



**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, 9th February 2009

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 sat in private at 11.39 a.m.

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

*The Committee sat in public at 10.36 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 fellow members: on my left, Mr David Callister MLC and the Hon. David Cretney MHK; 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.

EVIDENCE OF MR D WHITTAKER, MR R PILLING AND MR D ALLSEBROOK

The Chairman: Today, we have one witness, Mr Whittaker. Thank you very much, Mr Whittaker, for coming in. You have taken the stand here and you have two witnesses. If you would kindly introduce your two witnesses.

Mr Whittaker: Yes. On my left is Mr Robert Pilling, who is Chairman of the Malew Commissioners at the moment. On my right is Mr David Allsebrook. He is a past Secretary, but I have brought him along because he was dealing with the matters. He was Secretary, at the time all this was going on, of the Ballasalla and District Residents’ Association. He is now the hon. treasurer.

The Chairman: That is fine. Just to make it clear, the procedure: the Committee will be putting questions to you, Mr Whittaker, and it is up to you, if at any particular point you wish to call on one of your witnesses to assist you in the answer, although I would say, for the purposes of recording, it is very important for all of us not to talk across each other, so it will be very much a case of you calling a witness, who will then address the Committee. We may then put questions direct to the witness, or indeed back to you.

Mr Whittaker, the Committee have, of course, studied the Petition of Doleance – the Petition for Redress of Grievance, I should say – which you presented on Tynwald Hill in July last year, and which Tynwald Court has asked us to investigate. We also had your letter, dated 17th November 2008, in which you expanded on your concerns.

In a moment, I will ask you to make an opening statement, following which the Committee will then put questions but, firstly, I would just like to say a brief word about the scope of this Tynwald Committee’s investigation. The Standing Orders of Tynwald Court relating to Petitions for Redress of Grievance provide, among other things, that every Petition must relate to a matter of public interest and that it must not relate to any specific case which could be, or has been, adjudicated upon by the High Court or any tribunal or arbitration or any formal, officially-recognised complaints procedure, unless the Petition shows that in the particular circumstances it is not reasonable to expect the petitioner to resort, or to have resorted, to such a remedy.

So what this means in practice is that, while we can look at the particular cases, if they illustrate the points you are making, the Committee is not here to take a view on any particular case. We are much more concerned with your proposals for how the overall system might be improved, and that was the basis, as we have read it, of your Petition.

Mr Whittaker: Yes, that is why I brought the Petition.

The Chairman: Yes, indeed. So just to be clear, we shall not be reporting or making findings or commenting on any individual case that may still be before the courts, but we can certainly have reference to it as an illustration of a more general point that you wish to make.

So with that in mind, I would invite you, Mr Whittaker, to make any opening statement that you wish.

Mr Whittaker: The reason, gentlemen, that I brought this case – I felt that I had to bring this case – was because I am a member of the Ballasalla and District Residents’ Association... and I will cite a case, purely for illustration purposes, but I do not expect you to adjudicate on it.

In this particular case, there was a proposal to develop land at the back of the Clagh Vane estate and on land running up the side of the St Mark’s Road in Ballasalla, a pretty large development, and when we looked at it, we realised that this was going to grossly overload the infrastructure of Ballasalla, so we put in objections. These objections were very carefully considered and obviously, in due course, accepted.

This was rather an unusual case, inasmuch as it had to go before the Council of Ministers because it was a Government planning thing, rather than a private individual or developer. So it was considered by the Council of Ministers and they appointed an independent inspector and he fully endorsed our evidence that it was wholly unsuitable at the time, and to cut a very long story short, the Government and various

Procedural

**Tynwald Select Committee on the Petition for Redress of Grievance of Donald Whittaker –
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Departments concurred with him and accepted our evidence, so we were quite happy.

However, at that stage, the developer saw fit to introduce a Petition of Doleance which cited a lot of our evidence, and this involved us then going to the legal expense of defending our evidence. You will see, from the correspondence that I have put in front of you earlier, that this caused us to have to spend a considerable amount of money, and it is still ongoing. My brief is here, if this situation is allowed to continue in the future, it will deter other private objectors or individuals from pursuing the same course that we did because they just will not have the funds to do it. Therefore, the developers, purely by, dare I say, financial bully-boy tactics, will get their way.

The Chairman: Thank you. If I could start then, Mr Whittaker, you made reference to the fact that the Ballasalla and District Residents' Association put in objections. Can I, first of all, ask what sort of body, what status does the Ballasalla and District Residents' Association have?

Mr Whittaker: This is an Association formed to oversee... because there was a lot of development going on in Ballasalla, as you are probably aware, and also Ballasalla is the southern junction for all traffic, so you have got somewhat of a conflict of interest. So the Residents' Association was formed because a lot of people felt that we were going to be swamped one way and another and we have been recognised as an Association.

A lot of interested people, like myself, got together, and Mr Allsebrook and Mr Pilling. We meet every so often and discuss matters and we felt that, as a body, Ballasalla was going to be overstretched by this development, so that –

The Chairman: Were you given, in this particular planning application, party status as an Association?

Mr Whittaker: Yes, Mr Allsebrook... Yes, we were, because, for that reason... We were given a very large input.

The Chairman: Who is the Secretary of the Association?

Mr Whittaker: Mr Allsebrook was at the time, but now Mr Edward Power, behind me, is the present Secretary.

The Chairman: And therefore the objections were put in by the Secretary in the name of the Association, by Mr Allsebrook.

Mr Whittaker: Yes, that is correct.

The Chairman: And you are saying that the Association had party status conferred upon it. Was that on the basis that individual members of the Association had... as being, let us say, adjacent landowners themselves, would have been given party status as individuals?

Mr Whittaker: That is why, because a lot of our members live up at the Glashen Close and Ballabridson Park, which admittedly is across the road, and also some of the them on the Clagh Vane estate and some up the St Mark's Road, and they are all, as you rightly say, adjacent to the site which was

due to be developed.

The Chairman: So the Association acted, am I right, as the spokesperson for individuals who themselves did have party status but preferred to make their representations to the planning inquiry jointly through a spokesperson.

Mr Whittaker: Yes, that is right, and the reason for that was, a lot of them were elderly widows, who obviously it would have been...

The Chairman: So the Association, in this case, acted as an Association and not as a group of individuals. The Association represented the views of a number of individuals.

Mr Whittaker: Yes.

The Chairman: Did any individuals, who had themselves party status, make their own representations, do you know?

Mr Whittaker: Yes, some of them did, didn't they? Yes, they did.

The Chairman: In the Poacher's Pocket application, which was a little bit before, and you will be familiar with, members appear to have acted as individuals. Can you confirm whether the Association was given party status for that application?

Mr Whittaker: I think it was, too. Yes, it was.

The Chairman: In the Crossag Farm application, you talk about the Association having to 'defend itself', but in the Crossag Farm judgment, the Acting Deemster, Deemster Sullivan, refers to 'a number of individual third parties, all of whom are members of the Ballasalla and District Residents' Association.' What I am really getting at, did you or the Association approach the two cases differently?

Mr Allsebrook: May I understand the question you are talking about: Poacher's Pocket –

The Chairman: And the Crossag development. Did you approach the –

Mr Allsebrook: Perforce, we approached it differently, but of course it is the way it arises. In the latter case, a lot of individuals...

In both cases, we clubbed together to employ a lawyer, so we had a lawyer representing the overall interest. So, in that sense, it was the same, but the difference would have been that, in the latter case, there were a lot of individuals who actually put in their own representation, and then when it came to the further court cases, they all gave powers of attorney individually to myself to represent them in court, rather than expand the thing.

In the case of Poacher's Pocket, at that time we again had a lawyer who advised us to remain separately, as it were, so we just went on the way with our lawyer –

The Chairman: So as individuals in the Poacher's Pocket case –

Mr Allsebrook: But represented by the same lawyer.

The Chairman: Yes. You made individual representations as individuals who were also members of the Residents' Association, but you made those representations individually.

Mr Allsebrook: Individually and with a general representation through the lawyer, so in court they were mostly represented by the one lawyer.

The Chairman: That is fine.

At this point, can I ask colleagues if they have any questions on this particular point?

Mr Callister.

Mr Callister: I was just wondering, Mr Whittaker, what the position of the Commissioners was, the Malew Commissioners, at this stage? Were they entirely in line with BADRA in their views?

Mr Whittaker: Yes, they were. I think I will ask Mr Pilling, because he is Chairman, so he can tell you, but yes, I think they were in line with our views.

Mr Callister: Were there any members of BADRA also members of the Commissioners?

Mr Whittaker: Yes, Mr Pilling.

Mr Callister: Just Mr Pilling?

Mr Allsebrook: For most of the time, I was also, and I imagine that within our membership, for example, Mrs Crellin is a member of BADRA as well as being a commissioner.

Mr Whittaker: Because she is an interested party regarding the Crossag development. It adjoins her property as well.

Mr Pilling: Could I perhaps say something, Mr Chairman?

The Chairman: Yes, Mr Pilling.

Mr Pilling: On the Poacher's Pocket, Mr Allsebrook was a commissioner then. We, as the Commissioners, did have representation – Martin Moore represented us – and then there was an election, and when the Crossag Road development came on, Mr Allsebrook, I think, was no longer a member, but Mrs Crellin was, and we had an advocate, Simcocks, representing us.

Mr Callister: Mr Whittaker, if we just take the Poacher's Pocket and Crossag Farm, it seems that the concern for you over the Poacher's Pocket was over costs, but on Crossag Farm it was the imbalance. Is that correct to say?

Mr Whittaker: Yes, but the reason I am bringing this Petition is because it is becoming apparent to me that if a developer, who will obviously have a lot more financial substance behind him than an individual like myself or even BADRA, chooses to bring out a Petition of Doleance, it automatically involves us in an awful lot of expense. It does

not matter whether it is an issue like the Poacher's Pocket or Crossag Farm.

Mr Callister: So it is the cost, really, that is the prime reason that you are concerned.

Mr Whittaker: Yes. After the planning decision is made fairly and squarely, it is then when the developer chooses to bring a Petition of Doleance and legal representation is then required. Yes, that is my concern, the cost once legal representation becomes necessary.

Mr Callister: Did BADRA investigate the possibility of taking out insurance in these circumstances?

Mr Whittaker: I do not think we did. No, we did not.

Mr Callister: Was it not given any thought that you might be able to do that?

Mr Pilling: I do not know whether insurance is available for that.

Mr Whittaker: I did not, either. I have never heard of it. We never were aware of any –

Mr Callister: So not something you considered?

Mr Allsebrook: You also have to understand we are not an incorporated body, which twice stymied our... In the Poacher's Pocket case, if we had been an incorporated body, we would have taken it all the way through the High Court.

The Chairman: Just to be clear then, you are not an incorporated body; you are an informal association of individuals. Do you have a constitution or annual general meetings?

Mr Allsebrook: Yes, we have a constitution and we have general meetings, but you have to understand that the subscriptions, for example, are £7 per family, so even if you have 300 households, you only have income of £2,500 a year, so you are relying on donations, if you are going to talk legal fees, because the lawyers...

The Chairman: Yes. Just to be clear, you do not have the status of an Isle of Man charity, is that correct? You have not established as a charity, and you are not incorporated as a company?

Mr Allsebrook: No, we have been looking at becoming incorporated because of the complexities of...

The Chairman: If, of course, as a company, you were to have that legal structure, you would be in a position to seek public liability insurance and protection of that sort. Is that something that you now consider might have been helpful?

Mr Whittaker: Yes, it would have been.

The Chairman: So, if you were to be in this position again of contesting planning decisions with the possible likelihood, or the possibility of legal challenge, as was

the case in the Crossag case, would you be considering giving yourselves protection as an organisation through incorporating as a limited liability company?

Mr Allsebrook: We have asked certain of our members who are knowledgeable in accounting in this thing to try to set up a procedure for incorporating the organisation, yes.

The Chairman: I see.

Mr Pilling: May I just make a comment here, Mr Chairman?

Once you start going down that road, that then means that individuals like ourselves have to form ourselves into groups in order to be covered. I, for instance, could not possibly take on, say, something that was going on at the Poacher's Pocket, which as you mentioned is right at the back of me. If I decided to take something on on my own, I could not really afford to do it. I would then have to be...

The Chairman: Yes. Can I just clarify as well, presumably, in the case of Crossag, your concerns are to do with the costs of further legal action after the appeal stage, and in this case the developer has sought a Petition of Doleance –

Mr Whittaker: That is right.

The Chairman: – incurring you in costs. In the Poacher's Pocket case, it was the other way round, wasn't it?

Mr Whittaker: Yes.

The Chairman: You, as an association, certainly took steps and went some way down the road to mount a Petition of Doleance into the decision. What I am getting at... You presumably are not contesting the right of a developer to do exactly what you did in a different case?

Mr Whittaker: No, we are not, certainly not. We want some sort of... like I gather they do have... in a case in the UK... a person like myself would have some sort of Legal Aid to proceed, and this is what we are asking Tynwald to consider in the future. We realise it is probably too late for this case, but to stop this happening again. This is the purpose of my Petition.

The Chairman: If Legal Aid was available to the Ballasalla and District Residents' Association, as an Association, would that be something that you would welcome?

Mr Whittaker: Yes, I would, personally.

The Chairman: What would be your comment on the fact that Legal Aid is, under present law, not just here, but in the adjacent jurisdictions, only available to individuals on a means-tested basis?

Mr Whittaker: I will ask Mr Pilling to make comment on that.

Mr Pilling: Excuse me, sir. I am a little bit confused when you say 'insurance', because obviously as an authority we

have contested these, as we feel that it was not –

The Chairman: As a local authority.

Mr Pilling: As a local authority –

The Chairman: Commissioners, yes.

Mr Pilling: – we have contested both the Poacher's Pocket and also the Crossag Road development. I fully understand where the Residents' Association are coming from on the Poacher's Pocket. That was on various issues and they were various issues to do with the Planning Committee, on which there was a Select Committee, but unfortunately, due to lack of funds, they had to withdraw from that, which was very embarrassing.

But I am a little bit concerned, because... I would have to look this up. I was only told about this yesterday, but I understand there is legislation in the UK where the court can award costs to individuals when they are fighting big developers. I know no more than that. You might say, 'Well, you should have looked it up,' but I was only told about this yesterday and I am afraid I do not know many advocates in the UK, so I will try and find out for you, but I understand there is legislation on that.

I am concerned about the insurance angle, sir. I did not know we could insure things. The reason I say this is because we obviously have spent an awful lot of money on insurance and I was discussing this with the clerk on Friday and he seemed to imply to me that there was not any insurance on this.

If there was... If for some reason... It is a little bit embarrassing, because we are still in court, sir. As you well know, on the Crossag Road, costs were awarded. To go back, originally, when the... I think it was Mr Turner, wasn't it, who made the recommendation, which was accepted by Council of Ministers. Council of Ministers then gave their reasons for accepting it. Then the Doleance was taken out and we responded to the comments by an affidavit by Mr Brown and also comments which were made within the statement.

We, on advice, took a neutral stand, but we did point out that various things had been watered down, if I can put it like that, and perhaps the comments expressed by the inspector were not as strongly put by Council of Ministers as perhaps they should have been, and as a result the pleadings were then changed and the people – the company that took out the Doleance – have agreed to pay our costs from the angle of when they changed their pleadings.

We also took out, because we wanted to know the agreement that obviously the Department had made, because we felt that it was going to impinge and affect Ballasalla and Malew in a large way. You have got to remember, gentlemen, that there is... We have been talking about a village plan since 1991. We said in 1991... Mrs Sullivan, in her judgment, talked about the village plan, and we actually, as an authority, are looking very seriously at trying to put a village plan in because – this may take indirectly, but I think you must understand where I am coming from – any development south of Ballasalla, any houses, the waste, the sewage, the whole lot goes through Ballasalla, and also, with the Airport being expanded, and they are talking about double the number in the next 10 years – at least this was before the economic downturn, so I would not know about that...

So you have got to realise that here we are in Ballasalla in the pinchpoint of the whole of the south, and we are looking

at maybe 2,000 homes in the future in the south. We have gridlock, a lot of problems in Ballasalla. So it was important, I think, that we did actually take these Doleances out and we have actually contested the planning applications. But where we are coming from... There are lots of individuals, because the planning application would have allowed for 257 houses, which would have added 30-40 per cent to the size of Ballasalla, with all the infrastructure problems, social problems, the doctors, shops and everything else.

So this is the reason why I think it was taken out and we are now left with what you are talking about. Could we have insured? Under the legal process in the Isle of Man, I do not think we are covered for insurance.

The Chairman: That is fine. What we are looking at are options that might be open to an organisation which wishes to engage in legal action, or finds itself the subject of legal action as a result of going beyond a final appeal stage planning decision. You contested, either as individuals or as an Association, a particular planning decision before, which went a certain distance.

The grounds of the costs of continuing with that Petition of Doleance was, as we understand, a major factor in not proceeding, and similarly, in this other case, where you are, as you say, put in a position of defending yourself as an organisation, post appeal, you are potentially liable for costs to pursue that defence.

Mr Whittaker: That is the major factor. We suddenly found ourselves, Mr Chairman, in the position where we had to defend the evidence that we had offered.

The Chairman: Yes. So, as a body corporate, we were suggesting that you might have had the opportunity for public liability insurance, legal costs insurance. We are just enquiring whether you had explored that.

The question of Legal Aid has come up. Can I just go back, before I invite my colleagues to come in. The question of Legal Aid, which is available to those of limited financial means and is paid by the Treasury and ultimately the Manx taxpayer... Are you saying that you would like that system to be open to organisations and not just individuals?

Mr Whittaker: Well, maybe that would be a way open, yes, or in the worst scenario is it available? May I ask you a question? Is it available to individuals, because I was not aware it was.

The Chairman: It is available to individuals on a means-tested basis and on a basis of complying with very strict rules for legal aid but it is available to individuals, yes.

Mr Whittaker: Probably what we would like to see is, I think, if a developer decides to contest the evidence, that he has to – would you agree – if he has to put some money up, up front, if he wishes to – what we did was we submitted evidence which was accepted by the Government, the planning authorities and we thought that was the end of it, you might say, when the decision was made, but the next thing that happens is the developer comes along and, as I say, he then chooses to legally attack the evidence so we have to defend it. This rather takes a person, or a corporate body, by surprise, and then they suddenly find themselves in this situation.

The Chairman: Are you saying that you would prefer that system, even if it obliged you to put money up front in the event that you wish to enter a Petition of Doleance post-appeal, as you did in the Poacher's Pocket system? It would work both ways, would it not?

Mr Whittaker: Yes, it would, but in the case of the Poacher's Pocket the situation was a little different. We accepted the decision of the planning committee, but the only reason – am I right in saying? – that we then went ahead with that was because the developer did not adhere to the conditions. Do you see there is a slight difference?

The Chairman: But to pursue that legally, you were saying that if anybody wants to go to that particular stage, they should put money up front, so as not to disadvantage the other party who might not have the funds, but it would work both ways, would it not?

Mr Whittaker: Yes, if somebody has the funds to do it, yes.

Mr Allsebrook: I will give you an example, I mean we have won the case, we have been awarded costs which I do not know what the Commissioners' costs are but much greater, but our costs would have been over £21,000. We were awarded costs; now they have appealed the decision for various reasons, which as far as I can understand, they have no likelihood of succeeding, but in order to continue, our lawyer wants £10,000 deposit to continue the case. Not because... he is absolutely sure that we are right, but, of course, they are not sure, for various reasons, that they will ever get the costs back from the developer, so you are in a quagmire in which... and I do not know what would be the situation if this was done for individuals. Obviously, it would be better if you could do it through an individual from a cost point of view, but I am not sure that you would get the thrust that you need to have gone through the High Court in the way that we did.

I think it is as right that there should be some laws which guide the expenses and particularly the deposits that you have to make and there should be some help to the individuals. I think you are on the right track there and that possibly we could have examined that. With the Poacher's Pocket we had no option, for all sorts of reasons, but in this case perhaps we did have that option, perhaps that would have been a way.

I do not think it would have been an easy way. I think it would have been less successful, less likely to be successful, because in this case they called my name 42 times. The whole of the case was built upon the assumption that my evidence was in some way flawed and they called my name – I am talking about the various lawyers – 42 times. Everything is done by affidavit and I cannot conceive how another individual who would have qualified for the expenses could have prosecuted essentially what was my case.

The Chairman: Thank you, Mr Allsebrook.
Mr Callister, any questions?

Mr Callister: Mr Whittaker, your letter of 17th November, and I quote that,

'The most obvious step in the right direction to deter large developers from using this procedure'

– that is, Petition of Doleance –

‘and bringing in frivolous or unsound cases against legitimate objectors would be to impose severe penalty costs on them.’

Two points there, really. Who would decide what would be, and how would it be decided, whether a Petition of Doleance is frivolous and who would determine the penalty costs?

Mr Whittaker: I think the Government would have to do that, the adjudicator.

Mr Callister: No, the Government must be an adjudicator.

Mr Whittaker: Thinking about it, well, it would have to be the court, in that case.

Mr Callister: And the court would decide whether the Doleance is frivolous or unsound?

Mr Whittaker: Yes.

The Chairman: Would the court not, though, be required to hear the evidence and reach a conclusion?

Mr Whittaker: Yes, it would.

The Chairman: But then... the process has started, then. The clock starts ticking for costs at that point.

Mr Whittaker: But surely the court could quite easily determine in an outline whether it – do you follow what I mean?

The Chairman: You would like a system where a court, from the outset, before costs start to be accumulated, to rule that a particular case not yet heard is frivolous or not and worth hearing?

Mr Whittaker: Possibly, yes, but I will ask Mr Pilling to fill in on that.

Mr Pilling: You know with civil cases you have to produce a skeleton argument and, purely on the basis of that, I am just thinking of a way forward over this particular problem because you are absolutely right in what you have said. Once you start the legal bit... I understand in some cases that you put a skeleton argument and it is on that basis, but I think, quite honestly, that if you do wish to challenge a decision then some money should be put in court because what happens, let us say if, at the end of the day, you take out a Petition of Doleance because you do not like the decision and you go bankrupt or whatever happens and all the other parties in good faith put money up and spend lots and lots of money – and I am opening another avenue and I apologise – but I think, in the overall picture, that is something that perhaps you as a committee could give some consideration.

The Chairman: If in mounting a Petition of Doleance, having taken legal advice, you assess the likelihood of success or not and where costs may fall, that surely is the time to decide the strength of your case.

Mr Pilling: Can I stop you there for a moment, sir? You heard a decision, a perfectly legal decision made on Crossag Road, which was challenged, and it has now been proved because of the judgment, I am sure you have read the judgment of Mrs Sullivan? I have read it two or three times. That to me is – she does actually say that she is very impressed with the way the inspector had... and I have read the inspector’s report and I – brought back to them for a long time in planning, but that is another matter, as Mr Cretney knows.

I thought that was a very thorough job and when one is challenging individual... and with all due respect to the Isle of Man Government, you bring over independent inspectors, qualified and probably the best in England, over here. You spend a lot of money and I do not always agree with the planning process, but I must admit I have been very impressed with the way the inspectors – I do not always agree with them – but the inspectors put the case out and they say x, y and z.

The Council of Ministers accepted this Report and, for whatever reason... and then that is challenged. OK and I fully understand that you have the democratic right to that but then, in good faith, you should say, well, OK, I am prepared to put my money where my mouth is and I will put some money into court.

The Chairman: I come back again to the earlier point when the boot was on the other foot.

Mr Pilling: Yes, both sides, sir.

The Chairman: OK.
Mr Callister, anything further?

Mr Callister: Not quite yet, no.

The Chairman: Mr Cretney.

Mr Cretney: I think Mr Callister has asked most of what I was interested in.

I think the bottom line here is that you are concerned that it is small versus large and yet small is at a distinct disadvantage in these kind of processes and you would like to see more fairness in the system. It is just how we get to that position, so I understand where you are coming from. I do not think at this stage I have anything further to add.

Mr Callister: In your various discussions, and so on, on all of this because you have had a good time to consider it, have you thought of any means other than a Petition of Doleance that could be adopted, or even a pre-petition situation, that you would consider or recommend or give us an opinion even?

Mr Whittaker: We have discussed other possibilities but I think we came to the conclusion each time, that this was our only recourse, was it?

Mr Allsebrook: No, I think what he is asking is whether there is a structure like some ombudsman or something like that which would be in some...

Mr Whittaker: There isn’t at the moment, is there?

Mr Allsebrook: There isn’t, but I believe there is a

process and Mr Pilling referred to it slightly, did you not, that this process does exist in England which might save some of this. I do not know. Did I understand you correctly?

The Chairman: Are you talking about proposed reform in the English courts of the tribunal system? Is this what you were referring to?

Mr Pilling: No, sir. There were two things, actually, if I may just butt in there. One I know, as Mr Cretney will know, with all due respect, an ombudsman has been on the agenda for Tynwald for a very long time and my wife actually has stood on the Hill twice about an ombudsman and it was... for whatever the Select Committee did agree that one should be put in place and for whatever reasons it has not.

So perhaps I am in the unfortunate, difficult position because it was my wife and not me, but the bottom line, I think an ombudsman would be someone you could refer to in the early stages and a starting point, but as the laws of the Isle of Man... planning laws as they stand at the moment, you have no alternative but to go down the procedure of taking a Doleance out because there is nothing else you can do, sir.

The Chairman: It is intended that an ombudsman system to be known as the Tynwald Commissioner for Administration be brought in and we understand that that is in hand and consultation is about to start with the public but this is to be a system – I just want you to confirm your understanding – where complaints against Government administration are to be addressed and not a system of judicial review of court decisions, which is something different.

Given that the appeals system is a quasi-judicial system, do you see the proposed ombudsman system is an opportunity, instead of the Petition of Doleance, to challenge what are the decisions of legally-constituted tribunals, as opposed to alleged maladministration within Government itself or a Government Department?

Mr Whittaker: Yes, could you not spread the powers that are of the ombudsman to incorporate that? Yes, I think that would be a very good idea.

The Chairman: So you would see it as extending to a system of judicial review of tribunal decisions?

Mr Whittaker: Possibly as well as, because you see in this case I am sure you are aware, Mr Chairman, we were quite happy – there was no question, as far as we were concerned – with the Government's behaviour or decisions that were made. What caught us on the hop was the fact that the developer then chose to challenge. This was the problem so I suppose an ombudsman, yes, would probably... if you extended the powers of the ombudsman to incorporate what you have just suggested, would possibly be an excellent idea.

Mr Cretney: A mechanism whereby before it goes down the road that a sifting system which determines whether or not referrals to a Petition of Doleance are frivolous or vexatious or whatever, somebody could try and sift at that stage before the clock ticks, as Mr Rodan...

The Chairman: Mr Callister.

Mr Callister: Yes, just a final point that I have for Mr Whittaker, really.

During the Tynwald debate that brought about the election of this Committee, the Chief Minister, Tony Brown, said that if a level playing field were to be approved, the only way that the costs of the small person against the big company could be met, is through taxpayers' money. Would you agree that that would be something you would welcome or not?

Mr Whittaker: In the last resort, yes, you would probably have to if...

Mr Callister: You would be happy for taxpayers' money to be used in cases, so if that system came in you might get all kinds of Petitions of Doleance being put up by small groups or individuals.

Mr Whittaker: Then you would have what Mr Cretney has just said, a sifting system first.

Mr Callister: A sifting system and then taxpayers' money to pay for individuals?

Mr Whittaker: If it was really felt that the case was justified, yes, maybe.

Mr Allsebrook: With respect I do not recognise the truth of the original hypothesis. I do not see why that should be the case. I think the costs of that should be levied on the guilty party.

Mr Callister: But if the guilty party, as you were saying, think the company is found to be correct in the situation, who then meets the cost of the individual loser?

Mr Allsebrook: The small person.

Mr Callister: Yes

Mr Allsebrook: That is a difficult one.

Mr Pilling: May I say something, sir. Under the normal circumstances we had an initial review. Well, in fact we have not got a review, but I understand the review is the planning system is rather fluid, but we do have an initial one and then you have if somebody is vexed about it or not happy about it, they have a chance of going to an appeal, as I have said, with an independent inspector who certainly puts you down. If you then are going to challenge that as an individual, then you will probably have to take legal advice and that legal advice will tell you whether you are right or wrong, probably, or whether you are wasting your time because, I mean, they charge £300 plus per hour and the costs mount up.

However, it is rather different when the application is made by the Department of Local Government or DoT, or whoever it is. We had one on the Airport, if you remember, and there was only one person who was a resident down in Derbyhaven who took it. I was actually approached by this gentleman prior to the appeal and I did read his submissions and I said, 'Look, you are actually wasting your time, you are going to lose because in my opinion, x, y and z. However, you are doing this, now I suggest it was... he was... I was... when I read it all I was... said that my concern is the overall individual supervision of the actual proposal and I said I would suggest that you x, y and z and that actually came out in the appeal.

So what I am really saying to you that when you have got

an initial stage and the next stage and private individuals, I think you are very well covered, but it is especially when you get a major development or something going straight from... if a Department makes it and it goes straight to an independent inspector and then you actually, because of the planning process, you have problems because somebody might not like a little bit of it.

I think Mrs Sullivan's judgment actually says that some of it really was... the statements made on behalf of JD Kelly were perhaps not quite as accurate. I am trying to be very careful what I say because they are now challenging the costs, though they have been awarded. So I think there are two different issues.

The Chairman: It is certainly not our remit to examine the planning system –

Mr Pilling: No, no, no, no.

The Chairman: – and the planning procedure but if I understand you correctly, are you saying that when a planning application – and there is no review stage currently under the present system – there used to be – having initially been determined, it then goes to appeal, the appeal being called either by the applicant or the opposing parties, are you content, though, that for whatever the financial means you have at that stage, you do have this individual objector or, as a residents' association, every opportunity to make the case before the independent inspector? Do you consider you are afforded that opportunity to make the case?

Mr Whittaker: The Department actually states whether you are an interested party which, of course, makes problems.

The Chairman: Assuming you are an interested party?

Mr Whittaker: Yes, I think, as I said to you earlier on, I think that if then you do not like the decision and you go and take legal advice and the advocate says you are wasting your time and whatever and if you then want to pay the costs and you have got to pay their costs and your costs as well; but it is when it is called in and as you say and Government have to make a decision, then it is open, I think, if then somebody is directly affected by this and there is a lot of money, as with the developers, then as Mr Cretney said earlier on, it is a matter of getting a level playing field and the machinery in which, if you feel that this is the right and proper way, of actually putting this in place.

The Chairman: I am not saying that, whether or not the appeal decision is made by the Minister or by the Council of Ministers, in the event that it is called in, called in on grounds of national interest, for example, nonetheless there is then an end point to the planning process and what then might happen is that the aggrieved party by the nature of planning – there is always going to be a winner and a loser – is not happy with the decision and wants to take it further beyond the appeals stage, this is where Petitions of Doleance come in because some parties do not like the decision. Do you think it is right that they should be given – whoever it is, whether it be a developer or an individual objector – an open-ended right to pursue beyond the appeal stages because they do not like the decision?

Mr Whittaker: No, I do not. Can I come and give you an example there. We obviously objected to the Poacher's Pocket: now we lost. Fair enough. I was quite happy to accept the decision of Inspector Hollis, so that was that, but then why we then went and put a Petition of Doleance in – and I wish we had another way of doing it besides a Petition of Doleance – was because the developer broke the conditions.

One of the conditions, for instance, was – and I remember this so well – that the developer was not allowed to proceed with any development until the river authority, the drainage department of the river authority had put the bund in situation. Lo and behold, I look out of my window one Saturday morning and there is a roaring great bonfire and they are destroying a lot of the stuff completely prematurely and then, as Mr Allsebrook knows only too well, they went and destroyed trees. Our only recourse of redress was the Petition of Doleance but I reckon in that case, as you are rightly suggesting, I think an ombudsman would have been far better.

The Chairman: Without going into the detail of an individual case, of course, the previous Select Committee into that issue did find that administrative procedures in relation to complying with conditions had been implemented and the challenge was as to whether they had been correctly implemented and the Committee reached conclusions about that that they had been implemented technically correctly, but there were other issues as to whether that would have been a reasonable decision to reach.

So it was not, in answer to your point, the fact that conditions were not being adhered to. They were being adhered to under the processes that were available and which were properly conducted.

Mr Whittaker: In some cases, Mr Chairman, I do not think that independently of that Committee's remit, I do not think the developer did adhere to them. We felt very strongly that things did start to take place before the drainage people – am I not correct?

Mr Allsebrook: There are about 16 conditions and I do not think one of them was observed properly in either the spirit or the fact, not one.

The Chairman: Okay, as I say, we are not here to adjudicate on a particular case. What we are looking for is a mechanism by which a party who is aggrieved after a final planning decision can reasonably pursue those objections. I think that is what you are asking for.

Under the present system there are high legal costs to doing so and you are inviting us to find a way forward that does not incur high legal costs, but nonetheless is fair to everyone. Would that summarise your position?

Mr Whittaker: That is a remit, yes. I was just trying to illustrate the two different uses of a Petition of Doleance. We had to issue a Petition of Doleance in the case of the Poacher's Pocket because we felt that what had been agreed was not being adhered to. In the case of Crossag Close, the developer has suddenly jumped in with a Petition of Doleance because he is not satisfied with the decision and I think you can see there are two different...

The Chairman: Can I ask Mr King if he has any particular questions.

The Clerk (Mr King): Thank you, Mr Speaker.

The Committee started off earlier this morning learning about the status of the Residents' Association and we have got a gentleman here from the Residents' Association and from the local authority and I just thought it might be useful for the Committee to ask Mr Whittaker to explain a little bit about the difference between those two organisations and what is the importance of having the two different kind of bodies?

Mr Whittaker: This relates back to the history of Ballasalla. We at the time – I had better be careful what I say here – felt that the then Commissioners, when the Residents' Association was formed, were not looking after the interests of Ballasalla as they should have done and things were happening that we could see, there was gross overdevelopment. I am going back 11 or 12 years or more and so we formed the Residents' Association.

Since then, the members of the Commissioners and the situation has moved on and now there is a much more co-operative relationship between the Commissioners and the Residents' Association than there was in the early days. I think that sums it. Can you see why we felt in those...

Mr Allsebrook: The Association has been formed over 22 years and when it originally formed, it had many briefs, including a wide social aspect and took trips and did a lot of things and we have had to shave some of these things down because, over time, it came in conflict with the church's activities and other things in conflict with the Commissioners' activities.

So we now have a more zeroed approach but we have been there for 22 years and our principle thing is that we have the good of Ballasalla at the top of our list, whereas the Commissioners, of course, are for Malew and many of them do not live in Ballasalla and they are quite happy to see gridlock in Ballasalla... That is why we...

Mr Cretney: Isn't the traditional recourse in such matters through the ballot box?

Mr Allsebrook: That is right. That is why people like me have to stand as a commissioner and it is purgatory, (*Laughter*) and that is why – I have tried it – and I keep on standing and then, when I think everything is alright, I stand down. Then they drag me out in my old age. But that is not something I should have to do.

The Chairman: Thank you very much.

Can I ask my colleagues: any further points? No.

Mr Whittaker, would you like to make any further points to us before we close?

Mr Whittaker: First of all, I would like to thank the Committee for taking the time to hear my oral evidence and read my written evidence. I would like to see a way forward where the small individual is somewhat encouraged, rather than discouraged, from pursuing a planning application, and I think that sums up the remit of my Petition.

The Chairman: Thank you, Mr Whittaker, Mr Pilling and Mr Allsebrook, very much for coming and assisting the Committee this morning. We will obviously be considering the oral evidence we have heard.

It may well be, as we carry on with our investigation and call further witnesses, we may have occasion to recall you as an oral witness, in which case we will certainly give you notice of that. But I would like to thank you very much for your attendance this morning. That brings this particular session of the Select Committee in public to a close.

Thank you very much, everyone.

The Committee sat in private at 11.39 a.m.