

The Rt Hon Lord Hamilton



**The Lord President**  
Parliament House  
Edinburgh EH1 1RQ

29<sup>th</sup> May 2012

Stuart Todd Esq  
Assistant Clerk to the Public Petitions Committee  
Scottish Parliament  
T3.40  
Edinburgh EH99 1SP

*Dear Mr Todd*

### **CONSIDERATION OF PETITION PE 1427**

Thank you for your letter of 3 May 2012. This asks me, as Lord President, and the Court of Session Rules Council to provide responses to a number of calls made on behalf of Leith Links Residents' Association regarding the implementation of recommendations relating to multi-party actions in the Scottish Civil Courts Review Report.

I should point out at the outset that I am the Chairman of the Court of Session Rules Council ("the Rules Council"). The comments set out below reflect both my position and that of the Rules Council.

I note that the petition calls on the Scottish Parliament to urge the Scottish Government to take certain specified measures. Part of those proposed measures is that the Scottish Government should make changes to existing protocols that will “encourage the Rules Council to use rule 2.2 (of the Rules of the Court of Session) for multi-party actions” and to “encourage the Rules Council to introduce a protocol on recovery of documents” and “introduce a pre-action protocol for environmental issues”. This response focuses on those three calls in the petition.

The petition was considered by the Rules Council at its most recent meeting on 14 May 2012. I attach an extract from the draft minutes of the meeting. You will see that a number of observations were made at the meeting.

*Call to “encourage the Rules Council to use rule 2.2 (of the Rules of the Court of Session) for multi-party actions”*

It may be helpful if I explain some of the background to the introduction to rule 2.2 of the Court of Session Rules. In 2010, the Court required to deal with over 400 cases brought as personal injuries actions under Chapter 43 of the Rules in respect of the drugs viox and celebrex. Neither personal injuries procedure nor ordinary procedure was considered to be entirely appropriate in relation to such cases. Accordingly, there was a need to develop a special procedure to facilitate the case management of these cases. Rather than prescribe a bespoke procedure on the face of the Rules, it was agreed that a rule of general application should be introduced, in order to provide flexibility for different types of cases.

The rule was therefore introduced to facilitate the case management of particular categories of cases which were already before the Court.

The rule provides that the Lord President may make a direction where he is satisfied that an aspect of the procedure that would otherwise apply is unsuitable for the efficient disposal of those proceedings. In those circumstances, a direction may be made that that aspect of the procedure is not to apply and that such other procedure as the Lord President directs is to apply instead. To date, I have made only one direction under rule 2.2; Direction No. 2 of 2010, in relation to the actions of damages relating to the drugs viox or celebrex.

When the petition was considered by the Rules Council at its most recent meeting on 14 May 2012, some observations were made about the limits of the scope of rule 2.2. In particular, some doubts were expressed as to whether a direction could be made under the rule in relation to the initiation of a single group action, rather than simply providing a mechanism by which existing court proceedings could be case-managed. I share those doubts.

There is the further difficulty that the use of rule 2.2 does not affect court fees. If a direction were to be made under rule 2.2 and the Scottish Ministers wished to reduce their court fees in respect of such a procedure, they might need to make subordinate legislation to allow the charging of reduced fees for the signetting of actions which proceed under that procedure.

In any case, the introduction of a single set of procedural rules might not necessarily suit all types of action; for example, what is appropriate in relation to a claim for a common accident or disaster may not be appropriate in relation to an environmental nuisance claim. The adoption of a generic multi-party procedure will require careful consideration, which will be influenced

by factors which extend beyond the exigencies of one dispute, or even one type of dispute.

Ultimately it will be a matter for the Scottish Government and the Scottish Parliament to determine the content of any legislation on this matter. I am also very mindful of the fact that the recommendations on multi-party action procedure in the Scottish Civil Courts Review Report are very closely related to the recommendations on how such actions are to be funded. I would have thought that the Scottish Government's position on that matter is likely to be influenced by the recommendations of Sheriff Principal Taylor's Review of Expenses and Funding in Litigation. In my view, these are matters for primary legislation.

*Calls to "encourage the Rules Council to introduce a protocol on recovery of documents" and to "introduce a pre-action protocol for environmental issues"*

In relation to the proposed introduction of pre-action protocols, you will note from the minutes that there was some discussion at the Rules Council meeting on 14 May about the extent to which the Court has a remit under current legislative provisions to issue "mandatory" pre-action protocols. Certainly, the Civil Courts Review Report recommended that the court *should have the power* to make orders in relation to expenses and interest for non-compliance with pre-action protocols. That tends to suggest that the Court does not currently have such a power and that legislative provision would be required in order to confer the power upon it.

Provision is made in section 1 of the Administration of Justice (Scotland) 1972 to enable the recovery of documents prior to court proceedings being raised. It is not clear to me from the terms of the petition in what respect the existing

statutory provisions are considered to be deficient, or indeed how guidance contained in any pre-action protocol would enhance those operation of those statutory provisions. I am also not clear which particular matters the petitioner would wish to be referred to in any pre-action protocol on environmental issues.

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES  
COUNCIL  
PARLIAMENT HOUSE, MONDAY 14TH MAY 2012**

**Members present:** Lord President (Hamilton)  
Gerry Moynihan QC  
Nicholas Ellis QC  
Robert Milligan QC  
Graeme Hawkes, Advocate  
Gavin MacColl, Advocate  
Robin Macpherson, Solicitor  
Duncan Murray, Solicitor

**In attendance:** Lord Hodge  
Gillian Prentice, Deputy Principal Clerk of Session  
Robert Sandeman, SG Justice Directorate (for Colin McKay)

**Secretariat:** Kathryn MacGregor, Legal Secretary to the Lord President  
David Smith, Deputy Legal Secretary to the Lord President

**Apologies:** Lord Justice Clerk (Gill)  
Lady Dorrian  
Gordon Keyden, Solicitor  
Syd Smith, Solicitor  
Fred Tyler, Solicitor  
Colin McKay, SG Justice Directorate  
Graeme Marwick, Principal Clerk of Session

**Item 14: Any other business**

14.1 The Council considered correspondence received from the Public Petitions Committee at the Scottish Parliament regarding a public petition received on behalf of Leith Links Residents' Association. The petition called upon the Scottish Government to encourage the Rules Council to (i) use rule 2.2 to allow multi-party actions, as a temporary measure before legislation is made to implement the recommendations made on that topic in the Civil Courts Review Report, and (ii) introduce a pre-action protocol on the recovery of documents in multi-party actions.

14.2 Some doubts were expressed as to whether a direction made under rule 2.2 could apply to the initiation of a single group action, rather than

simply providing a mechanism by which existing court proceedings could be case-managed.

14.3 In relation to pre-action protocols, there was some discussion about the extent of any responsibility that the Court or the Lord President has for the efficient disposal of disputes generally (beyond the Lord President's statutory responsibility for the efficient disposal of the business of the Scottish courts). The remit of the Lord President or the Court to introduce pre-action protocols was considered to be subject to limitations at present. The Council also noted that provision was already made in section 1 of the Administration of Justice (Scotland) Act 1972 for the recovery of documents prior to an action being raised.

14.4 Nicholas Ellis QC suggested that the recommendations made in the Report of the Civil Courts Review were focused on class actions. Lord Hodge indicated that the purpose behind rule 2.2 had been to avoid a "one size fits all" approach to case management. Lord Hodge suggested that, in responding to the Committee, the Court could point to a number of measures or current developments within its remit which would facilitate multi-party actions pending the preparation of primary legislation on multi-party actions. Those were matters which could be dealt with by way of rules of court, practice notes or directions. Lord Hodge also emphasised that in any multi-party procedure there would still be a need for the Court to recover a proportionate amount of the costs of such actions. If rule 2.2 were used to assist the Leith Links Residents' Association and the Scottish Ministers wished to reduce their court fees, they might need to make subordinate legislation to allow the charging of reduced fees for the signetting of actions which are to proceed under that rule. It was agreed that a response should be sent by the Council to the Public Petitions Committee, reflecting the comments made at today's meeting.

14.5 Robert Sandeman provided an update as to where provisions about multi-party actions currently stood in the Scottish Government's planned legislative timetable for implementing recommendations of the Civil Courts Review Report. It remains the Scottish Government's intention to put forward legislation to enable multi-party actions. It is currently estimated that provisions on this matter would be brought forward around 2015 or 2016. It too would require to respond to the Committee in due course.

- **Judicial Office to prepare a draft response to the Public Petitions Committee on behalf of the Council.**