OUTER HOUSE, COURT OF SESSION

[2022] CSOH 95

GP1/22, P305/22, P657/22

NOTE BY LORD WEIR

In the cause

HUGH HALL CAMPBELL KC

Pursuer

against

JAMES FINLAY (KENYA) LIMITED

Defenders

Pursuer: Smith KC, C Smith; Thompsons
Defenders: Lord Davidson of Glen Clova KC, A McKenzie KC; CMS Cameron McKenna Nabarro Olswang LLP

30 September 2022

Introduction

[1] This note concerns three related cases which all called before me initially on 16 September and subsequently on 22 September 2022. In the first matter the pursuer is the representative party for in excess of 1000 Kenyan nationals who are group members of group proceedings previously authorised by the court in which it is claimed that they have suffered loss, injury and damage through the fault and negligence and breach of contract of the defenders. The two other matters concern petition proceedings in which the pursuer has sought interim relief from certain conduct alleged by the pursuer on the part of the

defenders in connection with those group proceedings. Both petitions called before me by order at the same time as I heard the preliminary hearing in the group proceedings.

[2] The pursuer has, separately, invited the court to have received minutes for breach of undertakings given, and interim interdicts pronounced, in connection with both petition processes. In view of the number of processes to which the group proceedings have now given rise, and to avoid any consequent confusion, I simply refer to the parties throughout this note as "the pursuer" and "the defenders".

Background

[3] On 16 February 2022 I granted permission for the bringing of the "James Finlay (Kenya) Limited Tea Estate Workers Group Proceedings" ("the group proceedings"). The pursuer is the representative party in those proceedings. I determined the issue as being claims in respect of musculoskeletal injury arising from common conditions of employment of employees engaged in harvesting tea on estates owned and/or operated by the defenders in Kenya. A timetable was fixed for the progress of the action.

[4] The interlocutor granting of permission was the subject of a reclaiming motion at the instance of the defenders. On 27 May 2022 the court refused the reclaiming motion. It made an order for defences to be lodged no later than 24 June 2022. On 17 June 2022 the group proceedings called before me on a motion by the pursuer for approval of the terms of a notice for their advertisement in Kenya. On the same date I extended the period within which claims may be brought in the group proceedings by a period of six months. Defences were thereafter lodged timeously. In the defences (and, therefore, subsequent to the disposal of the reclaiming motion) the defenders introduced a plea that the court had no jurisdiction to hear the group proceedings. The defenders also maintain a plea of *forum non*

conveniens – a plea which had previously been foreshadowed in argument at the permission stage.

[5] Two other developments require to be noticed. In the first place, prior to the hearing of the reclaiming motion, the representative party lodged a petition (P305/22) seeking interim interdict against the defenders from (broadly) engaging in behaviour calculated to intimidate and threaten group members or dissuade them from continuing with litigation against the defenders. Interim interdict in the terms sought was granted *ex parte* by Lord Doherty on 8 April 2022. After sundry procedure (and following the allowance of an evidential hearing) the petition proceedings were sisted on an undertaking granted by the defenders in terms closely similar, but not identical, to the interim interdict. The defenders conceded the expenses of the petition to date.

[6] In the second place, on 28 July 2022, the defenders applied for and were granted an interim injunction in the Employment and Labour Relations Court of Kenya. Interim orders were granted *ex parte* prohibiting the group members (although not the representative party himself) from (a) prosecuting or proceeding in any manner with the group proceedings and (b) initiating any further actions with regard to any work related injury claims arising in Kenya, pending the hearing of the Kenyan application. Certain consequential orders were made in relation to service and advertisement of the interim injunction. The practical effect of the order of the Kenyan court was that the group proceedings could not be progressed for as long as the orders remained in force. Such was the background in which the pursuer lodged a further petition (P567/22) along with a motion for interim interdict prohibiting the defenders (a) from continuing to prosecute ongoing proceedings which it had raised in the Kenyan court and (b) from raising any new proceedings which had the effect, or intended effect, of interfering in any way with conduct of the group proceedings.

[7] That petition initially called on 15 August 2022. It was continued until 19 August to enable senior counsel for the defenders to obtain instructions. Meantime the defenders gave an undertaking in the following terms:

> "i. That the hearing scheduled to take place in the Kenyan courts on 25 August 2022 will be delayed for a period of two weeks; and the respondents will make the necessary representation to the Kenyan court at the own expense for that to be effected.
>
> ii. No further or other applications will be made to any Court whether in Kenya or otherwise relating to the Scottish Group Proceedings between the parties pending the hearing of the interim interdict in this process.
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> iii. That all and any lists of Group Proceedings members will be removed forthwith by the respondents if placed on notice boards by them in furtherance of the Kenyan court order referred to in the petition; and shall not be replaced; and no further lists will be posted by them until the hearing of the interim interdict.
>
> iv. There will be no public statement by the respondents regarding this agreement other than to confirm its existence and content prior to the hearing on the interim interdict."

Lord Braid's order

[8] On 19 August 2022, in the petition process P657/22, the pursuer moved Lord Braid to grant interim interdict and interim performance. He issued an opinion on 22 August ([2022] CSOH 57) to the effect that the petitioner had presented a strong *prima facie* case, that the balance of convenience was in his favour and that interim orders and an order under section 46 of the Court of Session Act 1988 were appropriate. Lord Braid put the case out for a further hearing on 24 August 2022 for discussion of the precise terms of the interlocutor to be pronounced. On that date he granted the interim orders and issued a note setting out the reasons for why he made the orders which he did. The full background to the making of the orders is set out in Lord Braid's opinion.

[9] The orders pronounced by Lord Braid, which have not been the subject of any reclaiming motion, were in *inter alia* the following terms:

"…

3. Interdicts *ad interim* the respondent or anyone acting on its behalf:

(a) from continuing to prosecute the proceedings at its instance in the Employment and Labour Relations Court of Kenya at Nairobi City under case number ELRCPET/E133/2022;

(b) from seeking to raise any further proceedings other than those referred to in (a) above, in Kenya or elsewhere out-with the jurisdiction of this Court, which have the effect or intended effect of interfering in any way with the conduct of the Group Proceedings in Scotland, in which the respondent is the defender, with reference number GP1/22;

(c) from seeking to implement the orders of the Court in Kenya pronounced on 28 July 2022 in any way, and in particular by posting copies of the list of Respondents to the Kenyan proceedings on notice boards or, if effected, by continuing to permit them to be posted;

4. Grants orders *ad interim* in terms of section 46 of the Court of Session Act 1988:

(a) ordaining the respondent to apply to the Court in Kenya as soon as practicably possible in the proceedings referred to in paragraph 3(a) above (i) to recall or otherwise negate the effect of all orders which were granted on 28 July 2022, such as to permit the continuation of the Scottish Group Proceedings referred to in 3(b) above and (ii) to have the proceedings stayed; those applications to be at their sole expense; and

(b) ordaining the respondent as soon as practicably possible to publish a notice in English together with a translation in Swahili and published on its notice boards at all locations where it had previously been displayed the names of employees who were engaged in the group proceedings in purported implement of the court orders in the Kenyan proceedings; orders that the notice should inform group members of the terms of orders granted in 3(a) and 3(b) of this interlocutor and that it should include the following: 'Contrary to previous notices placed on this notice board, no person is required to provide their email address to JFK's Advocates;

…' ".

Kenyan hearing on 25 August 2022

[10] On 25 August 2022 the Kenyan proceedings called for a hearing. The pursuer was not represented at that hearing. The defenders were represented by an advocate of the High Court of Kenya, Geoffrey Obura. Precisely what transpired at the hearing (and, in particular, whether the defenders' advocate moved for a stay of the Kenyan proceedings) is a matter of dispute. It appears, however, that Mr Obura advised the Kenyan court of the terms of Lord Braid's order. At the hearing on 25 August the Kenyan court pronounced the following order:

> "1. The Respondents have not entered appearance, attended Court, or responded to the Application filed by the Petitioner, within 14 days, as directed by the Court on 28 July 2022.
>
> 2. The Orders issued by the Scotland Court cannot be enforced in this Court, as they are in breach of our Constitution, in particular with respect to our sovereignty.
>
> 3. The interim Orders issued on 28 July 2022 are confirmed.
>
> 4. The Respondents are granted another 14 days to respond to the main Petition.
>
> 5. Directions on hearing of the Petition to issue on 12 September 2022 before the Duty Judge.
>
> 6. The Respondents to be notified through the press media."

The hearing on 30 August 2022

[11] Following the Kenyan hearing on 25 August both parties sought variation of Lord Braid's orders. The petition called before Lord Ericht on 30 August 2022. At that hearing the defenders sought recall of the interim interdicts set out in paragraphs 3(a) and (c) of Lord Braid's order and the order for interim performance set out in

paragraph 4(b). The pursuer sought variation of Lord Braid's order to the effect that the defenders should be ordained to abandon the Kenyan proceedings.

[12] The circumstances giving rise to the applications for variation of Lord Braid's orders, and the competing submissions of parties, are set out in the opinion issued by Lord Ericht on 30 August 2022 ([2022] CSOH 61). I do not propose to repeat them here. Having heard argument Lord Ericht refused to vary Lord Braid's orders. He observed that the sole and limited question before the court was whether it should alter those orders because of a material change of circumstances between the granting of the orders on 24 August and the hearing before him on 30 August. He noted that both parties relied on the Kenyan court hearing on 25 August as representing such a material change.

[13] Lord Ericht was not, however, satisfied that the Kenyan hearing comprised a material change in circumstances where the reasoning of Lord Braid was concerned. Dealing with the defenders' application for recall, Lord Ericht said this:

> "… Lord Braid was made aware when granting the orders that the Kenyan hearing would take place the next day. In his opinion he took the view that the orders were directed not at the foreign court but at the wrongful conduct of the party to be restrained. The Kenyan court has decided that the orders were directed at the foreign court; it states that Lord Braid's orders cannot be enforced in the Kenyan court as they are in breach of the Kenyan constitution in particular with respect to sovereignty. That decision makes no material difference to the reasoning of Lord Braid as to *prima facie* case. Lord Braid's reasoning was that he was merely exercising his jurisdiction over the person of JFK, which is a Scottish company. The orders are *in personam* against JFK and are not intended to be an interference with the jurisdiction of the courts of Kenya or the sovereignty of Kenya (*Sabah Shipyard (Pakistan) Ltd* v *Republic of Pakistan* [2002] EWCA Civ 1643, paragraph [45]). There is nothing in the decision of the Kenyan court which detracts from that conduct-based reasoning: the decision of the Kenyan court is silent on the conduct of JFK. Nor does that decision make any difference on the balance of convenience: all the matters on which Lord Braid relies in paragraphs [41] and [42] are unaffected by the decision of the Kenyan court".

[14] Dealing with the pursuer's motion to order the defenders to abandon the Kenyan proceedings, Lord Ericht noted that the pursuer's position that no application to stay the

Kenyan proceedings had been made on 25 August was disputed (although, on the information available to him, Lord Ericht thought that there was considerable force to the pursuer's position that it had not been). He observed that, even on the petitioner's own account of what had happened at the hearing on 25 August, the Kenyan court had not refused an application to stay and that, accordingly, there was no material change in circumstances such as would warrant the making of any different order where interim performance was concerned.

[15] In order to regulate further procedure, the court directed that the two petition processes, P305/22 and P657/22, should call before me at the same time as the preliminary hearing in the group proceedings scheduled for 16 September 2022. It was a matter of agreement between them that parties should not be prevented from attending either the hearing due to take place before the Kenyan court on 12 September or the hearings on 16 September in this court. To that end the court varied the interim interdict granted on 24 August so as to exclude the 12 September hearing from paragraph 3(a) of the interim interdict, while senior counsel for the defenders gave an undertaking that no steps would be taken to prevent the preliminary hearing taking place on behalf of the defenders or any other interested party.

Preliminary hearing and by order hearings (16 and 22 September 2022)

[16] Parties lodged notes of proposals for further procedure in advance of the hearing initially fixed for 16 September 2022. The pursuer's note disclosed that the hearing in the Kenyan court, originally fixed for 12 September for case management orders to be made, had been continued in order that it could be dealt with by the judge who made the interim orders. A hearing date had been fixed for 19 September. The note also revealed that an

application had been made meantime on behalf of the group members to dismiss the Kenyan petition on the ground that it bore to determine a Kenyan constitutional issue which was not competent in the Employment Court. I was told that this application had to be determined but that a determination was not anticipated in the near future.

[17] That being the position senior counsel for the defenders invited the court to continue all matters into the following week to enable the hearing before the Kenyan court on 19 September to take place. Parties accepted that it was in contemplation that when all matters called before me the hearing originally appointed to take place in the Kenyan court on 12 September would have taken place. Lord Ericht had enabled the defenders to be represented at that hearing by relaxing the effect of the interim interdict of 24 August 2022. Parties were agreed that the relaxation should continue to apply in respect of what was simply a continuation of the Kenyan court hearing. I therefore continued all matters until 22 September 2022. On that date I heard further submissions for the defenders.

Pursuer's submissions

[18] Senior counsel for the pursuer acknowledged that as long as the Kenyan court orders were extant there was a material risk that the current group members (who were subject to the jurisdiction of the Kenyan court) would be in breach of the existing orders. That was the case notwithstanding that Lord Braid had ordered that the defenders apply for a stay in the Kenyan proceedings, the pursuer's position being that no such stay had been sought before the Kenyan court on 12 September. Senior counsel stated that the conduct of the defenders in publishing the names of all of the group members in the Kenyan national press and on the defenders' notice boards had been calculated (successfully) to cause fear and alarm amongst the group members and those contemplating joining the group proceedings. Senior counsel

also adverted to concerns that the defenders were seeking to avoid the effect of the interim orders and undertakings to which they were subject by deploying as a proxy in the Kenyan proceedings the Kenyan Tea Growers Association ("KGTA"), with whom the defenders had ties. I was told that an application had been lodged for the KGTA to join the Kenyan proceedings on the basis that it had a separate interest in those proceedings going ahead. (The application was not intimated to those representing the group members and was withdrawn, apparently without difficulty, a day later).

[19] The pursuer maintained that the defenders, on various grounds, were in breach of both the interim interdict granted by Lord Doherty, and the undertaking subsequently given, in the petition process P305/22 and also the undertaking given, and interim interdict and order under section 46 of the Court of Session Act 1988 subsequently granted by Lord Braid, in the petition process P657/22. The Lord Advocate having intimated that she did not intend to participate in either process the pursuer moved the court to allow minutes for breach in respect of each process to be received. Senior counsel for the defenders intimated that there would be no opposition to their receipt on being allowed 28 days for answers.

[20] Senior counsel for the pursuer recognised that there was doubt over whether the Kenyan court would negate the orders it had made and, even if it did, within what timescale that might be achieved. There were now significant numbers of individuals who wished to be added to the group register and were not currently subject to the Kenyan court orders. There was a legitimate concern that further delay would have time bar implications for those not already on the group register. Moreover, the issues of jurisdiction and *forum non conveniens*, raised in both the defences to the group proceedings and the defenders'

statement of issues, were not claimant specific. Accordingly, senior counsel proposed the following by way of further procedure:

(i) The claims of the existing group members should be sisted;

(ii) The group proceedings should be permitted to proceed with new claimants who are added to the group register and who are not, therefore, respondents to the Kenyan proceedings;

(iii) In order to protect them from intimidation, the risk of their names being published or becoming the subject to orders from the Kenyan courts, the new group members should be anonymised;

(iv) A revised group register tendered at the Bar and adding new, and anonymised, group members should be received by the court, and

(v) The interlocutor of 17 June 2022, pronounced by me in the group proceedings should be varied such as to enable further claimants to join the group register for a period of one year.

Senior counsel also invited the court to fix evidential hearings on the petition and answers in both petition processes with orders for the lodging of witness statements and other documents.

Defenders' submissions

[21] In reply senior counsel for the defenders noted that the pursuer and group members had now raised a preliminary objection to the competency of the Employment and Labour Relations Court hearing constitutional or sovereignty arguments in the anti-suit proceedings in Kenya. The hearing in those proceedings previously fixed for 19 September 2022 had been continued until the following day. The court had then decided that the preliminary

objection required to be resolved *anti omnia.* A hearing had been scheduled to take place on 28 September 2022, and parties were agreed that the defenders should be permitted to appear in answer to the preliminary objection which had now been raised.

[22] On the matter of further procedure senior counsel clarified that the defenders did not contend, in light of the raising of the anti-suit proceedings in Kenya, that it was for the Kenyan court to resolve whether the Court of Session had jurisdiction to hear the group proceedings. What was asserted was that the Kenyan courts had exclusive jurisdiction arising from the contractual relationship between the group members and the defenders. That was a complex matter of Kenyan law. A statement by the Kenyan court on Kenyan law on that matter would be of substantial assistance to this court when it came to consider the jurisdiction challenge in the defences, and preferable to a process by which a decision was reached solely on competing expert evidence about the applicable law. In these circumstances the "rational solution" to the conflict of jurisdictions would be for the Kenyan court of hear parties on the anti-suit orders. If, in due course, they were recalled then the conflict would be substantially resolved; if not, then the sensible course would be for the interim orders pronounced by Lord Braid to be recalled. At this stage, however, no motion for recall was being made. Both petition processes should be sisted meantime.

[23] The pursuer having recognised that the group proceedings would have to be sisted *quoad* those group members who were subject to the Kenyan anti-suit injunction, senior counsel submitted that it would be inappropriate for those proceedings to continue by the expedient of adding new claimants to the group register. Such would amount to a transparent stratagem to circumvent the anti-suit injunction of the Kenyan court. In any event, the pursuer could not properly make any submissions on behalf of prospective claimants who had not formally been added to the group register.

[24] To address what appeared to be a potential difficulty senior counsel for the pursuer moved for a revised group register (containing new claimants but with their details anonymised) to be received at the Bar. I did not understand senior counsel ultimately to object to the motion for its receipt to be made. The motion was, however, opposed. The addition of the new claimants would produce potential difficulties, and lead to unwieldy and unpredictable results, if the existing group members remained subject to the Kenyan anti-suit injunction. Further uncertainty arose from the terms of the existing interim orders, or undertakings given, in the existing Scottish proceedings and, in particular, whether their protection extended to new claimants.

[25] On the matter of anonymity the defenders did not accept that the pursuer's apprehension that new claimants would be subject to harm or intimidation, were they to seek to join the group proceedings, was justified. There was already general discussion regarding who were participants in those proceedings and no demonstrable evidence that they had come to any harm. There was, in that state of affairs, a risk that anonymising claimants would generate an unfair perception that the defenders were responsible for any names entering the public domain. In any event, anonymising the identities of new claimants offended against the principle of open justice without proper justification, especially in circumstances where it was proposed that the defenders themselves were not know of the identities of those were seeking to advance claims against them.

[26] Finally, senior counsel opposed the pursuer's motion to extend by one year the time within which claimants would be permitted to join the group register. While a balance had to be struck between the competing objectives of certainty and access to justice no justification had been advanced for why the existing deadline of 17 December 2022 did not

adequately strike that balance, at least pending further developments in the group and other proceedings.

[27] Accordingly, senior counsel submitted that the group proceedings, and both petition processes, should be sisted at least until the outcome of the preliminary objection raised in the Kenyan court was known.

Decision – further procedure

[28] While preparing this note I was advised that a brief hearing on submissions took place before the Kenyan court on 28 September. The court had, however, taken time to consider the submissions made and a further hearing had been appointed to take place in that court on 28 October 2022.

Petitions P305/22; P657/22

[29] In determining how the multiplicity proceedings can sensibly be progressed senior counsel for the defenders, while not seeking recall of Lord Braid's interim orders, floated the proposition that the landscape had changed upon the taking on behalf of the group members of a preliminary objection to the Kenyan anti-suit proceedings. That is indeed a new development. However, while not strictly a decision for today, it is not obvious that it has altered the landscape in any material way. As I understand it, the objection taken is confined to the power of the Employment and Labour Relations Court to make the anti-suit orders at all, whatever the merits of doing so. But whether or not that is so, it is important not to lose sight of the fact that the pursuer contends that the conduct of the defenders in seeking and obtaining the anti-suit orders in Kenya was an abuse of the process of this court, contemptuous of the Scottish proceedings, vexatious, and calculated to harass and oppress

the group members. The averments of oppressive conduct made in support of the application for interim interdict rely on (i) delay in raising the Kenyan proceedings; (ii) an alleged history of intimidation; (iii) repeated attempts to thwart orders of the Scottish courts; (iv) revision of the undertaking in petition process P305/22, showing that the anti-suit injunction was in contemplation at that point; (v) misuse of the group register, and (vi) the selective and in some respects misleading information which was placed before the Kenyan court. The fact that, as I understand it, the Kenyan court may give an opinion on 28 October 2022 on the matter of the competence of the granting of the anti-suit injunction does not detract from the fundamental contention of the pursuer that the raising of the Kenyan proceedings was itself "vexatious, oppressive and unconscionable".

[30] Moreover, although apparently confining himself for the time being to the submission that the group proceedings, and associated petitions, should simply be sisted pending determination of the preliminary objection, it is apparent from the written notes of argument, prepared on their behalf, that the defenders maintain the position that the rational solution to the conflict of jurisdictions would be for the Kenyan court in due course to hear parties on the anti-suit injunction. That, however, is no more than a rehearsal of the "superficially attractive" argument advanced before, and rejected by, Lord Braid when he granted interim interdict on 24 August 2022.

[31] It is in these circumstances that I consider it to [be] both necessary and desirable for the disputed facts, and legal contentions, in the two petition processes to be established. I propose to allow an evidential hearing on the petitions and answers of five days' duration on dates to be afterwards fixed. I accept senior counsel for the pursuer's contention that, given the importance of a decision on these matters, dates should be fixed as a matter of high priority. I will allow parties a case management hearing in each petition, to take place

on 25 November 2022, and appoint parties to exchange and lodge in process not later than 18 November 2022 full statements from all witnesses whose evidence is sought to be adduced and all documents upon which they seek to rely. There would seem no reason why the issues raised by both petitions could not be disposed of at the same evidential hearing. Whether it is necessary for the processes to be formally conjoined can no doubt be considered at the case management hearings.

[32] I will also vary the interim interdict granted on 24 August 2022 so as to exclude the hearing on 28 October 2022 in Kenya. If parties consider that that variation should have wider effect then I will hear parties further on the matter.

Minutes for breach

[33] In the absence of opposition I will allow the minutes for breach in the interdict petitions P305/22 and P657/22 to be received. I will appoint answers to be lodged within 28 days and fix a procedural hearing in each process for the same date. There is no particular reason why the minutes should follow the timetable for the interdict petitions themselves (although that can be kept under review) and I will therefore appoint the procedural hearing to take place on 11 November 2022.

[34] The dates I have stipulated in relation to the interdict petitions and the minutes for breach, and the duration of the evidential hearing, will be included in the interlocutors in the interdict petitions issued with this note. I am, however, conscious that they were not specifically canvassed with counsel during the course of submissions. If they give rise to any particular practical difficulty then parties should make contact with the clerk of court and I will be content, within reason, to vary the dates if they do not suit.

Group proceedings – GP1/22

[35] I address now the matter of the group proceedings. Senior counsel for the pursuer recognised that unless and until the Kenyan orders are recalled or negated the group proceedings could not continue without there being a risk of those group members who were respondents to the Kenyan proceedings being found in contempt of the Kenyan court. The solution he proposed was that the group proceedings could proceed to a consideration of the issues of jurisdiction and *forum non conveniens* on behalf of group members who were added to the group register subsequent to the making of the Kenyan orders, and who were not subject to them. The pursuer did not consider himself inhibited by the existing Kenyan court orders from doing so. Senior counsel moved that a revised group register be received at the Bar. In order to prevent such new group members from being subject to further orders from the Kenyan courts he moved that they should be afforded the protection of anonymity, and that that protection should extend to withholding the identity of individual claimants from the defenders themselves.

[36] There are well recognised circumstances in which claimants will be afforded the benefit of anonymity such that their names or other personal details are not placed in the public domain. The proposal that the identities of new group members be withheld from the defenders was acknowledged by senior counsel to be "highly unusual". For my part, I have never encountered a situation in which the identity of a party has been withheld from the other party to proceedings altogether. If there is a precedent for such a proceeding then I was not made aware of it. Senior counsel submitted that the high level issues of jurisdiction and *forum non conveniens* were not case specific and could be addressed and determined without the necessity of revealing the identity of claimants. That may technically be so. But even where such high level issues are under consideration it seems to me that the defenders

would be entitled to know that the proceedings were being advanced on behalf of individuals who were known to have been in their employment, with qualifying claims which were not subject to any relevant time bar.

[37] The motion made at the Bar for receipt of the revised group register depended on the court being satisfied that the new group members be anonymised in the way proposed. I do not consider that I can be so satisfied as long as the position is maintained that the identities of the new group members must be withheld altogether from the defenders. It follows that I must at this stage refuse the motion made at the Bar for receipt of the revised group register.

[38] I understand that the existing group members are all respondents to the Kenyan proceedings. I have not been invited to progress the group proceedings where those group members are concerned. I do, however, recognise that the pursuer may wish to reconsider the extent to which the existing interim orders afford the protection he considers necessary for new claimants to join the group register. He may also wish to give further consideration to the proposal to advance the group proceedings through new group members in circumstances where I have now fixed evidential hearings in the interdict petitions. That proposal must necessarily remain unresolved in light of my decision to refuse receipt of the revised group register on the terms proposed. Finally, I am conscious that although, in his most recent written submission, senior counsel for the defenders explored a number of potential permutations arising from the disposal of the preliminary objection to the Kenyan proceedings (not all of which recognised the continuing existence of the interim interdict pronounced by Lord Braid), they must be to a degree speculative. The only apparent certainty is that there will be a further hearing in Kenya on 28 October 2022 where a decision of the first instance judge is anticipated.

[39] What I propose to do, therefore, is to sist the group proceedings for a short period of six weeks. The group proceedings will call by order on 11 November 2022 at the same time as the procedural hearings in the minutes for breach. Amongst other things, that will enable the court to receive an update on the position regarding the preliminary objection taken on behalf of the group members. I proceed on the basis that calling the case by order will avoid any embarrassment for the existing group members where the Kenyan orders are concerned.

[40] I turn, finally, to the pursuer's motion to extend by one year the time limit for claimants to join the group register. Strictly speaking, the motion has five separate parts, four of which relate to the procedure associated with the updating of the group register, and will logically require to be addressed before the group proceedings are formally sisted.

[41] Dealing first of all with the extension of time, it is useful to recall that the interlocutor of 16 February 2022, granting permission for the bringing of group proceedings stipulated that the period of time within which claims may be brought by persons in the group proceedings would end three months after the date of advertisement of the granting of permission in the United Kingdom press. On 17 June 2022, following the defenders' unsuccessful reclaiming motion, I extended the time limit by six months from that date. At that point there was no suggestion that matters would develop in the way that they have now done. On the contrary certain administrative orders were made (unopposed) in connection with the mechanics of lodging a revised group register.

[42] In opposing the pursuer's application for a further extension senior counsel for the defenders recognised that a balance required to be struck between principles of certainty (presumably about the number of claimants likely to participate in the group proceedings) and access to justice. No doubt that is correct. However, it is difficult to avoid the conclusion that the current lack of certainty stems largely from the decision taken by the

defenders – whatever may have been the motivation behind it – to raise anti-suit proceedings in Kenya at the time in the life of the group proceedings that they did. The progress of those proceedings has been rendered unpredictable by that decision alone.

[43] Chapter 26A offers little guidance about the period within which claimants ought to be added to a group register in group proceedings, beyond the provision made for later claims in rule 26A.16. It is a matter for the court's discretion. Given what has passed since the interlocutor of 17 June 2022 was pronounced, I am quite satisfied that I should accede to the pursuer's motion. Consequently, the period of one year will run from the date of the interlocutor to which this note has been appended. I am, however, prepared to add the qualification that the one year period shall expire if proof on the merits in the group proceedings is allowed prior to its expiry, subject always to the right of the court to allow a later claim under rule 26A.16.

[44] Parts (2), (3) and (4) of the pursuer's motion seeking the extension of time sought dispensation from the requirements of rule 26A.14 relating to the addition and/or removal of claimants from the group register in favour of a more practical highlighting in colour of new and departing claimants on the group register. These aspects of the motion were not addressed in detail at the hearings before me. However, the interlocutor of 17 June 2022, at paragraphs [3]-[5], has already addressed the same issues and I therefore refuse parts (2), (3) and (4) of the motion as unnecessary. Parts (5) and (6) are more problematic in as much as they seek to dispense with the requirements in rule 26A.15(3) and (5) for lodging and intimating, within a 21 day timescale, changes to the group register. Standing my decision in favour of a short sist of the group proceedings for the reasons already mentioned I consider that this part of the motion is probably better dealt with in the context of any application made meantime to recall the sist for the lodging of a revised group register.

Those parts of the motion I will refuse *in hoc statu*.