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Briefing for the Public Petitions Committee

Petition Number: PE1427

Main Petitioner: Robert Kirkwood on behalf of Leith Links Residents' Association

Subject: Access to justice for non-corporate multi-party groups

Calls on the 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 of nuisance; and (5) introduce compulsory environmental insurance.

Background

Leith Links Residents' Association (LLRA) has, for a number of years, campaigned against the unpleasant smells released by Seafield Sewage Treatment Works. This has included attempting to take legal action against the owners (Scottish Water) and operators of the plant. In doing so, LLRA has experienced various procedural difficulties in raising a court action on behalf of numerous residents. This led the association to raise a previous petition (PE1234, see below) calling for the introduction of a class/multi-party action court procedure in Scotland. The current petition deals with ongoing issues in relation to raising multi-party actions in Scotland.

The term "multi-party action" can be used to describe a court action where a number of people have the same or similar rights. There are several different types of multi-party action. The most relevant for the current petition is an action where one (or several) pursuers are appointed as typical cases to pursue a court action reflecting the interests of a wider group of people. It is not currently possible to raise a multi-party action in the Scottish courts.

1) Use of Rule 2.2 for Multi-party Actions

The Scottish Government set up the Scottish Civil Courts Review in 2007, under the auspices of Lord Gill, with a remit to improve the efficiency and effectiveness of the civil courts. Its final report (2009) made recommendations for the introduction of a procedure for dealing with multi-party actions in the Scottish courts. In response, the Scottish Government has, broadly, accepted

the recommendations. It states[1] that those relating to multi-party actions will require primary legislation.

In the meantime, LLRA propose that Rule 2.2 of the Rules of the Court of Session could be used to allow multi-party actions to be raised until a bespoke procedure is in place. Rule 2.2 states:

> "2.2. (1) Subparagraph (2) applies where, for any reason, the Lord President is of the opinion that an aspect of the procedure which would otherwise apply to particular proceedings, or proceedings of a particular description, is unsuitable for the efficient disposal of those proceedings.
>
> (2) The Lord President may direct that that aspect of the procedure is not to apply in respect of those proceedings and that such other procedure as he directs is to apply instead.
>
> (3) Before making such a direction the Lord President must consult—
> (a) in the case of particular proceedings, the parties;
> (b) in the case of proceedings of a particular description, the parties of any proceedings falling within the description which have already been raised."

The Lord President is the head of the judiciary in Scotland. In principle, Rule 2.2 could allow for new procedures to be introduced which support multi-party actions. However, in practice, this would very much depend on the willingness of the judiciary to develop what may be complex procedures in advance of Scottish Government action in the same area.

The petitioners suggest that the Court of Session Rules Council (responsible for drafting procedural rules for the conduct of Court of Session business) could use Rule 2.2 to develop procedures for multi-party actions. However, Rule 2.2 gives the power to vary current court rules to the Lord President, as described above. The Court of Session Rules Council could, separately, draft rules in relation to multi-party actions, but these would take time to develop and would not affect cases currently being considered by the court. In addition, the Court of Session Rules Council may also not want to act in advance of Scottish Government proposals in this area.

2) Modify court fees so only a single payment is required

The fee for initiating court action in the Court of Session is currently £180 (although other fees are likely to be required depending on the course the case takes). According to LLRA, this means that, if 500 residents participate in an action, each would be required to pay the initial £180 fee.

The Court of Session etc. Fees Order 1997 (SI no. 688) lays down the fees which must be paid in relation to different stages of court action. Where a

[1] Scottish Government Response to the Report and Recommendations of the Scottish Civil Justice Review. (2010) Paragraph 166.

number of people participate in the same action (i.e. they present one case to the court, which is taken forward by one solicitor), they only pay one set of court fees. If a number of people initiate court actions separately on similar issues (and each presents a slightly different case), then each individual would have to pay court fees related to their case.

It is unclear how these rules may impact in practice on LLRA. It appears that it is not possible for them to take the matter forward as one action (as, in this situation, they would not need to utilise a multi-party action procedure). Therefore, under the current rules, it is possible that separate fees would be required.

The petitioners suggest that Scottish Ministers use their powers under the Court of Law Fees (Scotland) Act 1895 to modify court fees in the case of multi-party actions so that only one fee is payable. Such a power is exercised by order, subject to annulment by the Scottish Parliament and is the usual way of altering or updating court fees.

The issue of court fees in relation to multi-party actions is not discussed specifically in either the Gill Review or a 1996 Scottish Law Commission paper dealing with multi-party actions (discussed below). However, it is likely that the intention is that only one court fee would be payable – although this may be at an increased rate to reflect the complexity of multi-party procedures.

3) Encourage the Rules Council to introduce a protocol on recovery of documents

Recovery of documents refers to the process by which a party to a court action in Scotland can require the other party (or a third party) to produce documents relevant to the case. The scope for recovering documents in Scotland is limited in comparison to the situation in England.

In Scotland, only documents specifically relevant to a case as stated to the court can be recovered. Recovery requires a court order, and the court has the discretion to refuse to grant it. The usual stage at which a request for recovery is made is after the case the parties intend to make to the court has been finalised. It is possible to recover documents in advance of this stage[2], with a view to making a party's case more specific. However, as a leading textbook on the law of evidence states[3]:

> "It has been said that a party must first have set forth a case in general terms and not be merely trying to discover whether he or she has a case."

[2] Special court rules for commercial actions set out different requirements in relation to the recovery of documents. In addition, it is possible, under the Administration of Justice (Scotland) Act 1972, to require the recovery of documents in advance of any court proceedings being initiated. However, the courts use this power narrowly in practice.
[3] Walker and Walker: The Law of Evidence. Third Edition. (2009) Paragraph 21.5.2.

In England, the process of “disclosure” requires that any party to a court action list and make available for inspection any documents on which their case relies; which adversely affect their case; which adversely affect another party’s case; or which support another party’s case. Disclosure generally takes place after an initial case has been made to the court. However, it is possible for disclosure to take place earlier than this. Parties have an obligation to conduct a reasonable search for documents, given the nature and complexity of the case. The court can also require specific disclosure of certain documents or classes of documents.

Lord Gill considered the issue of disclosure in his civil courts review (chapter 9, paragraphs 18 to 38). He accepted that existing Scottish procedure did not encourage early settlement of a case. He also highlighted that the English system can be costly and cumbersome. He therefore recommended that wider and earlier disclosure should be possible: however, this would be under the control and at the discretion of the judge (who, under the general reforms proposed by Lord Gill would take a much more active role in managing a case’s progress).

‘Pre-action protocols’ are used in England to set out what steps parties should have taken before coming to court. They are intended to encourage parties to resolve their disputes without involving the courts, where this is possible. Most include only general references to a requirement to disclose documents. A notable exception is the pre-action protocol in relation to personal injury claims, which details a number of categories of documents which should be disclosed to the parties, depending on the context of the incident. There is, at present, no pre-action protocol for environmental claims in England.

Pre-action protocols also exist in Scotland. However, they take the form of voluntary agreements between the Law Society of Scotland and the Forum of Scottish Claims Managers (with the exception of a pre-action protocol for commercial actions in the Court of Session, which is part of formal court procedure and is mandatory).

The Gill Review considered the issue of pre-action protocols (chapter 8, paragraphs 2 to 53). It recommended greater use of compulsory, subject-specific pre-action protocols, which should be developed by a Scottish Civil Justice Council (which, the review recommends, should replace the current Court of Session and Sheriff Court Rules Councils).

4) Clarify the common law of nuisance

The law of nuisance places certain restrictions on what landowners/occupiers may do on their land. The law generally recognises that a landowner or tenant has the right to the free and absolute use of his property, but only to the extent that such use does not disturb his neighbour’s comfortable enjoyment of their land. The law of nuisance therefore requires that a fair balance is struck between the competing rights of neighbours. In Scotland, it is generally held that, for a nuisance to be created, some sort of fault is required on the part of the neighbour, whether it be deliberate, negligent or reckless conduct.

The petitioner is concerned that the effect of the court's decision in the case of Marcic v. Thames Water Utilities Ltd. [2003] UKHL 66 is that, where a public utility is required to operate under a specific statutory regime, the possibility of raising an action based on common law nuisance is removed. The petition calls for a statement from the Scottish Government on the effect of Scotland's statutory regime governing sewage on any common law action in nuisance.

Marcic is an English case. There are many similarities between the law of nuisance in Scotland and England, but there are also important differences. For example, fault on the part of the neighbour is not required in England: indeed, no fault by Thames Water was alleged in the Marcic case. In addition, functions in relation to water and sewerage management are devolved to the Scottish Parliament and a very different statutory regime is in place. It is therefore not clear how influential the decision in the Marcic case would be in determining whether a common law action of nuisance exists in particular circumstances in Scotland.

(5) Introduce compulsory pollution liability insurance

The petitioner is concerned that, where a multi-party action in relation to environmental damage has been successful, a business may not have sufficient resources to meet the claim. In addition, the business's owners may be tempted to asset-strip in order to minimise the resources from which damages can be paid. The petition calls for compulsory environmental damage/pollution liability insurance to be introduced for businesses working in high risk areas such as sewage.

It is currently a requirement, under the Employers' Liability (Compulsory Insurance) Act 1969, for organisations with employees to have employers' liability insurance to cover injuries and illness caused by an employer's negligence. Many organisations also choose to have public liability insurance to protect them in the case of injury to the person or property of a member of the public. It is common for public liability insurance policies to include coverage for pollution liability in certain circumstances. Bespoke policies which provide more extensive cover against environmental damage are also available commercially.

It is not clear that introducing such a requirement would be within the devolved competency of the Scottish Parliament. The regulation of any entity set up to run a business is a reserved issue (under schedule 5, head C1 of the Scotland Act 1998), as is insurance (schedule 5, head A3).

Scottish Government Action

The Scottish Government commissioned the Scottish Civil Justice Review, headed by Lord Gill, which reported in 2009. It made several recommendations which impact on the subject matter of the petition. These are discussed in more detail under the relevant headings above. The Scottish Government has agreed, broadly, to implement the review's recommendations ("Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review" 2010).

In its publication "Renewing Scotland: The Government's Programme for Scotland 2011-12" (2011), the Scottish Government committed itself to implementing the Gill Review in the longer term. It is likely that a number of proposals will not be brought forward until at least the second half of this parliamentary session.

Legislation creating a Scottish Civil Justice Council is expected to be introduced to the Scottish Parliament imminently. The precise role of the Council will not become clear until the Bill is before the Scottish Parliament. However, in a consultation on the subject (2011), the Scottish Government proposed that it would be responsible for implementing the aspects of the Gill Review that can be taken forward as court rules. This is likely to include pre-action protocols as well as some aspects of a multi-party action procedure.

In addition, the Scottish Law Commission produced a report on "Multi-party Actions" in 1996. This considered various policy options and included, as an annex, draft rules of court which could be used to implement its recommendations.

Scottish Parliament Action

The Scottish Parliament's Petitions Committee considered a previous petition from LLRA (PE1234) calling for a multi-party action procedure to be introduced in the Scottish courts. The petition was closed on the basis that the Gill Review had brought forward recommendations on the issue.

The Scottish Parliament's Justice Committee looked at implementation of the Gill Review as part of its scrutiny of the 2012-13 Draft Budget on 1 November 2011 (see cols 395 and 248). In addition, Question SW4-00777 from John Lamont MSP (answered 24 June 2011) asked about the Scottish Government's implementation plans for the Gill Review.

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