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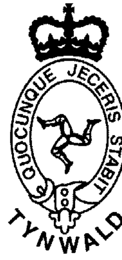

TYNWALD COURT
OFFICIAL REPORT

RECORTYS OIKOIL
QUAIYL TINVAAL

PROCEEDINGS

DAALTYN

(HANSARD)

SELECT COMMITTEE ON THE PETITION FOR REDRESS OF GRIEVANCE OF DONALD WHITTAKER

BING ER-LHEH MYCHIONE YN AGHIN SON LHIASAGHEY ACCAN DONALD WHITTAKER

Douglas, Monday, 2nd March 2009

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Members Present:

Chairman: The Speaker of the House of Keys (Hon. S C Rodan)
Mr D Callister, MLC
Hon. D C Cretney, MHK

Clerk:
Mr J King, Deputy Clerk of Tynwald

Business transacted

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The Committee adjourned at 12.17 p.m.

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Tynwald Select Committee on the Petition for Redress of Grievance of Donald Whittaker

The Committee sat in public at 10.30 a.m. in the Millennium Room, Legislative Buildings, Douglas

[MR SPEAKER *in the Chair*]

Procedural

The Chairman (The Speaker of the House of Keys, the Hon. S C Rodan): Good morning, everyone. I would like to welcome you all to this sitting of the Select Committee of Tynwald on the Petition for Redress of Grievance of Donald Whittaker.

This Committee was established by Tynwald on 23rd October last. The motion establishing the Committee was, I quote:

> 'That Tynwald appoints a Committee of three Members with powers to take written and oral evidence pursuant to sections 3 and 4 of the Tynwald Proceedings Act 1876 as amended, to investigate and report with recommendations on the Prayer of the Petitioner in the Petition for Redress of Grievance of Donald Whittaker presented on Tynwald Hill on 7th July 2008.'

At this point, I would like to introduce the members of the Committee. I am Steve Rodan. I am Chairman of the Committee, and my fellow members are, on my left, Mr David Callister MLC and the Hon. David Cretney MHK; on my right, our Clerk to the Committee, Jonathan King; and our *Hansard* clerk, who is recording the proceedings this morning, Mr Clive Alford.

At this point, if I could ask everyone, please, to make sure mobile phones are switched off.

Today we turn to the other side of the discussion and we have the opportunity, as a Committee, to put some points raised by Mr Whittaker to witnesses who have professional involvement in the legal system. So, at this point, I would like to invite Mr Seth Caine from the Isle of Man Law Society to come forward.

EVIDENCE OF MR S CAINE

The Chairman: Good morning, Mr Caine.

Mr Caine: Good morning.

The Chairman: Thank you very much. I am most grateful to you for coming to the Committee this morning and I am grateful, also, for the written submission you sent us in November, which has been very helpful.

Mr Caine: My pleasure.

The Chairman: So, Mr Caine, you represent the Isle of Man Law Society. Could you, perhaps, just by way of introduction, say what your role is in the Law Society.

Mr Caine: Yes. I am a member of the Council of the Law Society. I have been a member of the Council for five years.

In my private practice, I specialise in litigation. I have quite a lot of experience in dealing with Petitions of Doleance and, so, Sharon Roberts, the then President of the Law Society, asked if I would speak on behalf of the Law Society to your Committee.

The Chairman: That is lovely. We have some questions we would like to put to you, but did you have any opening remarks, of a general nature, you wish to make on the subject of the Petition or our investigation, as a Select Committee?

Mr Caine: Yes. I listened to your opening remarks with interest and I realise that costs are, perhaps, an issue that the Committee will be looking at quite carefully. Perhaps I could just make some general remarks about that.

Petitions of Doleance, as I have set out in my note, are nearly always brought against a public authority. It might be a local authority; it might be a Minister exercising a power under the planning provisions; it might be a Government Department. The most common order sought is a quashing order, whereby a decision of a local authority, a Department or a Minister, is quashed because they have failed to follow, usually, the procedure laid down by Tynwald.

The courts do not look at the merits of the decision; they simply look at the merits of the decision-making process to ensure that the rules and regulations and the rules of natural justice have been complied with. As a result, the normal respondent to a Petition of Doleance is the Government Department, the local authority or the Minister, and it is worth, I think, differentiating between a respondent and a noticed party.

A respondent to a Petition of Doleance is usually the person whose decision is being challenged and they are rather akin to a defendant in a civil action brought by a plaintiff. The court will then allow notice to be given to other interested parties, so they become noticed parties and they can take part in the proceedings and in the hearing. But usually, the main defence to the Doleance Petition is put forward on behalf of the Government Department or the local authority, normally by the Government Advocate, Steven Harding, who is here today, or by Oliver Helfrich from the Attorney General's Chambers.

The court is usually astute to ensure that there is no duplication of submissions to it. So, whilst it will allow noticed parties to make submissions, it will say, 'we do not want you to repeat what has been said on behalf of the Department.' That is partly to save costs and partly to save court time.

So, normally, a noticed party may have an advocate present, but they will limit themselves to making points to the court that are discreet or unique to the noticed party. They will not reinvent the wheel and put forward all the arguments put forward on behalf of the Department.

For that reason, the costs incurred by a noticed party in a normal petition should not be substantial, because all they are doing is dealing with any mop-up points that are not caught by the Department or the local authority.

I noticed that in the Petition of Grievance itself, of Mr Whittaker, he stated that only a third of costs are recovered. I disagree with that. In 2001, Order 48 of the Rules of Court

was amended. We now have, in my opinion, a very effective costs recovery procedure. The court has an absolute discretion in relation to costs, but Order 48 states that costs are normally awarded in favour of the winning party unless there are good reasons not to.

In my experience, in the last few years, adverse costs, if your client obtains an adverse costs order against another party, you should recover 70 to 80 per cent of your costs. If costs are awarded on the standard basis. The courts have a very good costs assessor. It is done mainly by Paul Coppell, the Deputy Chief Registrar. He is very good; he is very efficient; he is very quick. The court also has the power to order costs on an indemnity basis which is a slightly higher level. In those cases you would expect to recover costs of 80 to 90 per cent of your expended costs.

So, an advocate who has obtained a costs order on behalf of his client will prepare what is usually called a draft assessed bill, setting out all the work he has done; all the time he has incurred; all the costs. He will submit that to the costs assessor at the General Registry who will go through it and allow a figure. There is a quite a good system in that the costs of the assessment are ten per cent of the amount allowed. The usual costs order made by the court is that costs will be paid in a sum to be assessed in default of agreement.

So, an advocate would normally have their costs assessed in house, come to a figure, write to the other side and say, 'these are our costs.' If they agree, they are paid. If they are not, they go to assessment. If that figure or greater is achieved on assessment, then the other party pays the ten per cent. If that figure is not achieved on assessment, the assessor allows a lower figure and you pay the ten per cent. So there is, in my submission, quite an effective costs mechanism now in place in the Island and there has been for the last few years.

Apart from that, I think that is all I have to say on costs.

The Chairman: Okay. Thank you.

So, when Mr Whittaker makes his claim that the system currently favours those with deep pockets, what do you understand him to mean when he says that, given that there is a system in place for recovery of costs, if the case is successful, of course?

Mr Caine: I am not clear exactly what Mr Whittaker is referring to. If we look at the decision in the case of the Petition of Doleance brought by J G Kelly Limited in relation to the proposed Crossag Farm development – which I know BADRA was involved in and Malew Parish Commissioners – the petitioner lost that case. The respondent to that case was the Council of Minister who were represented by Mr Helfrich and they won.

So, the large burden of costs would be borne by the Council of Ministers because they did the bulk of the work in defending the Petition. Then Malew Parish Commissioners and the independent third parties, as they were called, raised points that had not been dealt with by the Council of Ministers. At the end of the hearing, acting Deemster Sullivan granted all parties, including the independent third parties and Malew Parish Commissioners their costs on the standard basis.

So, they should be in a position now, or their advocate should be in a position, to prepare a draft tax bill, a draft assessed bill, submit it and recover, I would hope, a substantial portion of their costs.

The Chairman: So, ultimately, who paid the legal costs for all the parties?

Mr Caine: They would be paid by… The legal parties would have paid going forward and they will have received bills, I anticipate, on a regular basis: monthly or two monthly. But, they should now be able to recover those from J G Kelly under the costs order granted by acting Deemster Sullivan.

The Chairman: Right. So, any third party who did this – I am not looking at this particular case – but a residents' association which is obliged, because of the actions of other parties, to engage in a legal process such as a Petition of Doleance in order to safeguard the interest of their members or the public interest, they incur legal costs on a forward basis with legal fees and paying up front to lawyers.

This is a process… they may well feel obliged to go down this particular path as a noticed party or as an interested party. Outcome is not guaranteed. What would happen if, at the end of the day, the case went against them and the subject of the petitioning party, the party that took the action, was successful? The costs would be awarded against the respondents in that case. Where would that leave this association?

Mr Caine: Well, in a Petition of Doleance, if the petitioner won, then they would seek a costs order. You cannot get your costs twice. So, they would be seeking to recover their costs, usually from the local government or the Government Department or the Minister, who is usually indemnified. Any remaining costs would be against a third party or a residents' association. So, the bulk of the costs, I anticipate, would be paid by the respondent, being the Government Department or the local authority and the remaining costs, which I would hope would not be substantial, would be paid by the residents' association.

Usually, at the very start of a case, the Deemster will give directions and he will say, in order to control costs, the bulk of the argument will be put forward by the respondent. Interested parties can attend; they can keep a watching brief; they can instruct an advocate, but he will not be allowed to duplicate the arguments, to say everything twice. That works back in relation to the costs. They will say, 'well, 90 per cent of the work that we incurred should be paid by the Department or the local authority, with the balance being paid by the interested parties.'

The Chairman: Can you see the point that a residents' association, faced with an unfavourable outcome in an action where they feel they have no option but to attend to protect the interests of their community, are faced not only with their own legal costs, to whatever degree they want to engage legal representation, but the costs of the petitioner, potentially? Their complaint is, this could break us and we are at a substantial disadvantage. Unlike the petitioner – a developer, possibly – we do not have deep pockets. Therefore, we start considerably disadvantaged, a hand behind our back, and really we may feel we have no option but to let it go. The potential in costs is too much.

Mr Caine: Yes, I say two things, I think, to that.

Firstly, if a Petition of Doleance is brought by a petitioner against the decision of a local authority, say, or a Minister, and a local residents' association wants to take part, initially

they will take some advice and that advice might be that this Petition is wholly misconceived and there is a good defence to it and you may want to run part of that defence.

The majority would be done by the Government Department. If you win, you should get your costs back. If the advice is, 'well, actually, there has been a mistake here. The rules have not been followed. We think it is very likely that the court will quash this and you have not got much of a defence.' Then they may want to take a view, we are not going to take part in this, because we are probably going to lose and we are probably going to get an adverse costs order.

It is in the same way that any client who comes to see me might say, 'I am being sued' and I will say, 'frankly, I think you are banged to rights. You have not really got a defence. You had better settle.' Or 'I can see there is no point there in running up a lot of costs defending this: you cannot succeed.'

Of course, all that would happen is the decision in a typical Doleance Petition would go back for reconsideration. So, they are not that prejudiced. All that will happen is that the decision maker will have to reconsider his decision and comply with whatever rules or regulations the court has found he has breached.

The Chairman: So, you are saying, ultimately, they will take advice on the likelihood of success; whether they were responding or, indeed, if they were the petitioner themselves.

Mr Caine: Yes. People quite often come along and say, 'I want to apply to quash the decision of this or that.'

I can give an example. I belong to the Derby Square Residents' Association and we challenged a planning application. The inspector said it should be granted. The Minister followed the inspector's recommendation. We looked at it very carefully and concluded that he had done it by the book and there were no grounds to challenge it, so we did not.

The Chairman: The grounds for challenge that you looked at, were they to do with the legal process itself and potential flaws in that?

Mr Caine: Yes, because the court will not interfere with the merits of the decision. It will only look at the decision-making process. In that case, we felt the Minister had done it by the book.

The Chairman: So, supposing it had been, just for the sake of argument, a 50/50 chance of success. That was the legal advice you were receiving and a residents' association which did not have a lot of funds. They would, ultimately, not engage at all, they would just drop the whole thing, potentially?

Mr Caine: They would have to make a decision and they would have to… I would hope that any lawyer would say, 'there is a big litigation risk here.' That is what lawyers talk about. That you are by no means certain of winning and if you lose you may get an adverse costs order against you.

In reality, in my experience, Doleance Petitions are rarely 50/50. It is usually pretty black and white. Either someone has followed the rules or they have not. But, 50/50, the local residents' association would have to take a view and they might have to say, 'you are right. There is a serious risk of losing. We cannot afford that'

The Chairman: So, are you saying, in the majority of cases, it will be clear from the outset the relative chances of success and that would inform the judgement of the residents' association as to whether to take part?

Mr Caine: Yes. If it is a good chance of success, then I would anticipate they would go forward and hope to recover their costs. With a poor chance of success, then they would not.

The Chairman: Thank you. Can I ask my colleagues. Mr Callister.

Mr Callister: Thank you.

Mr Caine, how valuable do you believe this process to be?

Mr Caine: Very valuable. I think it is crucial. It is regarded and described often as a unique Manx remedy. It is the equivalent to English judicial review. It incorporates matters such as *certiorari* quashing *mandamus*. Also *habeas corpus* which, in England, goes back to Magna Carta. It is a real check and a balance upon Government; just to make sure that any person in authority – it could be Government, it could be local authority, it could be a civil servant exercising a power – complies with the rules and regulations that are laid down and complies with the rules of natural justice. I think in any mature, democratic society you need these sorts of checks and balances and all societies have them.

Mr Callister: Has there been a noticeable growth in the number of Petitions of Doleance taken against Government or local authorities in recent years?

Mr Caine: I could not answer that. I think, possibly, the Government Advocate can answer that more, because he will defend most of them.

I have probably seen more brought, but most of them have been successful and one can read into that either that decision makers are getting careless or that rules and regulations are becoming more complex. We are getting a lot more regulation. There is more for people to fall foul of and, usually, the courts say that they are not criticising the decision maker. There is never bad faith; it is never impugned. It is usually somebody has just made a mistake, but it is right that somebody who may be seriously affected by that mistake should have the right to go to court and get the decision quashed so the rules are complied with.

Mr Callister: Where a challenge is not upheld, then, is there an average cost, you could suggest that might apply?

Mr Caine: It would depend. I have done two where I acted for the respondents. In one my costs were £5,000. In one they were £8,000. It depends. It might be a lot more than that, if there are some very complex issues of law or evidence.

Mr Callister: The system is, then, that the Petition of Doleance cannot reverse any Government, local authority decision. Can they make recommendations?

Mr Caine: They cannot make recommendations as to the decision. They would simply make a recommendation as to

the decision making process. So, they might say, 'you did not take into account this requirement; you put too much weight on this and you should have given this person the opportunity to be heard as a matter of natural justice. So, we would like you to reconsider the decision in the light of that guidance.' But, they certainly will not go into the merits of the decision. The courts are very aware of that and very careful not to stray into policy or into issues that are for the decision maker.

Mr Callister: So, this particular Petition of Mr Whittaker, then. Do you think it has real substance?

Mr Caine: With respect to Mr Whittaker, no I do not and I do say that with respect to him. I think if one looks, for example, at the J G Kelly Petition, if we talk… I do not know whether Mr Whittaker was one of the independent third parties, but the independent third parties in that were represented by Lawrence Keenan Advocates. That is a matter of public record.

The main defence in that case – I acted in that case and acted for the Department of Local Government – was put forward by the Council of Ministers. My role, really, was just to mop up anything that had not been covered by the counsel for the Council of Ministers, so we were not hugely involved in the case. The third parties also addressed the court, really, in relation to issues that had not been covered by the Council of Ministers.

I do not know what their costs were, but they should not have been huge, given the work done by the advocate for CoMin. They have got a costs order against J G Kelly and, if they get those assessed, they should be able to enforce those and there is a good procedure, now, under Order 48A of the Manx Rules of Court.

The Chairman: Just before I bring Mr Cretney in, on that example, though, if the residents' association itself was the petitioner and bringing the action, they would start clocking up, from the word go, substantial legal costs; an uncertain outcome. Their best advice might well be, 'yes, you have a reasonable chance,' bearing in mind what you say about the clear-cut nature of these cases, but it could well be, could it not, that, because they do not have deep pockets, they are not going to take the risk, despite the best advice that they had a reasonable chance of success, in case they lost and ended up paying all the other parties' costs?

Mr Caine: That is absolutely right. There are ways round it, depending on how large the association is: they may all contribute, but they would have to live with that risk, I agree. It may be that one of them would be entitled to Legal Aid and he would apply for Legal Aid, which can only be granted to individuals.

The Chairman: Yes, and he would run it.

Mr Caine: The advocate advising would have to certify to the Legal Aid officer that there was a good prospect.

The Chairman: So, you say, there are ways round it in the manner you have just described, but are there alternatives to that process or could there be alternatives, do you think?

Mr Caine: I am not aware of any alternative. I do not think you could get legal insurance for something like that. I think, unless Tynwald was minded to say that if a local residents' association – or, for example, in one of the well-known Doleance cases it was an unincorporated association of butchers and, of course, they have got enough common interest to be a party – if Tynwald were to say that in the discretion of, perhaps, a court, they should be a party, then Tynwald could pay something towards their fees, but I think that would have to be carefully thought through. At the moment, there is no requirement to obtain leave to bring a Petition of Doleance, whereas in England you have to get leave to bring a judicial review. So, there is a kind of filtering out process.

The Law Society thinks that leave is unnecessary in this jurisdiction. I am aware that – he will speak – the Government Advocate thinks that, perhaps, there is a need for a legal process and it may be that, if leave is granted because the court has gone through that filtering process and decided that there is a proper case to advance that, at that stage, there could be some sort of funding for an unincorporated association.

The Chairman: And that funding, ultimately, would that be public funding or would it be costs recoverable from the one or other party?

Mr Caine: Well, it would be public funding, but it would be like Legal Aid. If the residents' association succeeded and got a costs order against the respondent, they could recover those costs and they would have to pay them back to the funding body in the same way that the successful Legal Aid applicant will recover. Normally, they would get their costs from the other side, but anything they got from Legal Aid they will refund.

The Chairman: A residents' association, which, of course, is not entitled to Legal Aid as an organisation, if its individual members were also, through the means-testing process, not found to be eligible for Legal Aid, there is really nothing they can do about it, is there?

Mr Caine: Not at the moment, no. They would have to – which we did on the Derby Square Residents' Association – I provided my time for free, but we brought in an expert on Victorian architecture and we all put so much into the pot and we paid him and we did not get our money back. That is just the way it is at present.

The Chairman: And you can see how this would be a deterrent to achieving… people without deep pockets actually being able to achieve justice?

Mr Caine: Only to a limited extent, I would suggest, because if they have got a good case, then they should, in my submission, get their costs back, the bulk of their costs back, so whilst they may have to fund it up front… although, if you spoke to an advocate, he may say, 'look, I will bill you at the end. If I get my costs from the other side, fine. If I do not, you will have to pay me.'

If they are bringing a case where they are at a serious risk of losing and having to pay the other side's costs, then I would question why they are bringing the case. But if they have got a good case and they have been properly advised that they have got a good chance of success, then obviously it is not without risk, but there is a mechanism under, in my opinion, a good costs recovery procedure that we now have,

that they would get their costs back and they would not have to pay the other side's costs.

The Chairman: Okay. Mr Cretney.

Mr Cretney: I think you have developed the point I was interested in latterly, really. I was just interested, you, on behalf of the Isle of Man Law Society, Mr Caine, suggest that the Law Society do not believe there should – I think I picked up – be any filtering system?

Mr Caine: That is right. I think at the moment it is a unique Manx remedy. It is a right.

If you have got a complaint against a decision that has been made, then you have a right to simply bring that and have it heard. In England, you have to persuade a judge that you have got a good case, otherwise they will not allow you to go to the time and cost and court time of bringing… In England, some of the cases are absolutely huge. We are talking about runways: the third runway at Heathrow or whatever, and the costs are going to be hundreds of thousands, perhaps millions. So, they like to filter them out. In the Isle of Man, we do not have many cases that are that big.

Mr Cretney: Thank you. And for organisations such as this residents' association, in terms of getting their advice in the first instance, as to whether it is likely they will be successful, any idea how much that kind of advice would be?

Mr Caine: It would depend very much upon how complex the issue was. It might be very straightforward, in which case, it might be an hour's work: a few hundred pounds. It might be, I would have thought, at most, perhaps £1,000. You would be able to review the material and give a view as to the merits or otherwise.

Mr Cretney: Okay. Thank you.

Mr Callister: I mean the crux of this matter is the costs, really, that apply to people who have limited funds, as against contractors and so on. Is it a system that is fair to both sides and, indeed, fair to noticed parties as well, from that respect?

Mr Caine: Yes. It is fair in that, if it goes to a Petition of Doleance and it is heard by the court then, if you win, you should get your costs back and, if you lose, you are probably going to have to pay the other side's costs. I accept that you may have a property developer with deep pockets and you may have a residents' association who do not have deep pockets, but it is an important remedy in the Island.

A lot of the people availing themselves of it will be residents' associations and so on and if they have got a good case, then it may be that they have to just live with the risk that, if they have been advised that they should win, that they will get their costs back.

Mr Callister: There is no 'no win, no fee' process available, is there?

Mr Caine: No. We do not have that. I do not think they would have that in England, either. Even in England it is limited to things like personal injury, although I am not an expert. But, no, we do not have that over here.

The Chairman: Are you aware of whether organisations can take out legal insurance to cover their legal costs in situations like this?

Mr Caine: They can but most of the ones I have seen are where you are being sued, perhaps because you have been in an accident and injured somebody or because you are being sued for a debt or a contract or a tort. If you chose to take part in a Petition of Doleance, where you do not have to get into it if you do not want to, unless you are the respondent, then I think, that it would be difficult to claim under the policy and the respondent is nearly always a local authority, Government Department.

The Chairman: Does the Law Society have a view as to whether Legal Aid should be extended from individuals to organisations of the sort we are talking about?

Mr Caine: I have not discussed that with the Law Society.

Speaking for myself, I can see the merit in that and I could see the benefit of that, but it may be that if, in due course, a leave provision was brought in, whereby there is a filtering process and the case only proceeds if the court has decided it has merit, then possibly at that point Legal Aid could come in, because you would know that there has been an independent filtering process.

The Chairman: So, I think we are quite interested in this, whereby there is a filtering process and the case only proceeds if the court has decided it has merit. Then possibly, at that point, Legal Aid could come in, because you would know that there has been an independent filtering process.

I think we are quite interested in this possible leave process that is being introduced as a filtering mechanism. That would presumably give some greater certainty to a residents' association without deep pockets as to the likelihood of whether they should start off in the process, in terms of the risk of the legal costs that they might incur.

Are you saying that that, aligned with a Legal Aid award mechanism for organisations, would be a development that you and the Law Society would be interested in?

Mr Caine: As I say, I do not have instructions from the Law Society, so now I am speaking personally.

I can see the merits in that. The only note of caution I would sound is that, in England, the application for leave process has become very complex. There is a huge amount of case law when leave should and should not be granted, and all of that case law relates to appeals against a refusal to grant leave. So we think the leave process has its own problems, but if a leave process was brought in, then if Tynwald felt that a residents' association should get Legal Aid after that point...

The Chairman: Do you think it would encourage more frivolous cases to be brought that would not otherwise be brought?

Mr Caine: I do not see how it could, because you would not get through the leave process. At the leave process, the court is looking to make sure there is a proper case with proper issues to be determined.

The Chairman: In a letter to the Committee – I am just

quoting Mr Whittaker – he said:

> 'The most obvious step in the right direction, to deter large developers from using this procedure and bringing in frivolous or unsound cases against legitimate objectors, would be to impose severe penalty costs on them.'

Mr Caine: I would say two things to that. If an application is frivolous, or that poor, then normally you would apply to strike it out, and, at an early stage, if you are served with a Petition of Doleance on behalf of your client and you think it is complete nonsense, you can go to court and say, 'Strike this out as being an abuse of process or showing no proper cause of action.'

If, though, it is one that can be brought, then I am not sure what is meant by 'severe costs', but the court certainly has the power to award indemnity costs under which anyone should recover around 90 per cent of their costs. In cases such as *re Cussons,* in the Bride Parish Commissioners case, the Deemster in that case said:

> 'The only test is what does the interest of justice require.'

If a case is regarded as wholly unmeritorious, then the courts will say, 'That is wholly unmeritorious, and so we are going to award costs on the indemnity basis.'

The Chairman: Would the likes of a residents' association, which was defending such an action, get all its costs back?

Mr Caine: Hopefully, about 90 per cent.

The Chairman: Ninety per cent, but it could... and typical costs... You quoted some figures earlier.

Mr Caine: There are two very straightforward cases.

One involved someone who got leave to put an extension on their house. A neighbour complained and brought a Petition of Doleance. It was thrown out and they recovered, I think, about 95 per cent of costs. I think that was about £5,500.

In another case, we acted for a developer in relation to planning development in principle they had got. We defeated that, and the costs in that case were £8,000. Those were standard costs.

The Chairman: But it could well be that, even with the award of costs – 90 per cent or 95 per cent – a residents' association which is just funded by its own members could still be out of pocket in the thousands, potentially.

Mr Caine: Yes, depending how big the case was.

Mr Cretney: Could I just develop that a little bit?

The Chairman: Yes.

Mr Cretney: Why is it that it is decided that 100 per cent cannot be awarded? Why is that?

Mr Caine: Lawyers would be quite happy if it was 100 per cent. Tynwald has said, and the Rules say, that you only get your costs relating to the case. So if you are reporting to your client –

Mr Cretney: I see.

Mr Caine: – you do not get your costs back. If you are simply responding to letters and so on, they will not give you those costs.

The Chairman: Under the Rules, as they are drawn up, and a residents' association may conclude, might they not, that these Rules are not very fair, because they are having to pay for lawyers, for the initial advice and the letters and so on –

Mr Caine: That would be covered.

The Chairman: That would be covered?

Mr Caine: Yes.

The Chairman: I see.
Mr Callister.

Mr Callister: Thank you, Mr Chairman.

Just on Legal Aid, how does our Legal Aid in the Isle of Man compare with elsewhere in the British Isles?

Mr Caine: I am not in a position... Because I do not know what the position is in the UK, I could not make a sensible comparison.

Mr Callister: On this pre Petition of Doleance process matter, one of the items mentioned was the possibility of the Isle of Man having an ombudsman.

Five years ago, the Council of Ministers produced a report on the possibility of having an ombudsman, and there is, as we understand, the possibility of legislation coming forward in the near future on that matter. In this report, it describes, as far as Petitions of Doleance are concerned... In its weaknesses they refer to legal costs and formal legal process. They saw that as a weakness in the process. That is one element. The other is would there be any merit, should an ombudsman be appointed, in having an ombudsman as a filtering process before moving to a Petition of Doleance, or even replacing the procedure of Petition of Doleance?

Mr Caine: No, I do not think so. I think if we did not have the Petition of Doleance we would sail close to being in breach of obligations under the Human Rights Act. It would be a matter for Tynwald as to what power they gave an ombudsman.

A High Court judge has a power to quash, for example, a Minister's decision. That is very serious. The courts do not do that lightly. I certainly would not bring a Petition of Doleance on behalf of a client seeking to quash a Minister's decision lightly.

If you are going to grant that power to an ombudsman, I think that is far greater than any power an ombudsman has in England, and I think, really, that power should only be exercised by a Deemster in the High Court.

Mr Callister: Would an ombudsman be someone who might be in a position to examine the merits of the charge?

Mr Caine: No. I think that would have to be done by a judge, because he would understand the… An ombudsman could look at the case. He might make a report, he might

criticise, he might issue a reprimand or whatever his powers are, but I think as to whether an application to quash, for example a Minister's decision, should go forward, that should be dealt with by a judge because it is such a big power and he is the person to actually assess whether it is a proper case.

What I would say about that criticism... If one looks at paragraph 5.3 of my note, I refer there to the decision in *Lezayre Parish Commissioners* in 2002, and that is a judgment of Acting Deemster Nigel Teare, who is now an English High Court Judge – a very eminent High Court Judge – and he said:

> 'A Petition of Doleance is the form of proceeding in the Island by which decisions of public bodies may be judicially reviewed. It has the advantages of being a remedy of considerable scope, by bringing a procedure which is simple and unencumbered by legal formality.'

It really is described in a number of cases as an informal flexible remedy, and it is. The Deemsters are very keen not to allow people to take procedural points. They will not let it get caught up in rules of procedure. They do treat it, in my opinion, as a wonderful Manx remedy whereby people can go to court and they can get speedy and simple redress.

In *re Kerruish,* in the Staff of Government, Deemster Bingham, who went on to the Privy Council, said:

> 'The essence of the Petition of Doleance is that it should be simple and therefore unencumbered by legal formality, and also speedy so that the issues can be tried quickly. This most desirable speed and simplicity, which I do not believe can be matched in any other mature system of justice, can only be achieved if the requirements of the Petition of Doleance are kept flexible in the light of the golden rule laid down by Sir James Gell in 1904.'

That is, I think, a really important statement – that it cannot be matched in any other mature system. It is something that is very precious to the Island.

Mr Callister: If you had anything like an ombudsman, any pre-hearing system would lengthen the whole process of dealing with it as well. That is one of the things you are saying.

Mr Caine: Yes, I think so. I do not think the ombudsman would have the power to award costs.

Mr Callister: In respect of the weaknesses of the system, as legal costs and formal legal process then, you would not agree with this report, presumably?

Mr Caine: No, I would not. I think doleance is… I practised in England for 10 years – I am Manx, I came back to the Island – and I think doleance is a credit to the Island.

The Chairman: Can I just ask, are there any time limits for bringing a Petition of Doleance?

Mr Caine: There is no formal time limit, but the courts say that it has to be brought promptly. If you exceed six weeks, then you are going to really struggle. It may be that the court would say six weeks is too long. In recent cases, I have seen Doleance Petitions thrown out where they were brought after five months and the court said that is far too long. It is a simple, speedy process.

The Chairman: We understand, from some written evidence we have had, that there is a proposal in the Isle of Man to bring in new Civil Procedure Rules to simplify proceedings, with savings in time and costs. Can you tell us anything about those proposals?

Mr Caine: Yes, I am on the Rules Committee for that. They are going to, to a certain extent, mirror the Civil Procedure Rules in England, which replaced the Supreme Court Practice from 1999, and they are intended to simplify and speed up access to justice so that there are not too many procedural steps, there are not so many legal formalities. So they are going to update our Rules of Court ,which were brought in in 1952. They have been updated regularly, but they are going to replace those and bring in not just the provisions of the Civil Procedure Rules, but the underlying concepts and principles, which is a speedier, more flexible access to justice.

The Chairman: I see. How will those changes be relevant in the situation we are talking about? Would there be any impact on doleance?

Mr Caine: Not in my opinion, because doleance is really very simple. A petitioner will lodge his petition with a supporting affidavit. The respondent will file his answer with a supporting affidavit. Any noticed parties will do the same. Very rarely is evidence given; in fact, the courts discourage the attendance of witnesses, as I have explained in my note at paragraph… Yes, it is 'The cost of bringing a Petition of Doleance' at paragraph 9. At paragraph 9.2:

> 'Deemster Kerruish, in the *Aragon Properties* case, referred to the judgment in *re Kinrade* That identified the court's discretion to permit cross-examination in doleance proceedings as being an exceptional course, rarely allowed, save where required by justice.'

Usually, any orders for discovery of documents – quite often is none, because the issues are clear on the face – if there is a disclosure order, it is usually quite short; there is exchange of skeleton arguments and it comes to trial quite quickly.

The Chairman: So it is the exception, rather than the rule, to allow cross-examination.

Mr Caine: In all the cases I have done, I have never seen anyone cross-examined in a doleance petition.

The Chairman: So, in your view, just to sum up, the system of Petition of Doleance that we have is designed to give a speedy decision. It is legally 'unencumbered' – is that the word?

Mr Caine: That is the word I would use, yes.

The Chairman: And, for a residents' association, there is really no alternative system, either in being or that could be developed, that would improve upon the situation?

Mr Caine: I do not believe so. I do not believe that an ombudsman would have the kind of powers necessary to quash a decision. Also, I do not know how quickly an ombudsman could sit, but if a Petition of Doleance is brought – typically in relation to a planning application – then normally... I think in *J G Kelly* it dragged out for a

long time, but normally it would be brought pretty quickly, so that everyone knows what will happen.

If the decision is quashed, it goes back; if it is not, then the developer will have his planning permission and can proceed. I cannot think of anything else that would be as effective as doleance.

The Chairman: And Petitions of Doleance, by their nature... It is a system of judicial review, isn't it, into the procedures that have been used; not on the decision itself?

Mr Caine: Yes.

The Chairman: Is there, in your view, any merit in the suggestion that that Petition of Doleance system should be more widely cast to look into whether a public body has come to the right or the wrong decision, rather than just the process by which the decision was reached?

Mr Caine: No, I would be opposed to that, and I think the courts would be opposed to that. The courts make some quite strong comment, which is that policy decisions and decisions of that nature should be made by the elected body. They should not be made by courts and judges, who are not elected. As long as the elected body makes its decision in accordance with the rules and regulations, then the court should not interfere, and it will only interfere… It will not likely interfere, even where they have perhaps breached a rule or regulation, because the court has an absolute discretion. It might say, 'Yes they have breached a rule or regulation, but in all the circumstances of this case, I am not going to issue a quashing order.' So I think that would be resisted by the courts. I do not think they would want to look at the merits of the decision, because they do not see that as part of their job.

The Chairman: Petitions of Doleance are brought as an act of last resort where there is no alternative remedy. In the situations we have talked about... We have talked about the ombudsman as a possible alternative and you have given your view on that, but would you say there was any adequate alternative that could be drawn up that would be cheaper and less of a deterrent to bodies like residents' associations?

Mr Caine: I think that would be very difficult, because quashing a decision of a Minister or a Government Department is a very serious matter; it should not be done lightly. The only person with the power to do that is a High Court Deemster. I do not think that power should be spread more widely, and I do not think he should do it – and they do not do it – unless they have examined all of the issues and looked at all the arguments. They take it very seriously and I think that, whilst the power is important, it needs to be exercised very narrowly and only after a proper consideration of all the relevant issues.

The best way, I think, of doing that is through the hearing of a Petition of Doleance in the court. I accept what you say about the costs and I accept that a residents' association who cannot get Legal Aid... there is perhaps a problem there, where the case is not the strongest. Where they have got a strong case, then I would hope that they would be protected by the costs regime they have, but there is that area where, perhaps, there is not a strong case, a 50/50 case. For what it is worth, I would always say to a client who is thinking of bringing a 50/50 case, 'If it was me, I would not do it,' but if they determine to bring that, then hopefully they are going into it with their eyes open. If the case is only 50/50, then one would have to say, 'Should you be bringing it? Are you really being prejudiced here, because if your case is only 50/50, then what is your prejudice?' If it is 80 per cent, then clearly you know you have been seriously prejudiced.

The Chairman: Thank you very much.
No further questions? Jonathan, had you any points?

The Clerk: Could I just ask one, Mr Speaker,?

The Chairman: Yes, indeed.

The Clerk: One point which I think might be of interest to the Committee, Mr Caine: you said earlier, in an illustration, that you were involved in a case where the residents' association, I think, was thinking of challenging the planning authorities. You looked at the case and you decided that the authority had acted lawfully and had followed the correct procedures; therefore you did not proceed.

The question is, is it not true that, in nearly all cases, if you look hard enough and if you spend enough time on it, you will virtually always be able to find something to quibble with in an administrative decision?

Mr Caine: Yes, but… Well, I am not sure that is right, but even if you did look hard enough, if it is *de minimis* – it is something very small – then you can be pretty sure the court will say 'No prejudice has been caused here.' Even if you were to succeed in getting home on that, the court might well say, 'We are not going to quash on the basis of that.' It is not just a rubber-stamping exercise: you win your case, you get your order. If they went to an advocate, the advocate might say, 'Technically, that is a breach, but I do not think you would persuade a court to quash on the basis of that breach.'

For example, in the case I was involved in, when I was a member, that was a planning appeal where the matter went to a planning inspector. He made a decision, which we thought was completely wrong, to recommend that planning permission be allowed. It went to the Minister and the Minister concurred, so we were looking at whether we could challenge the Minister's decision to accept the recommendation of the planning inspector.

The Clerk: So you would accept that, if you look hard enough, you will often be able to find something, even if it is *de minimis*. So doesn't it also follow that, if there is a case with A on one side and B on the other – A is rich and B is poor – A can get further?

Mr Caine: I think that is putting it too starkly, but that is the position with regard to litigation generally.

The point I would come back to is that, certainly in cases like the *J G Kelly* case, the bulk of the work was done by the Government Advocate on behalf of the Council of Ministers, so the exposure to costs of the independent third parties was not that great, because the court had said at the outset, 'We are not going to allow duplication.' So their costs... I do not know what they were, but I should not have thought they were substantial. There is that protection, in that most cases of doleance are against a local authority, a Government Department, a Minister, who will defend it.

I accept there is a different position where you have a residents' association who want to challenge a decision, but they have to look and say, if it is a *de minimis* error, 'Are we realistically going to persuade the court to quash on the basis

of this? If we are not, we do not proceed.' If it is a serious error and they have got a good chance of succeeding, then their costs should be protected by the costs recovery system we now have in place. If it is a 50/50 case, then they may be at a disadvantage if they are going to challenge a decision. But again, they are not challenging a big developer; they are challenging a decision of a local authority, of a decision maker. It is always a public person – Minister, local government, Government Department, whatever – and they are the defendants.

In some circumstances I am aware of, the decision maker, even if it wins, will not enforce costs orders against a local residents' association; that is in their discretion.

The Chairman: Without prolonging the argument, if the developer with deep pockets has a 50/50 case and, for whatever reason – some might say a frivolous reason – wants to pursue it, the residents' association is obliged, as a party, to engage and start ratcheting up legal costs, which they would hope to get back, but of course there is no guarantee of that and, of course, if the developer with deep pockets chooses to pursue, are you saying there is a time limit on Petitions of Doleance, or could this be dragged out for a long time to the disadvantage of other parties?

Mr Caine: I think there are three points to that. The developer would have to bring the Petition of Doleance very quickly. If he left it more than six weeks he would face a strike-out application for undue delay – it is called 'laches' – which would be likely to succeed.

As to how long the petition took to be heard, normally they are heard fairly quickly because there is not much legal formality.

As to whether the residents' association would be obliged, I would suggest they are not obliged because the defendant to the petition will be the decision maker, which is the local authority, Government Department, Minister. They are the people who will incur the bulk of the costs in defending it, and the local residents' association can say, 'We will leave it to the Government Department. They will defend it properly, they will employ good advocates and they will put all the arguments forward.' Only if they felt that they had a particular point that they wanted to raise, which perhaps was not going to be covered by the Government Department, would they be obliged to join in and incur costs, and those costs... The Deemster, at the directions hearing at the outset, would say, 'I do not want duplication.' So if the deep-pocketed developer was successful, he would seek the bulk of his costs from the Government Department or the decision maker. He would not be seeking the bulk of his costs from the residents' association, and he cannot get double his costs back.

The Chairman: Thank you very much, Mr Caine.

Your evidence has been very helpful, indeed. I would like to thank you for your time. Thank you very much.

EVIDENCE OF MR S HARDING AND MR O HELFRICH

The Chairman: If I could now ask Mr Harding and Mr Helfrich, from the Attorney General's Chambers, to come forward, please.

Good morning.

Mr Harding and Mr Helfrich: Good morning.

The Chairman: I would like to thank you both very much for coming in this morning, and in a very similar manner, the area of questioning that we are likely to cover is very similar to what has gone before, but could I, in the first instance, invite you to make some opening remarks to the Committee.

Mr Harding?

Mr Harding: Yes, thank you.

First of all, I am Stephen Harding. I am the Government Advocate. I am employed in the Attorney General's Chambers, effectively as the Attorney's Deputy. I have a particular responsibility to advise and represent Government Departments, Statutory Boards etc in relation to Petitions of Doleance, and to generally advise in relation to matters of public and administrative law, with the assistance of Mr Helfrich, who is a legal officer within Chambers and a qualified advocate and solicitor.

Thank you.

The Chairman: Thank you very much.

Mr Helfrich, is there anything you wish to add at this stage?

Mr Helfrich: Not really, Mr Chairman. I think, from the point of view of an introduction, the majority of things that Mr Caine submitted to yourselves was perfectly clear, and I would not have very much to add to that as an opening statement.

Mr Harding: May I also add that I agree with the vast majority of Mr Caine's submissions to the inquiry today.

The Chairman: That is very helpful to us to know. That is fine.

Just as in Petitions of Doleance, we will seek to avoid duplication of evidence. However, can I ask, perhaps as an opening question, what is your reaction to Mr Whittaker's claim that the system of doleance currently favours those with deep pockets?

Mr Harding: I do not agree with Mr Whittaker's statement. I do not think that the use of the word 'favours' is particularly appropriate, as it seems to suggest an element of bias. However, what one can say is that access to justice is usually assisted by being able to fund litigation or, alternatively, to have access to Legal Aid, and accordingly it is probably easier for a person with the availability of funding to have access to the courts.

However, what is important to remember in this particular context is we are dealing with planning decisions here and it is important to remember that these decisions are policy laden and there is... I would submit that, where a considerable sector of the public is affected and is concerned, then there is an important role for local authorities to be involved, basically to look after the interests of hopefully a large section of the community in that area.

Obviously, one has to look at the type of matter that one is dealing with, or the context, because there could be matters where a local residents' association is concerned about matters which affect an area as a whole, or the matter where one is purely concerned with very, very personal interests, and one has to really be very, very careful that one

is not confusing the two. That is one of the reasons why I say that there is an important role for local authorities to be involved. One could see that it would be very possible for individuals within a residents' association to approach the local authority and say, 'Look, we are very concerned about this. We should be concerned *en masse* because of the effect that this may very well have upon our area. And, by the way, we are more than happy to provide witness statements and any assistance we can give to you in relation to your role as statutory consultee in the planning process.'

So I would say that, no, I do not agree with Mr Whittaker's statement, and I would say that it is important to recognise the importance of the local authorities in these matters.

The Chairman: Thank you.
Mr Callister.

Mr Callister: What about the situation where the residents' association is in conflict with its local authority?

Mr Harding: Yes, that is a very good point, indeed.
I think there comes a stage where, when one does have that particular set of circumstances, it may be useful that the court could effectively look at that particular matter, where, for example, it asks of the residents' association, 'Look, have you had any kind of dialogue with the local authority, and what has been the outcome of that?' As you say, there could be a conflict and it was quite obvious that the Residents' Association were bringing forward issues which did have an effect upon a reasonable section of the community, as opposed to just the individual interests.

Mr Cretney: But I do not think that was the case in this instance, anyway.

Mr Callister: No, but I mean in general terms, yes, it can happen.

Mr Harding: I can see that there could be a differentiation and, as in many areas of law, one has to look at the facts of the case.

Mr Callister: More weight, perhaps, would be given, then, to the local authority, rather than a residents' association, by a court, because of their status.

Mr Harding: Yes, I think the status of a local authority would be respected by the courts. Certainly, in my experience the courts accept that local authorities have an important role and function and they are recognised in the planning process as statutory consultees, in any case. So, yes, I do think that the courts do respect what a local authority would have to say, and if I were sitting in the shoes of a Deemster, yes, I would want to hear what they had to say.

Mr Callister: That is something that associations might take a note of, then.

Mr Harding: Yes, I think it would be useful. Certainly, if I were a member of a residents' association, one of the first things I would be doing, would be to sit down with my fellow residents to canvass their views and then to effectively go to my local authority and say, 'Look, we've got a fair sector of our community here. We have concerns. Are you going to advocate these for us, and if not, why not? Why don't you see there is any weight in what we are saying?'

Then one could get to the next stage, of course. If they were effectively knocked back by the local authority, then would be the time when they would say, 'Right, okay, we're going to have to take this on ourselves. Let's consider whether or not it is appropriate to see an advocate, or alternatively, whether we feel that we can represent ourselves,' because that is always another option that is open. I am not saying it is the best option, but it is an option that is open.

The Chairman: Thank you.
You gave us a very helpful written submission in November, covering grounds for doleance and the procedures. You say that, broadly speaking, the grounds for a doleance fall into four categories. Could you perhaps just expand on those, because it might be the case, and perhaps you could confirm whether Petitions of Doleance are brought on categories which are inappropriate.

We have heard about the process by which a decision is being made and whether the procedures were flawed or somehow *ultra vires*. That is clearly one of the categories. In your experience, have people sought to bring Petitions of Doleance on totally inappropriate grounds?

Mr Harding: The note was very helpfully prepared by my friend, Mr Helfrich. However, I just wish to be a bit more general. Doleance is similar to judicial review in the United Kingdom, as we have heard from Mr Caine, and it is basically a central control mechanism of administrative law by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities.

So it is an important safeguard which promotes the public interest, assists public bodies to act lawfully and ensures that they are not above the law, and protects the rights and interests of those affected by the exercise of public authority power.

As a supervisory jurisdiction, it is different from ordinary adversarial litigation between private parties and an appeal, which is effectively a rehearing on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong.

The procedure has evolved on the Island and I would agree with Mr Caine that we have a quite simple, straightforward remedy of much utility, but it is important to remember that it is an important control ventilating a host of varied types of problems.

There can be many areas of administrative power which could be liable to be reviewed by way of Petition of Doleance, so the focus of cases could range from matters of grave public concern to those of acute personal interest, general policy to individualised discretion, social controversy to commercial self-interest and anything in between.

As far as the subject matter is concerned, it is not really possible to give an exhaustive range of subject matter, as examples are many and varied but, generally speaking, the one overriding feature is that they involve public authorities, of which Government Departments, Statutory Boards, particular officers who are appointed to a particular decision-making role by a Government Department and indeed local authorities themselves – and there have been some bodies which have an element of public nature about them, such as charities which have also been liable to attack… So it is very difficult for me to give any kind of an exhaustive example of areas which could be attacked.

The Chairman: Is it the case that Human Rights legislation and European law have broadened the grounds on which a petition may be brought, in terms of insufficient regard, let us say, to the principles of the European Court on Human Rights, in reaching a particular decision? So, rather than the process that was followed through, actually the broader, legal arguments about whether Human Rights legislation has been fully taken into account in reaching a decision?

Mr Harding: Yes, obviously Human Rights can also raise their head in other areas – for example, criminal law – but, yes, that has. Obviously, the imposition of the Human Rights Act and the European Convention have grafted on a whole new area. In some areas there are dovetails between, for example, natural justice and article 6, fair trial considerations, but yes, there is a greater… There has been an extension of their subject matter.

The Chairman: My next question: what constraints exist on matters which may be pursued by Petition of Doleance?

Mr Harding: Really, the only constraint that I can think of is that they would not involve a public authority or have a public element about them. One of the important things is that there does have to be a public element concerned, so really I cannot issue a Petition of Doleance against my next-door neighbour or a private individual, generally speaking. There is that public element that has to be present.

The Chairman: Are there any constraints on the remedies which a Petition of Doleance will actually receive? I think we have heard from Mr Caine that the most that would happen is that the decision would be referred back to be made afresh on certain grounds, but there could be no expectation that the Petition of Doleance system would itself alter the decision, whether it was a planning decision…

Mr Harding: Yes. As Mr Caine quite rightly said, it is all about procedure, really. Basically, the court has discretionary power – and it is important to always remember that the powers of the court are discretionary – to quash a decision, prevent something from happening, or clarify, and basically there is a trilogy of main remedies, which is *certiorari*, which is a quashing order, *mandamus*, which is a compelling order, i.e. making you do something, and prohibition, which is a prohibition of doing something.

Mr Caine has also quite correctly pointed out that there is *habeas corpus* as well, which is a specific area, writs of *habeas corpus*. Those have been renamed in the UK as simply quashing, mandatory and prohibiting orders, and they have been brought within the single judicial review procedure – of course, here we have the doleance procedure – and also available are the remedies of declarations, injunctions and damages, and those are available on a Petition of Doleance as well.

Thus, basically what happens… If one is looking at a planning matter, if, for example, the decision was quashed, then what happens is that the planning decision is remitted back to the decision maker. The reason for it being remitted back to the decision maker… The courts are very careful not to usurp the role of the decision maker. In other words, the responsibility for making the decision is upon, for example, the Minister, and the courts do not want to step into the shoes of the Minister and make the decision.

However, in remitting the decision back, the reasons for judgment will obviously inform the decision maker as to the, first of all, correct process, but it could result in a new decision being made to refuse, or indeed grant, planning permission which was not the previous decision. So it can be, in effect, that the original decision is overturned, albeit that it is the decision of the original decision maker.

The Chairman: Mr Callister.

Mr Callister: Thank you, Mr Chairman.

Would you have any information about what might be the typical costs of Petitions of Doleance and the kind of public funding that exists to support those people without private means who wish to bring proceedings?

Mr Harding: It is very difficult to say what the typical costs of a petition could be, because they involve such wide-ranging subject matter potentially.

It would be possible for a Petition of Doleance to… Say, for example, a Petition of Doleance was issued and the decision maker decided not to contest and to allow a quashing order, one could be looking at a very, very low figure of a couple of thousand pounds, possibly. Alternatively, one could see, where there are matters of considerable public controversy… I am dealing with a couple of those at the moment where it may very well be possible for the costs to reach many tens of thousands of pounds. So, yes, it is very difficult to –

Mr Callister: So there is little point in asking for an average figure, then.

Mr Harding: It would be very difficult to give an average figure, in my experience.

Mr Callister: I was interested to hear you refer to some of these Latin legal terms being put into plain English as well, but that is beside the point.

Is there any information that you have available about growth in numbers? Are we getting more Petitions of Doleance now than in past years?

Mr Harding: I think it is fair to say… I was appointed in February 2002 and certainly in my time in the Attorney General's Chambers I have seen more Petitions of Doleance presented. Maybe that is as a result of the people becoming more aware of what they are and how to use them, but certainly yes, I think there are.

Mr Callister: Mostly on planning issues?

Mr Harding: Planning is one of the main areas, yes, because really, let's face it, planning is an area of controversy, albeit that it is also, it must be remembered, an area which is laden with Government policy, and it does tend to… Certainly where one has large developments, yes, it can affect a reasonable number of people.

So yes, planning is one of the main areas that one would see Petitions of Doleance being presented.

Mr Callister: What percentage of petitions win the case – that is to say are returned to sender, as it were?

Mr Harding: My own experience is that it is quite few. We do tend to be able to successfully defend the vast majority of petitions, I think it is fair to say.

Mr Callister: Is our Legal Aid that is available to people in the Isle of Man reasonably comparable to that elsewhere in Britain? Are we more generous or less generous, shall we say, in general?

Mr Harding: My own experience… I have not practised in the UK, but certainly the moves in the UK… I think that we have probably a more comprehensive system of public funding here at the moment than is available certainly in the United Kingdom.

I think that, under the circumstances, yes, the Manx system is more generous.

Mr Callister: I am sure you have heard what Mr Caine had to say about the ombudsman idea. Have you any views on that?

Mr Harding: I think, obviously, the ombudsman idea is a good idea, but really the ombudsman system is used for cases of maladministration. I do not think that it would really be of great assistance as an alternative to the Petition of Doleance, which is there to challenge the legal process. I have to say that I do have considerable respect for the doleance jurisdiction and the way it is administered. I think it is an admirable system in many ways.

I only have one real, not necessarily a concern, but I personally would like to see a leave stage introduced. That is the only real area that I think we possibly lack. So I do think, as I have said, it is a very important constitutional jurisdiction. It is a very important way that the courts can control the excesses of power, and I really think that in many cases an ombudsman system would not really deal with the issues well. It may very well be, of course, that following a successful Petition of Doleance there were issues that would have to be dealt with by an ombudsman as well, but that is another issue.

Mr Cretney: I just wondered if you felt you might like to elaborate a little on your personal contention that a filter mechanism would assist?

Mr Harding: Yes. In the United Kingdom, of course, there has been a filter system, a leave system, for some time. I think it was introduced in the 1970s, Order 53 of the former Rules of Court. At the present time, if a Petition of Doleance was presented and one felt that it was not really meritorious, it would be up to the person defending it to have it struck out and take a particular action to do so. I have found that the courts are pretty loath to strike actions out and it was only in really clear cases that they would.

However, I do think that a requirement to effectively seek the leave of the court would potentially get rid of those cases which clearly have no possible chance of ever getting anywhere. There are some cases that have appeared and I have thought, I do not know why this is being allowed to go on, to be quite honest with you, and there are other people here, potentially third parties, who are being put to some cost as a result of that.

So my own view has always been, I felt quite strongly that there should be a leave stage. When the new draft Rules of Court were originally drafted, the first draft did have the leave stage included. However, I understand that following presentations by the Law Society that leave stage was removed from the Rules. I am not sure why that happened, and personally that is about the only area where I do not agree with Mr Caine. Everything else, I do agree with, so we will perhaps have to agree to disagree. Hopefully, that answers your question.

Mr Cretney: It does. I just think that, perception or otherwise, the view that is put across by the residents' association type of organisation is that there may be… and I think the system sounds to be very sound anyway, but that there may be frivolous proposals –

Mr Harding: Vexatious cases.

Mr Cretney: Correct. Put forward, and as such, big pockets, small pockets comes into play, perhaps.

Mr Harding: Yes. There are a number of scenarios that one could have, for example.

Let's say that a residents' association decided actually to be the primary mover and to present the Petition of Doleance. There is a possibility that they may not have had the very best legal advice. One obviously would hope that that would not happen, but I am sure they would be somewhat relieved if, in fact, they did not get the leave to take on a developer when, in fact, it was highly likely that they were going to incur substantial costs and then come back later and say, 'My goodness, we've been saddled with this enormous burden.' It cuts both ways.

Not only does it prevent, in my opinion, decision makers from being unduly burdened, but it would also prevent litigants from actually starting off on a hopeless case. One would hope that that would not happen, I must say, but it does cut both ways.

Mr Callister: Two points on that, then. The situation at the present is that the defendant asks for this to be stricken.

Mr Harding: Struck out.

Mr Callister: Striked… To have it… To strike it out! Is that a certain weakness that we have in the system now, then? It seems to be.

Mr Harding: I would say, no, the striking-out process is not the weakness; I would say, personally, I feel that the… I would not necessarily say it is a weakness. I would say that the absence of a leave stage is regrettable.

The actual striking-out process or remedy is available in relation to many other things other than just striking out a claim at the very beginning, so striking out is another useful remedy. It is just a shame that one has to resort to that when one feels that there is a case which would possibly not have been granted the leave of the court to proceed, because it really –

Mr Callister: Who would make a leave judgment, if we had that system?

Mr Harding: The courts would. The Deemster would make a preliminary judgment. He would look at the papers, consider whether leave would be granted. There could, of

course, be a hearing. It is possible to appeal that decision as well to the Appeal Court, so it does have safeguards itself, as well.

The Chairman: Just on that principle, that the same decision maker would be deciding whether leave be given, is that considered appropriate? It may be that the Deemster, having heard evidence during the course of the action, might be in a position of reaching a different decision, having concluded that this was vexatious or frivolous, not worth hearing, having heard later what one of the parties had to say, might –

Mr Harding: This is the counter-argument that… It is always possible for a judge to say, 'Look, I am not quite sure; however, on balance, I am going to allow this matter to proceed to a full hearing, and what then may very well have a bearing on, is whether or not I, in my discretion, if I do find the case is proved, I would grant a quashing remedy or any other order, or alternatively…'

I think the experience has been, in the UK, that where there are judgments which are 'we are not quite sure', they would allow the matter to proceed, and that is, generally speaking, the judicial experience. However, if, for some reason, a judge did make a quite obviously wrong decision regarding leave, then it is possible to appeal that decision, in any case.

The Clerk: Mr Speaker, may I just come in very briefly and ask: why is an application for a leave to proceed cheaper than what happens already? What is missing? Does the other side get a chance to say anything at the leave stage?

Mr Harding: Yes, the other side, of course, gets an opportunity of making representations, it is my understanding, if necessary. The savings would be involved in striking out an obviously frivolous or vexatious petition, in other words not allowing it to proceed.

Costs-wise, I am not sure whether it necessarily would add to the cost because you actually have to make sure that you have got a good case. Hopefully you have got a good case anyway before you present it to the court, but there is a possibility. What you have got to remember, of course, is that Petitions of Doleance… You do not necessarily have to be legally represented. You could represent yourself, and there may very well be cases where people come to the courts, having not been legally advised, with a case which really does not stand on all four legs, and it is better to nip it in the bud.

The Chairman: So just really to conclude on this one, when Mr Whittaker says in his letter that the most obvious step to deter large developers from using the Petition of Doleance to bring in frivolous or unsound cases – what we have just been talking about… whereas he says the most obvious step would be to impose severe penalty costs, and you might have a comment on how that could be done… but really what we are saying is that the leave stage would be the alternative mechanism to prevent these frivolous and vexatious cases?

Mr Harding: If Mr Whittaker… one of his concerns is about bringing frivolous and vexatious cases, one would hope that a leave stage would be able to deal with those cases and nip costs in the bud. Having said that, there are very few cases that I have seen which have been truly frivolous or vexatious and, generally speaking, there is at least a nugget of substance in them, but yes, if one is looking at truly frivolous and vexatious cases, then yes, generally speaking, the courts are alive to them, but my own feeling is that a leave stage may very well assist.

The Chairman: Having got through the leave stage and, on the basis of the evidence at the hearing, it turns out to have been, after all, a frivolous case, let us say, would the imposition of a penalty be practical or appropriate?

Mr Harding: I think that, as Mr Caine has said, the court has a very wide discretion in relation to costs under the new Order 48A, and basically it can order two types of costs at the moment. Those are indemnity costs, where effectively it is almost like a penalty, or costs on the standard basis, which are basically party costs. So, as Mr Caine has explained, you cannot always get the costs of necessarily having a consultation with your client or… It really is the costs of the effective litigation.

Indemnity costs go somewhat further, but I think that penalty costs… I would not agree that they would be an appropriate way of doing things. I think that it would be very unusual for a court, having decided to allow a matter to proceed, then to turn round and say, 'Actually, this was such an awful case that we are going to penalise you.' It may very well be, of course, that the way the litigation is conducted… Say, for example, a litigant is continually making unnecessary applications to the court and basically racking up the costs, then what one would expect the litigant to be penalised in is by way of indemnity costs.

My own feeling is that the powers that the court has in relation to the costs orders are appropriate and I do not agree that costs orders should be the first line of defence against bringing frivolous or vexatious cases.

The Chairman: Can you just explain a bit more what indemnity costs would cover in addition?

Mr Harding: Yes, indemnity costs really are more or less covering… Unfortunately, I have not got the Rules of Court with me, otherwise I could give a full description of what they are, and in fact it might be useful if the… In fact, I wonder whether I have got – excuse me – a description of indemnity costs.

The Chairman: But basically the costs over and above the court costs incurred by the other parties.

Mr Harding: Yes, there is a specific definition which I would rather give you, if I possibly can. Here we go.

Mr Helfrich: My understanding, really, is that, in terms of indemnity costs there, you are looking at the costs across the board, which would include costs that do not necessarily move a litigation forward.

A standard basis is all the costs incurred in directly moving the litigation forward. So that would be, for example, pleadings, communications with the other side, whereas obviously the costs incurred in reporting back to your client, in terms of what has happened, does not necessarily push the litigation forward.

So on an indemnity basis you will be entitled to recover those costs, as well as the costs of pushing forward.

The Chairman: So the residents' association would be able to recover the early costs pre court of consulting with lawyers.

Mr Harding: I have the actual definition here, which is Rule 12.2 of Order 43A. It says:

> 'On an assessment on the indemnity basis, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Chief Registrar may have as to whether the costs were unreasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party and in these Rules the term "indemnity basis" in relation to the assessment of costs shall be construed accordingly.'

So that is what indemnity costs are, as opposed to standard costs, which are:

> 'On an assessment of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Chief Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.'

So you will see that the onus of proof in fact changes from one party to another. So basically the indemnity cost is more wide-ranging, in effect.

Mr Helfrich: Mr Chairman, if I can, I suspect that your concern there is perhaps that the cost advising the client in relation to the merits.

The Chairman: Yes.

Mr Helfrich: That would be picked up on a standard basis. That is the ongoing litigation, so that would not fall outside a standard basis. So you would, in the normal course of events, on a set up standard basis, be able to recover the cost of advising your client in relation to the litigation.

The Chairman: That is what I was driving at.

The system of Petition of Doleance is a peculiarly Manx system, although it shares features of judicial review. In the Isle of Man, what features of it would make it better or not as good as judicial review in England?

Mr Harding: Well, I think that they really parallel each other. I think, though, that the Manx system is less encumbered by formality. It is a very informal system, albeit that obviously in recent years the Deemsters have been inclined to more actively case manage and so one gets very clear directions in relation to filing of skeleton arguments, pleadings, etc. But I still think that we are, at the moment, less… It is still a more flexible system.

Apart from that, they are really reasonably similar. Of course, we do not have the leave system, which arguably some people would say is a legal formality.

The Chairman: In terms of simplicity of procedures, the time and the costs, would Mr Whittaker, for example, or the BADRA group have a better time in the Isle of Man or if they were in England under their system of judicial review? Would they have greater cause for complaint in England than they do in the Isle of Man?

Mr Harding: I do not really think so. Certainly, I think that they have got less cause for complaint on the Isle of Man than they would have in the UK, to be quite honest with you.

The Chairman: Is it more expensive and it takes longer in the UK?

Mr Harding: I would not necessarily say that it takes longer, because obviously the time it takes to deal with a Petition of Doleance has increased over the years as a result of having to be more actively case managed and whatever, but I think really that, as far as the Manx system is concerned, it stacks up extraordinarily well against the English system. I think, in a way, our system has very few faults.

The Chairman: Any final points?

Mr Cretney: I am fine.

Mr Callister: No, I am alright.

The Chairman: Jonathan? No, okay.

Can I ask you, gentlemen, are there any final points you would like to make to the Committee? We are grateful to you for your answering of our questions.

Mr Harding: No, thank you, Mr Chairman.

Mr Helfrich: Sorry, may I say briefly, what the Government Advocate was saying about the leave stage, I can say that since 2000 in England, certainly, what has happened is now all the parties can contribute to the leave stage. Pre 2000, it was just the petitioner, effectively, that was proving, generally speaking, without the other parties… was having to demonstrate that his action had some kind of merit. That has changed now and the noticed respondents can all chip in at that stage to make representations as to whether or not there is any merit in the case moving forward.

As Mr Harding said, whilst there may not be a huge amount of difference, cost-wise, in terms of an application strikeout, or striking out on a leave stage if the leave stage is brought in, the difference is it is the onus of it being on the defendant on a strikeout application. The defendant is being put into the position of having to make another assessment on the merits of their case, which obviously would not be the case if a court had a mechanism to strike out, because it could very well be on advice that the respondent gets that decision… Sorry, the party that is making the strike application just gets it wrong, whereas obviously on a leave, if a leave stage was there, then the onus would not be on that party. It would be for the court to make the decision, which I think is probably quite an important distinction, really.

The Chairman: David.

Mr Callister: Just then, in this case in the UK, is it the same body that judges on the leave stage as then if it went forward for the hearing?

Mr Helfrich: Sorry, I could not answer that, although that is something that I could certainly find out for the panel,

if that would be helpful.

The Chairman: Yes, if you could advise us on that.

So in the case of what you are saying, a residents' association, is that process of leave as formal in the sense that legal argument has to be presented? So a residents' association would still, if it wished to have its case best understood, rather than risk talking to the Deemster themselves, would they be advised to seek legal representation even at this stage, or a far more informal hearing by the Deemster with all the parties sat round the table, so to speak?

Mr Harding: One would obviously have expected, before the petition is presented, that the parties would have been fully legally advised in any case. So, as far as informality is concerned, I think that it would have the normal formality that would go with, effectively, a court hearing, albeit that it is only dealing with a small area of the –

The Chairman: I am just trying to think of… like a residents' association, which is a noticed party – it is not initiating any of this – finds itself, against its wishes, brought in because they have legitimately objected, let us say, during a planning process.

Mr Harding: This is an interesting point that you raise here in relation to being brought in against their will. The point is that if one is a noticed party, one has the choice as to whether or not one wishes to be part of the proceedings. The only people who are necessarily involved are the petitioner and the respondent. A noticed party does not actually… It is a choice that they take as to whether or not…

What tends to happen is that the Deemster will make an order saying these are the noticed parties, they have an opportunity of coming to the court and saying whether they wish to take any further part. They do not have to be involved. So, for example, even the local authority would not necessarily have to be involved. That is in the Crossag Road matter, just as the BADRA did not have to be involved. That was a choice that they took, so at the end of the day –

The Chairman: They would make that choice, presumably… That is quite an interesting question. Supposing it would have been in the interests of their case to be a noticed party so that they could be examined and the evidence given to the planning process, and therefore from that point of view would want to be a noticed party, but in doing so, they are going to take the risk of incurring legal costs that they could quite easily absolve themselves from just by simply saying, 'We don't want to be a noticed party.'

So it comes back again to if you have got deep pockets it is an easy decision to carry on to be a noticed party and promote the interests of your association or your own interests, but if you have not, you are going to be deterred, aren't you?

Mr Harding: Litigation, by its very nature, does involve obviously making a decision as to whether or not… I mean it is cost-benefit analysis, and that is what Mr Caine was referring to. One sits down with one's lawyer and one reaches a decision as to whether or not, first of all, one has a strong case, and then one considers… Well, one of the obvious questions would be then, 'Well, okay, you think we have got a decent case, or you think we have got 50/50: if we decide to go ahead with this, what is our exposure likely to be?' It is always open to… and I would say that a good advocate will be advising that. Certainly, when I was in private practice, one actually has a duty to let your client know what they are likely to be in for and then they have to make the decision.

There again, I come back to the points I originally made in relation to the possibility of pursuing, or saying to the local authority if one was a particular residents' association, 'Look, are you prepared to effectively represent our interests? Are you on board with us? We will quite happily provide you with the ammunition to fire.' So, yes, it is unfortunately not cut and dried and one has to make decisions at various stages in litigation as to whether or not one decides it is worthwhile to proceed.

The Chairman: I think we have covered all the ground as a Committee. I would like to thank you, gentlemen, very much for coming. You have been very helpful indeed and of great assistance. Thank you very much.

Mr Harding and Mr Helfrich: Thank you, Mr Chairman.

The Chairman: That then brings to an end the public session of taking of evidence of this Select Committee this morning. In the event that we have further oral evidence sessions, these will be notified through the media in the usual manner.

So thank you very much to members of the public and to the witnesses again for their attendance. Thank you.

The Committee adjourned at 12.17 p.m.