



PUBLIC PETITION NO.

PE01427

Name of petitioner

Robert Kirkwood on behalf of Leith Links Residents' Association (LLRA)

Petition title

Access to justice for non-corporate multi-party groups

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to implement the Scottish Civil Courts Review recommendations on multi-party actions by making changes to existing protocols that will (1) encourage the Rules Council to use rule of court 2.2 for multi-party actions; (2) modify court fees to a single payment; (3) encourage the Rules Council to introduce a protocol on recovery of documents; (4) clarify the common law right of nuisance, and (5) introduce compulsory insurance.

Action taken to resolve issues of concern before submitting the petition

The subject petition is associated with previous Petition PE1234 which called for the instigation of a class (multi-party) action procedure or similar in Scots Law. PE1234 was first presented in committee on 3rd March 2009 but was subsequently closed on 17th November 2009 following favourable recommendations published in the Civil Courts Review Report (Lord Gill) during the intervening period. LLRA agreed closure following advice from Shirley-Anne Somerville MSP, the main parliamentary supporter of the petition.

The subject of Court Fees was raised with Mr. MacAskill on 16th June 2010 with the result that he would discuss the matter with the Lord President at their next scheduled meeting. LLRA have not yet received a response.

Various meetings have also been held with Malcolm Chisholm MSP on all of the issues in this petition and a meeting will be held with the Shadow Minister for Environment and Climate Change on Wednesday 28th March 2012.

Our proposed petition was also the subject of an article by Ian Swanson in The Edinburgh Evening News (March 19th 2012).

LLRA has noted recent debates on the Aarhus Convention and, in particular, the raising of petition PE1372 by Friends of the Earth. Much of the thrust of this petition is similar to that of PE1372, particularly in the areas of affordability and access to potential evidence where this petition provides specific focus. This petition does not in itself request the Government to demonstrate compliance with the Aarhus Convention but notes that, on some criteria, the Government may be in breach thereof.

Petition background information

In general LLRA seek to establish common access to justice for multi-party claims, as a minimum on a par with that enjoyed in the rest of the UK. To that end LLRA wishes to propose a cheap and pragmatic approach, by legal or procedural means as best fitted, to each of the categories listed above. This will be developed in the following section.

The Scottish Ministers in their response to the Gill report (paragraphs 164-167) have subsequently agreed in principle that there should be a special multi-party procedure based on the proposals of the Scottish Law Commission. However, in view of the time required before such legislation can be introduced (and also taking into account that previous proposals were lost in the legislative wash-up before the last UK elections) this petition proposes changes to existing protocols that can give, within a relatively short period of time, true practical access to justice, for non-corporate multi-party groups seeking to pursue a legal claim against a corporate defendant. These proposals are furthermore consistent with The Scottish Ministers Response to the Scottish Civil Review (4.5) which makes the following point:-

‘The difficulty, of course, is that Scotland faces a period of unprecedented pressure on public finances, and it is clear that simply spending more money on a wider range of publicly funded services to improve access to justice is unaffordable and unsustainable. It will be necessary to prioritise, to co-ordinate expenditure more efficiently, and to be innovative in identifying opportunities to secure justice in new, cheaper ways.’

<http://www.scotland.gov.uk/Publications/2010/11/09114610/0>

This petition’s proposal to change existing protocols does exactly this. These protocols focus on the following issues:-

- Court Fees
- Recovery of Documents
- Common Law Right of Nuisance
- Insurance

As outlined above, LLRA have made several attempts to pursue litigation (which are no longer continuing) against a private company acting for a public utility supplier. In each case Scots Law or court procedure has denied public access to justice. This petition therefore urges the Scottish Parliament to take the following pragmatic action.

Multi-Party Actions

Rule of Court 2.2 allows the Lord President to direct that normal rules of procedure can be departed from in certain circumstances. Rule 2.2 could be used as a vehicle to progress multi-party actions pending the development of bespoke multi-party rules and any associated primary legislation should that be necessary. This petition requests the Government to encourage the Rules Council to use existing Rule 2.2 to allow non-prejudicial access to justice in multi-party actions.

Court Fees

A multi-party action in Scotland would require each individual claimant to pay an initial fee (currently £180) resulting, where say 500 residents are involved, in a total fee of £90,000. The size of the signet fee would make pursuance of the claim untenable. In England and Wales only one fee, in the region of £1500, is payable. Scottish Ministers are allowed to exempt or modify court fees by Section 2 of the Courts of Law Fees (Scotland) Act 1895. This petition encourages the Government, in the specific instance of a multi-party action, to exercise their existing power to modify court fees to a single payment at a level commensurate with the rest of the UK.

Recovery of Documents

In comparison with the situation in England and Wales the provisions for recovery of documents in Scotland are prejudicial to potential claimants primarily in that the associated protocol is not enforceable. In addition, in Scotland, there is no protocol for environmental issues.

Successful pursuance of a multi-party claim will, in all probability, rely on recovery of relevant documentation from the corporate defendant. Under Scots Law recovery of anticipated key documentation can only be enforced by taking court action against the

defendant but, paradoxically, pursuance of that very court action will depend on prior knowledge of the existence and content of the targeted document. A “catch 22” situation in favour of the corporate defendant therefore exists.

In the recent past, a similar action in England was successful having turned on the evidence provided by key documentation which the defendant was legally obliged to disclose.

This petition requests the Government to encourage the Rules Council to introduce an enforceable pre-action protocol in which are listed the types of document that should be made available by the holder. In this way the legal advisors of the potential claimants could advise their clients whether the documentation supported litigation, thus avoiding subsequent frivolous court action. In the event of refusal of the holder to supply the documents compliance with the protocol could be enforced by an Order of Court.

It may be noted that, as a result of recent experience, the Association of Personal Injury Lawyers (APIL) has been asked to re-consider its previous stance against enforcement of disclosure.

It should also be noted that pre-action protocols, albeit voluntary, currently exist in Scotland for disease claims, personal injury and professional negligence. It should be a relatively simple matter to draft a similar protocol for environmental issues. This petition requests the Government to encourage the Rules Council to introduce a pre-action protocol for environmental issues.

Common Law Right of Nuisance

The Waste Management Licensing (Water Environment) (Scotland) Regulations 2006 statute was introduced to govern the operation and maintenance of sewage management. It is not clear whether or not this regime has removed the common law right of nuisance in Scotland. In the case of *Marcic vs Thames Water* in England a landmark decision was ultimately made when the House of Lords ruled that, as the public utility company was legally required to operate under statutory provisions, control and procedure, the common law right of nuisance had been removed and replaced by a new statutory regime. As the 2006 statute is silent on the matter this petition requests the Government to state categorically whether or not the introduction of the statutory regime has or has not removed the common law right of nuisance.

Insurance

Corporate liability insurance is compulsory for personal accident but not for environmental claims, even though the risks are similar. Public utility companies therefore risk having to meet validated environmental claims from their own funds. Where the value of the claim threatens the company’s expected trading capability, the company may be tempted to take action such as asset stripping in order to reduce the enforceable forfeit. This petition encourages the Government to introduce a law of compulsory environmental (e.g. sewage, land fill, open cast) insurance to ensure that there are sufficient funds to restore the environment to its original form. This would have the added advantage of removing risk provision premiums from the public purse.

Unique web address

<http://www.scottish.parliament.uk/GettingInvolved/Petitions/PE01427>

Related information for petition

Do you wish your petition to be hosted on the Parliament's website to collect signatures online?

NO

How many signatures have you collected so far?

1

Closing date for collecting signatures online

N/A

Comments to stimulate online discussion