings in favour of that applicant. The applications were separate causes. The interlocutors submitted for review were those concerned only with permission to bring group proceedings. To reclaim the appointment of the applicant the reclaimers required to seek leave to appeal and have leave granted (RCS 38.2(6); 38.3(3)(a), and *Bridgehouse*).

Analysis and decision

[42] The opinion of the court in *Mackay* v *Nissan Motor Co Ltd and others* [2025] CSIH 14 explains the key elements on the introduction of group proceedings in Scotland, the statutory provisions under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, the relevant Rules of the Court of Session (Chapter 26A), and the Practice Note (Practice Note No 2 of 2020). It also sets out the policy aims of the 2018 Act, the test for the court reviewing discretionary decision-making, and this court's decision on the proper approach to be taken on the appointment of a representative party and permission to bring group proceedings. In that case the issue of competency of the reclaiming motion of the appointment also arose.

[43] In summary, decisions to authorise an individual as the representative party and to give permission for proposed group proceedings to be brought are discretionary in nature. Whether to grant or refuse the applications does not involve hard-edged questions of legal principle of the type that are amenable to review on their merits by an appellate court. Rather, such decisions entail the exercise of broad powers of case-management in the overall interests of the fair administration of justice and can only be reversed on appeal in strictly constrained circumstances. The resolution of such questions falls pre-eminently within the discretionary sphere of decision-making entrusted to the Lord Ordinary. As in the *Mackay* case, the Lord Ordinary in the present case is not only an experienced commercial judge, but also one with considerable experience of handling group proceedings, exemplified in his opinion in *Bridgehouse* v *Bayerische Motoren Werke AG* 2024 SLT 116 Exercise of the broad and discretionary case-management powers requires a pragmatic and realistic approach to be adopted with a particular emphasis being given to ensuring that the underlying policy, aim and purpose of the 2018 Act is given proper effect.

[44] *McKay* also reiterates the well-established test for this court when invited to interfere with a discretionary decision, namely whether the Lord Ordinary misdirected himself in law or otherwise transgressed the limits of discretion reposed in him so as to permit an appellate court to intervene and set aside his decision (*Forsyth* v *A F Stoddard & Co Ltd* 1985 SLT 51, Lord Justice Clerk (Wheatley) p 53). The Inner House will not overrule the discretion of a lower court merely because it might have exercised it differently (*Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36, Lord Reid p 66).

Appointment of the representative party

[45] This issue was not the subject of an application for leave to reclaim and there was no reclaiming motion enrolled in respect of it. The reclaimers sought dispensation of the requirement to enrol a reclaiming motion in this representative party action, and any requirement to lodge papers. That matter is considered below, together with the issue of competency. We will first explain the court's position on the reclaimers' submissions about authorisation of a representative party.

[46] When determining the suitability of the applicant, which senior counsel for the reclaimers accepted was the core criterion, the Lord Ordinary considered all of the elements of RCS 26A.7 and the full information before him. He found that the applicant is a member of the group and satisfies the abilities and expertise required; his interest in the proceedings, and his financial benefit, is the same as any other group member; he is independent from the defenders; he can be expected to act fairly and adequately in the interests of the group as a whole; he will be advised by a firm of solicitors acting in accordance with its legal and professional obligations, (including its professional obligations in respect of success fee

agreements); and there is no conflict of interest at this stage. In reaching his view, the Lord Ordinary referred appropriately to his earlier decision in *Bridgehouse.*

[47] The Lord Ordinary did not err in his interpretation and application of RCS 26A.7. The reclaimers' contention as to the nature of the test, arguing that the representative party is not in the same position as an ordinary would-be pursuer and must lodge supporting evidence and vouching to demonstrate his suitability, goes too far. It is not correct that the complexity and seriousness of the allegations made against the reclaimers demanded demonstration and evidence of the applicant's ability and skills to discharge his function competently. As explained in *Mackay,* the one overriding requirement is suitability and that has to be assessed in a holistic fashion, taking account of all of the relevant features in the particular case and having regard to the considerations mentioned in RCS 26A.7(2).

[48] The reclaimers' argument that the Lord Ordinary cumulatively failed to give due weight and consideration to the factors set out in RCS 26A.7 cannot succeed. The weight to be given to the various individual points was quintessentially for the Lord Ordinary to determine, as the discretionary decision-maker. Before we could interfere with his assessment, we would require to be satisfied that he has left out of account some relevant factor or taken account of an irrelevant consideration or that his decision was in some sense wholly unreasonable or unjudicial. There is no basis to conclude that the reclaimers' submissions have met this test.

[49] The reclaimers focus in part on the absence of material before the court to show that the applicant was a suitable appointee, including why he had been selected, what qualities he possessed, his ability and skills and nothing "to suggest any kind of mastery or control of the cause". However, no negative information of any kind about the applicant's suitability was put before the Lord Ordinary (nor to us). As noted above, when the first applicant

(Ms Rutherford) sought authorisation to be the representative party the defenders objected to her appointment and the application was amended to substitute Mr Milligan in her place. No objection raising any such negative factors was made about Mr Milligan. In those circumstances, as observed in *Mackay*, it is difficult to see what more the applicant can reasonably be expected to do in order to demonstrate his suitability. He is in the same position as in that case: an ordinary and willing member of the group of claimants; with the benefit of representation by an experienced team of solicitors from a large firm, which has developed expertise of acting in multi-party litigation, a steering group of solicitors, with similar experience and independent counsel.

[50] RCS 26A.7(2)(e) and (f) use the word "demonstration" and the reclaimers contend that the onus is on the applicant to carry out the demonstration. The conclusion to be reached on that matter is plainly something which is open to inference by the Lord Ordinary on the basis of the information before him, including nothing to suggest that the applicant would not act fairly and adequately or that he had any conflict of interest. In the absence of such information, the test is a low bar.

[51] We reject the reclaimers' criticisms about information on financial resources to meet the expenses. The Lord Ordinary made clear that the funders, Quantum Claims, had given an undertaking to the court to indemnify the applicant and group members in respect of awards of expenses. He also referred to the underlying strength of the balance sheet. While Quantum Claims is involved in the funding of a number of diesel emission cases, that does not cause the financial resources to be insufficient. Their involvement in the *Mackay* case, criticised on a similar basis, was not seen as problematic. As the Lord Ordinary observed, it will be open to the defenders to seek caution later if circumstances justifying that approach should arise.

[52] The first to third reclaimers raised before the Lord Ordinary the issue of *dominus litis*. The Lord Ordinary explained that, on the undertaking given by Quantum Claims, the applicant has the financial resources to meet any expenses award. That being so, there was no need to consider alternative sources for payment of an award of expenses, such as *dominus litis*. That is plainly correct. In this reclaiming motion, it was said that the question is who is in control for the proper administration of justice and that a "random individual" as the representative party is not in control. However, the representative party has a distinct role and his legal team have their own separate duties and responsibilities.

[53] It follows that that the reclaimers' criticisms of the Lord Ordinary's decision in *Bridgehouse*, one of the central themes in their submissions, are unfounded. His approach was correct and indeed, as he said in the opinion (at para [44]) an unduly restrictive approach to the appointment of a group member as group representative could discourage the bringing of group proceedings in Scotland and would run counter to the policy objective of broadening access to justice. It is obviously correct that an ordinary litigant in a civil case can proceed without the authorisation required before bringing group proceedings, but as noted it is a low bar. It is not, despite the reclaimers' protestations to the contrary, an onerous test.

[54] The reclaimers made reference to certain English authorities on group proceedings, seeking to draw from them that considerably more scrutiny requires to be applied when dealing with representation. However, the factual circumstances of these cases differ from what is before the court in the present case. In *Riefa* v *Apple Inc and others* [2025] CAT 5 the Competition Appeal Tribunal reached the view that the applicant was extremely reliant on her legal advisers (para 89) and that there were considerable doubts about whether they could be satisfied that she would fairly and adequately act in the interests of the class

members, for the purposes of the authorisation condition (para 91). In *Smyth* v *British Airways plc and others* [2024] EWHC 2173 (KB) 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 (para 36). No such matters arise in this case.

[55] In any event, in reaching our decision we have had regard to the policy considerations reflected in the 2018 Act and interpreted the statutory provisions and rules of court applicable to group litigation in Scotland. It is perhaps worth recalling that if the previous person originally named as the applicant had remained as the proposed applicant, the Lord Ordinary would, if the problems raised were established, have refused both applications. This illustrates that any legitimate matters of concern would have been fully taken into account.

[56] Accordingly, there is no basis for the court to interfere with the Lord Ordinary's decision to grant the application for appointment of the applicant as the representative party.

Permission to bring group proceedings

[57] Once again, this involves a discretionary decision reached by the Lord Ordinary. The test for the Inner House to interfere with the exercise of his discretion is not met. The central points raised by the reclaimers are whether the applicant had demonstrated that there was a *prima facie* case and that there was a real prospect of success. In *Mackay*, the authorities on those matters are mentioned, as are the tests to be applied. Applying them in the context of the present action, it is clear that the Lord Ordinary reached the correct conclusion on each point. On *prima facie* case, his view that questions of relevancy and specification are not dealt with at this juncture in the action is correct. The question of

allegedly unspecific allegations of fraud made in the draft summons is again a matter to be dealt with when the pleadings are finalised. The low test for a *prima facie* case at this preliminary stage is met. The argument that there was no basis for the averments made that the proposed group members' vehicles contained cycle recognition devices is plainly a matter to be dealt with as the case progresses. It is clear that the Lord Ordinary has extensive case-management powers (RCS 26A.22). The test for real prospects of success is again plainly met.

Competency of challenge to appointment of the representative party

[58] The reclaimers' argument that an interlocutor of 29 October 2024 granted permission for the group proceedings and stated that the applicant was the representative party is correct, but that was the interlocutor dealing with permission for group proceedings. The authorisation matter was dealt with in a separate interlocutor of the same date. Similar issues on competency as raised in the reclaiming motion in *McKay* arise here, as the only reclaiming motion enrolled was against the Lord Ordinary's decision granting permission to bring group proceedings. In short, in relation to the reclaimers' arguments about the two applications forming part of single proceedings, we will adopt the same approach as taken in *Mackay* and reject that contention for the reasons explained therein. As a consequence, there is no competent appeal before the court challenging the Lord Ordinary's decision to authorise the appointment of the representative party.

[59] Senior counsel for the reclaimers made the valid point that if these are separate preliminary proceedings, the right to bring a reclaiming motion after the final decision on representation is made arises without the need for leave. However, there requires to be a reclaiming motion on the particular interlocutor that is challenged. This realisation resulted

in senior counsel making a motion at the bar for dispensation of the requirement to have brought a reclaiming motion on that decision, along with dispensation of timetable requirements and the need for a procedural hearing. Senior counsel for the applicant recognised that the court may wish to deal with the challenge to the Lord Ordinary's decision on representation. The court's views on that matter are set out above. Had there been a competent reclaiming motion to that effect it would have been refused. However, in circumstances where no reclaiming motion has been enrolled against the relevant interlocutor it is not appropriate to allow that matter to be reclaimed.

Disposal

[60] We will refuse the reclaiming motion on the application for permission to bring group proceedings. The reclaimers' motion for dispensation with various requirements of the rules and to allow the appointment of the representative party to be reclaimed is also refused, albeit that even if allowed it would have failed for the reasons explained above. All questions as to expenses are reserved.