

Rodgers, P
Three very Manx remedies

George Johnson Prize Trust Essay Winners: 2009

This version is available: <http://radar.brookes.ac.uk/radar/items/b99c1cd3-3f26-c283-3a8b-d1a6a72006fd/1/>

Available on RADAR: August 2013 with permission from the Isle of Man Law Society.
Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners.



This work is licensed under the  Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/3.0/>

This document is the electronic version of the original printed version.

“Petitions of Doleance, Status Quo and Actions of Arrest are useful Manx remedies and should be retained” - discuss¹

Three very Manx remedies

Paul Rodgers, Articled Clerk²

¹ George Johnson Law Prize Essay 2009; Essay (c)

² Articled to Irini Newby; Articles commenced November 2007

~ - . - ~

Table of Contents

~ - . - ~

1.0	INTRODUCTION	3
2.0	PETITION OF DOLEANCE	4
2.1	Introduction	4
2.2	Usefulness in the Separation of Powers.....	4
2.3	The lack of procedural bureaucracy.....	5
2.4	Time Limits	6
2.5	Usefulness – Sufficiency of remit and power	8
2.6	Issues of cost.....	9
2.7	The proper parties to petitions of doleance.....	9
2.8	Proposed changes	10
2.9	Conclusion	11
3.0	ACTION OF ARREST	12
3.1	Action of Arrest	12
3.1.1	<i>Introduction</i>	12
3.1.2	<i>Personal Arrest</i>	12
3.1.3	<i>Proprietary arrest</i>	13
3.1.4	<i>Purpose of the action of arrest</i>	14
3.2	The Mareva Injunction (“Freezing order”)	14
3.2.1	<i>Introduction</i>	14
3.2.2	<i>Purpose of the Mareva</i>	15
3.3	Comparison of Action of Arrest and Mareva in terms of property	15
3.3.1	<i>Similarities</i>	15
3.3.2	<i>Differences</i>	15
3.3.3	<i>Summary</i>	16
3.4	ECHR in Actions of Arrest	16
3.4.1	<i>Proprietary Arrest</i>	16
3.4.2	<i>Personal Arrest</i>	16
3.4.3	<i>Article 5 ECHR</i>	17
3.5	Conclusion	19
4.0	PETITION FOR RESTORATION OF THE STATUS QUO	21
4.1	Introduction	21
4.2	Nature of the order	21
4.3	Interim Injunction	22
4.4	ECHR Considerations	23
4.5	Conclusion	23
5.0	SUMMARY	24

“A Manxman, to be true to his native character, must be a Conservative ; for even if he pretended to be a Radical, he could in reality be nothing better than a hybrid, hanging between the two. According to the few pretended specimens of the article which he had seen, he believed the Manx Radical, if he really had an existence, though he very much doubted it, would be found to be a man either five centuries behind his time or five centuries before it, and most probably not himself sure which. From his conservative principles he did not want any change. He must, however, say something on the bad side of this characteristic. One of its worst features was an opposition to necessary and salutary reforms. This has ever been an unmistakable feature of Manx character. So much so, indeed, that great difficulty was generally found in introducing even the most beneficial changes, there was always the Manx predilection to stand still as long as they could, until pushed along or shoved along in some way or another.”

Report on lecture of Rev T.E. Brown given at King William's College
reported in Manx Society volume 16, 1869

1.0 INTRODUCTION

1. The three remedies to be discussed are all ancient civil suits peculiar to the Isle of Man which continue to subsist in largely unaltered forms. They are as a group substantially incongruous, the action of arrest and *status quo* petitions could loosely be described as injunctive relief but they are entirely distinct to the petition of doleance which is the Manx form of judicial review.
2. The usefulness of the remedies and the question of reform will be assessed in the light of proposed legislative changes and other similar remedies, and their compatibility with human rights law³. Accordingly, the author will show that two of the remedies are intrinsically useful to Manx society and should be retained whereas the other remedy has no cause for its continuation. In such circumstances the Manx “predilection for change” should be overcome to institute reform.

³ The Human Rights Act 2001 brought the European Convention on Human Rights (“the ECHR”) into force on the Isle of Man.

2.1 PETITION OF DOLEANCE

2.2 Introduction

3. The petition of doleance is the Manx system of judicial review. It has developed to be a means for the “ordinary citizen” of the island to obtain redress for perceived injustice⁴ done him at the hands of those exercising judicial or quasi-judicial functions⁵, i.e. administrative functions delegated by Tynwald. Although the petition has strong similarities to judicial review in other jurisdictions such as the Channel Islands⁶ and England⁷ there are several unique aspects to doleance. Firstly, at its core it is a simple and speedy⁸ remedy unencumbered by legal formality⁹. Secondly, it retains many procedural idiosyncrasies. There are no permission requirements and frivolous actions may be controlled by the right to strike out actions for undue delay or want of standing. It had long been assumed that such rules made the courts more accessible to ordinary Manxmen. However, in the recent *Petition of Whittaker*¹⁰, the petitioner argued that the cost of defending petitions discriminated unfairly in favour of the wealthy.

2.3 Usefulness in the Separation of Powers

4. The petition of doleance *ergo* judicial review is fundamentally useful and indeed necessary in a democracy. Judicial review is a judicial function which takes place as a result of the separation of powers doctrine¹¹. The essence of the doctrine is essentially that there should be

⁴ See Bingham J.A. at 390 in *In re Kerruish* 1961-71 MLR 374

⁵ See Deemster Moore at 355 in *In re Ackernley* 1961-71 MLR 354 (as approved by Deemster Doyle appearing alone in the Staff of Government Division at paragraph 62 in *The Petition of Hafner*, 2DS/2007, 17 at 62): "In my opinion a petition of doleance applies only where relief is sought in respect of some legal wrong in proceedings either by a court or by some other tribunal or by some body exercising judicial or quasi-judicial functions"

⁶ See discussion of judicial review in the Isle of Man, Guernsey and Jersey in the Guernsey case of *Bassington et al v H.M. Procureur*: GLJ Issue 26 p.105 (“Bassington”) at p.117-118

⁷ Particularly in terms of the grounds of review. The grounds are properly described as illegality, irrationality and procedural impropriety (See Deemster Doyle at 36 in *MTM v FSC*, CP2003/119). This is entirely consistent with the Diplock categorisation in the GCHQ case *See Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374. Lord Diplock divided grounds for judicial review into three classes: ‘illegality’, ‘irrationality’, and ‘procedural impropriety’; Petitions can now be made on the basis of human rights or European jurisprudence where applicable See *In re Seaside Shipping*, a case on MEQRs which apply to the Isle of Man under Protocol 3 of the Act of Ascension.

⁸ *In re Kerruish* 1961-71 MLR 374 Bingham J.A. at page 390 (approved by Deemster Doyle at 53 in *Hafner*, *Ibid.*) stated that a petition of doleance provides: "within a comparatively compact community a simple and speedy means for the ordinary citizen to obtain redress for injustices which, in England, would be remedied by orders of certiorari, habeas corpus and the like. 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".

⁹ In the case of *Re Lezayre Parish Commissioners* (16th September 2002) (unreported) Acting Deemster Teare QC stated (at paragraph 15 of the judgment), “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.”; following Bingham J.A. in *In re Kerruish*

¹⁰ *Petition of Grievance of Donald Whittaker of 66 Beech Grove Silverburn Estate Ballasalla Malew* read at the sitting of Tynwald on 7 July 2008

¹¹ The concept of the separation of powers can be traced back to Aristotle in his *The Politics*.

a clear demarcation of functions between - to excuse a Manx pun - the three legs of government - Tynwald¹² the Council of Ministers¹³ and the Judiciary in order that none should have excessive power and that there should be checks and balances between the legs.¹⁴ To paraphrase Montesquieu¹⁵ were there no separation there would be arbitrary control. Therefore, the judiciary must be supervisors of the delegated functions preventing abuses of power. It would appear that the role of the judiciary is particularly important in the Isle of Man given that the separation of powers is even less perfectly implemented than in the UK¹⁶.

2.4 The lack of procedural bureaucracy

5. The island takes many positive principles from English judicial review including the grounds of review. However, in recent times England felt it necessary¹⁷ to alter its procedure to introduce additional formalities¹⁸ including a permission stage and a three month time limit¹⁹. Despite aiming at improving fairness²⁰ efficiency and cost²¹, the latter two criteria have been favoured²² the interests which predominate are those of saving court time and protecting public authorities²³.

¹² the Legislature consisting of the Queen Lord of Mann, the House of Keys and the Legislative Council.

¹³ the Executive.

¹⁴ There is in all such separation systems overlap between the legs. However, the extent of such interreaction, how it takes place in the Isle of Man, whether it is useful, whether it should be retained are all beyond the scope of this essay.

¹⁵ In his *De l'Esprit des Lois* (1748), "there is no liberty if the power of judging is not separated from the legislative and the executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator".

¹⁶ Edge, P.W. (1997), *Manx Public Law*, University of Central Lancashire at 153, "the doctrine of separation of powers is imperfectly implemented in the United Kingdom, and even less so in the Isle of Man"; See further at 153 - 179

¹⁷ One of the reasons was the increasing number of application for immigration review. See, for example, Cornford, T., "The New Rules of Procedure for Judicial Review" [2000] 5 Web JCLI at 2.

¹⁸ See Part 54 of the Civil Procedure Rules of England and Wales.

¹⁹ Which should be regarded as a long stop; See *Andrew Finn-Kelcey v Milton Keynes Borough Council* [2008] EWCA Civ 1067

²⁰ See Cornford, T. at 6 [2000] 5 Web JCLI. "There was originally a presumption in favour of granting permission where the test of arguability was satisfied should be spelt out in the rules (Ch.7 paras 13 and 14) [...] What is lacking is the one measure proposed by Bowman to improve the claimant's position at the permission stage. Like the old Rules, the new Rules say nothing about the criteria for the grant of permission and thus leave matters in the rather unpredictable state that they were in before".

²¹ See Cornford, T. at 5, *Ibid.*, Although, the Bowman Committee's terms of reference required it to "put forward costed recommendations for improving the efficiency of the Crown Office List..." that do "not compromise the fairness or probity of proceedings, the quality of decisions, or the independence of the judiciary" (Bowman Report 2000, preface p ii) in practice the Report is overwhelmingly concerned with matters of cost and efficiency.

²² The author has no information or statistics on whether efficiency is an issue in the Isle of Man.

²³ See Cornford at 7, 10, *Ibid.* "as in the case of the permission stage, they are by and large driven by considerations of saving court time and protecting public authorities rather than of fairness or access to justice."; "there are no criteria for protecting the claimant at the permission stage".

6. The Manx situation is the polar opposite²⁴. The courts welcome doleance sometimes even when improperly pleaded²⁵. The aim of the Manx courts is to make justice as accessible as possible without allowing frivolous and vexatious claims²⁶. In stark contrast to the English rules, the law is simply that the petitioner “proves his case”²⁷. Even when an applicant does provide affidavit evidence cross examination is the exception not the rule²⁸ since it is not considered necessary²⁹. The author agrees with Bingham JA³⁰ that the system can only retain its virtues³¹ if it retains its flexibility³². The current Manx model does so by continuing in a format largely unchanged since its inception. Insodoing this simple procedure saves both time and costs³³. Therefore, it is submitted that a new rule for judicial review modelled on English law should be treated with circumspection.

2.5 Time Limits

7. Manx law relies on the equitable principles of undue delay³⁴. The right to strike out does not solely depend on time, it depends on the circumstances of each case³⁵, does not apply where

²⁴ Although it has been said that the time limit of 3 months is persuasive

²⁵ See Deputy Deemster Corlett in *In re Holmes*, ChD, CP2008/84 at paragraph 26, “It seemed to me as a result of those exchanges that Mr. Holmes might very well have a cause of action in negligence against the General Registry and that accordingly he could, if he thought fit, amend his current Petition of Doleance to plead negligence on the part of the General Registry and that his Petition of Doleance could continue on the basis that it was making a claim for a declaration of unlawfulness combined with a claim for damages, such a claim being permissible under section 44 of the High Court Act 1991”.

²⁶ Further, there is yet to be an outcry over swamping of the judiciary with doleance claims

²⁷ Affidavits are not technically necessary. In the case of *In Re Kerruish* Bingham J.A. stated at 389 : “In England it is true that the practice (and maybe, by now, the Rule) is that an application for certiorari must be supported by an affidavit, but the historical development and procedural requirements of certiorari in England are so different from those of doleance in the Isle of Man that in my view the best guide to follow is that provided by Sir James Gell in the Corkish case, which is to the simple effect that the petitioner must prove his case as in any other petition. There is, therefore, no mandatory rule of practice or law that a petition of doleance must be supported by an affidavit”

²⁸ Bingham J.A. in *Re Kerruish* at 389, “The essence is that the petitioner must prove his case. To this end he may support his petition by affidavit. If he does, the other side can apply for an Order requiring the attendance of the petitioner so that he can be cross-examined. In cases where irregularities by defendants are alleged, it may be that such an Order will usually be refused, for it will not be the plaintiff’s character or conduct or credit which is in question.”

²⁹ *In Re Kinrade* CP 2003/138 (14th May 2004) Acting Deemster Moran identified the Court’s discretion to permit cross-examination in doleance proceedings as being, “an exceptional course rarely allowed save where required by justice”.

³⁰ As he then was; now Lord Bingham.

³¹ of simplicity and being unencumbered with formality

³² Bingham J.A. in *Re Kerruish*, *Ibid*, “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 the petitioner must prove his case, together with the implied corollary that the means by which he seeks to do so are at his own choice and risk. If the flexibility of this procedure should, at any future time, bring abuses and frivolous applications in its train, means can well be devised to remedy matters, for a petition of doleance is above all a discretionary remedy.”

³³ See Caine, S. at 9.1 in Law Society response to Petition of Whittaker, dated 28 November 2008

³⁴ The leading authority on time limits in judicial review is set out by Deemster Doyle at paragraph 43 in *Petition of Seaside Shipping*, ChD, CP2007/99. It is clear from that recent judgment that in contrast to the present position in England the Isle of Man applies the common law principle of *laches* within which there is no absolute time limit for bringing an action.

³⁵ See Deemster Doyle at 43(1), *Ibid*.

there are issues of general public importance³⁶; and will be heightened by showing prejudice and/or change of position and/or acquiescence³⁷. Clearly this is a flexible system. In contrast, proposals for new Manx rules moot the idea of establishing a time limit rule identical to that of England.

8. That English rule³⁸ states that claims must be filed “promptly” but “in any event not later than 3 months”. However, that rule must be read in conjunction with a second rule³⁹ which gives the power to extend time under the court’s general case management functions. Accordingly, there is tension between the two rules. Moreover, the lawfulness of the promptness requirements was questioned in *Burkett*⁴⁰ whilst even England’s own guidance manual acknowledges that pre-CPR case law⁴¹ on extensions of time will continue to apply⁴². Accordingly there is a potential for legal action on the time rules thus creating the potential to restrict accessibility to justice.

³⁶ *In re Malew Parish Commissioners* (Ch.D.) 2001-3 N-5; as approved by Deemster Doyle at 43(5), “In certain circumstances a petition of doleance may be permitted to proceed even if there has been a significant delay. This may be the case where the petition raises on its face matters of general public importance (see for example *Malew, R v Secretary of State for the Home Office ex parte Ruddock* [1987] 1 WLR 1482 and the *Equal Opportunities Commission* case) and where there is a strong public interest in the resolution of the petition on its merits and it is otherwise appropriate for it to proceed;”

³⁷ See paragraph 43(1), 43(4), *Seaside Shipping*; This is similar to the Scottish system as discussed by Lord Hope in *Burkett* whose comments were discussed in *Seaside*

³⁸ See Rule 54.5(1) of the Civil Procedure Rules 1998; See proposed rule 14.23 of the draft Rules of the High Court 2009

³⁹ Under the court's general power of management, “Except where these Rules provide otherwise, the court may- (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)”; See proposed rule 7.2(2) of the draft Rules of the High Court 2009

⁴⁰ In the Scottish House of Lords case of *Regina (Burkett) v Hammersmith and Fulham London Borough* [2002]

1
W.L.R. it was held *obiter dicta* by Lord Hope and Lord Slynn that the promptness requirement was incompatible for the convention. Lord Hope stated, “The problem is that the word “promptly” is imprecise and the rule makes no reference to any criteria by reference to which the question whether that test is satisfied is to be judged.”; Lord Slynn stated at 53, “It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty” Contrast *Burkett* with *Lam v United Kingdom* App. 41671/98), heard 5 July 2001 where the ECHR found that the promptness requirement was proportionate in ‘pursuit of a legitimate aim’ namely the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of the administrative decision’. That decision was not cited in the *Burkett* case where Lord Steyn and Lord Hope concluded that the timing rules for judicial review breached the principle of legal certainty under the Convention. This oversight was noted in the post-*Burkett* case of *Hardy v Pembrokeshire CC* [2006] EWCA Civ 1008 where the Court of Appeal relied upon *Lam* to justify its refusal to find the domestic timing rules in breach of the Convention. It expanded its justification for doing so to include reference to the use of ‘promptly’ within the Convention itself, and by showing that Convention jurisprudence permits laws that are couched in vague language provided the citizen is able to see with a reasonable degree the consequences of his action.

⁴¹ Based upon Supreme Court Act 1981 section 31(6).

⁴² The pre-CPR considerations are very similar to Manx rules including exceptions for issues of general public importance. See case of *R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482 ; S

2.6 Usefulness – Sufficiency of remit and power

9. In order to be useful individuals must have full access to the court to test the legality of inferior tribunals⁴³ and a full range of useful remedies. It is clear from the case law that there is full access to challenging decision makers. Petitions have proceeded against the full breadth of the island's bodies including the Attorney General⁴⁴, High Bailiffs⁴⁵, the Council of Ministers⁴⁶, Ministers⁴⁷, the Chief Constable⁴⁸, Departments⁴⁹, the FSC⁵⁰, the gaming board⁵¹, and various tribunals⁵². Doleance is also waiting to protect individual rights when for whatever reason the statute has sought not to do so⁵³. Further, petitions of doleance are effective from a remedies perspective. Following statutory changes⁵⁴ it is clear that a full artillery is available from damages⁵⁵ through quashing order, prohibition orders⁵⁶,

⁴³ Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants)* Bill, 2 February 2004, HC 304 2003-4, at 57 commenting on the possibility of excluding the right to judicial review in the new immigration appeals system

⁴⁴ *Petition of Winnel* (ChD) 1993-95 MLR 85 – Conduct of prosecution subject to doleance if not part of judicial decision or procedure (as restricted by s10(2) High Court Act 1991); *In re Fredsriksen* (SOGD) 1996-98 MLR 286 – AG's discretion to order investigation under section 24 Criminal Justice Act 1990 subject to petition of doleance; *In re Richardson* (SOGD) 1996-98 MLR N-9 – AG's decision to implement request for assistance under s21(2) Criminal Justice Act 1991 subject to review, see als. *In re Hafner* (ChD) 2005-06 MLR 430

⁴⁵ *In re Hill* – Decision of High Bailiff not to exercise discretion under section 16 Summary Jurisdiction Act 1989 favour of jury trial subject to petition of doleance; *In re Hafner* (SOGD), 2DS/2007/17 – Decision of Deputy High Bailiff under s21 Criminal Justice Act 1991 subject to petition of doleance.

⁴⁶ See *Petition of JG Kelly and Jackson Homes*, CP2003/13 – decision of the Council of Ministers in respect of planning application subject to petition of doleance.

⁴⁷ *Petition of Malew Parish Commissioners and Corlett*, CP 2001/21 – Minister responsible for planning decision subject to petition of doleance; See also *Tilleard –v- Allinson*, CP2008/1

⁴⁸ *In re Culverhouse* (SOGD) 2003-05 MLR 558 – decision of Chief Constable not to consent to advocates acting under section 17A Criminal Justice Act 1990 subject to petition of doleance.

⁴⁹ *In re Manx Ices* (SOGD) 2001-03 MLR 64 Department of Local Government and the Environment alleged non compliance with Article 28 of the EC Treaty re import licensing subject to doleance; *Petition of Galloway*, CP2000/70 – Department of Home Affairs decision to transfer defendant to the UK subject to petition of doleance; See also, *In re Newberry*, CP2008/29 – Decision of Home Affairs to transfer defendant to Lifers unit in UK subject to petition of doleance.

⁵⁰ *Re: MTM (Isle of Man) Ltd (ChD)* 2003-05 MLR 415 –Review of Financial Services Commission discretion not to award a corporate service provider's license.

⁵¹ e.g. *Arnold Robert v IOM Gaming Control Board* 1984-86 MLR 321

⁵² *In re Graley* (ChD) 2005-06 MLR 520 – Decision of Interception of Communication Tribunal not to permit representations subject to petition of doleance.

⁵³ See leading case of *In re Kenyon* (ChD) 2001-03 MLR 1– If statutory appeal mechanism available, convenient and appropriate court has discretion to order it to be used. ; see also recent case of *Thomas v Department of Education* the appeal division held that the proper mechanism for an appeal against an interlocutory matter in the Work Permit Tribunal was via petition of doleance.

⁵⁴ The preamble to the High Court Act 1991 specifically states that it is to “extend the remedies available under petitions of doleance”

⁵⁵ Damages can be awarded under three circumstances: firstly, if damages would have been awarded in a private law action (Damages were awarded *In re Harvey* 1993-95 (ChD) 1993-95 MLR 415 where a DOLGE official had measured the position of a building, decided it was wrongly situated, which resulted in a stop order and the petitioner being ostracised in the community and leaving the IOM. He sought declaration that the building was correctly positioned and damages. It was held there was sufficient proximity to give rise to a duty of care on official's part, negligent misstatement, foreseeable loss, damages awarded. Court directed that when a damages claim under s 44 is included in a petition of doleance, the cause of action (negligence, fraud, trespass etc) should be specifically pleaded.). Secondly, under EC law (as it applies to the island under Protocol 3). If EC law is infringed there is a right to damages; where the infringement is that the state acted outside the limits on its discretion, breach is sufficiently serious and state has manifestly and gravely disregarded the limits on the exercise of its power (See *Wade Administrative Law*, H W R Wade & C F Forsyth, 9th edition, 2004, OUP) . ; Damages are also available to afford just satisfaction for a human rights breach (Section 8 Human Rights Act 2001).

⁵⁶ Order telling a body not to perform a particular unlawful act held.

*mandamus*⁵⁷, declaration⁵⁸, injunction to the rarely used *habeus corpus*.

2.7 Issues of cost

10. The grievance of Whittaker⁵⁹ was that planning decisions frequently appealed by doleance forced ordinary people to defend them. In his view objectors should be able to participate in doleance without risk of cost penalties⁶⁰. The author avers the only potential victim in such scenario is the defendant and that two general costs rules afford him ample protection. Firstly, costs follow the event⁶¹ and secondly, a party who comes forward only to defend a judicial decision in his favour should not pay costs⁶². Taking the two rules together, a defendant to a planning decision in his favour can have his costs and eat them. Moreover, the current rules⁶³ provide an equitable approach to objectors' costs. *Tilleard*⁶⁴ confirmed that an unsuccessful party would usually only be responsible for one set of costs⁶⁵ except where a party deals with a separate issue or where distinct interests justify separate representation⁶⁶. This rule equitably prevents a petitioner from paying costs to multiple parties arguing the same point as in Whittaker's case⁶⁷.

2.8 The proper parties to petitions of doleance

11. The court has the power to strike out claims for want of proper standing. Accordingly a more prescient question is – does doleance have fair rules of standing?⁶⁸. Firstly, a party aggrieved⁶⁹

⁵⁷ An example of a Mandamus order is the *Petition of Crowe and Gill* (ChD) 1921-51 MLR 247. That case held that (i) mandamus orders are never granted against Crown or its servants; (ii) They are only granted where there is a legal right of the Petitioner to the performance of some duty (iii) The concern of court is whether the discretionary powers of an administrative body have been exercised or not, not whether they have been exercised properly.

⁵⁸ *Petition of Reilly* (ChD) 1981-83 MLR 118 - Petitioners initially prayed for order to compel Local Government Board to issue a "stop" notice in connection with alleged illegal development of land by 3rd party. Petitioners subsequently amended their petition to seek declaration that the Local Government Board was guilty of an abuse of its discretionary powers. It was held that doleance was the proper means of obtaining a declaratory judgement relating to the conduct of an administrative body.

⁵⁹ Although couched generally and taken by Tynwald in general terms

⁶⁰ Further, his petition was based upon other baseless assumptions, i.e. that this followed from a situation in which only a third of costs are generally recoverable even when the case is won.

⁶¹ which means that the losing party must pay the other side's costs

⁶² See *R v Liverpool Justices ex p Robert* [1960] 2 All ER

⁶³ See paragraph *Allitson v Tilleard* at 41, *Ibid.* approving *In re Corner House Research* (2005) EWCA Civ 192

⁶⁴ *Ibid.*

⁶⁵ See *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184

⁶⁶ *Ibid.*; See also *R v Panel on Take-overs and Mergers ex p Datafin plc* [1987] QB 815

⁶⁷ The defendant parties arguably had no distinct interests in Whittaker's case, but there were bi-partite, or even tri-partite representation of the same issues and interests. See Early Publication of the Select Committee on the Petition for Redress of Grievance of Donald Whittaker, 9th February 2009. BADRA's evidence to the Select Committee made it clear that individual residents gave powers of attorney to BADRA to represent them through one Advocate. Further, the oral evidence confirmed that the position of the Malew Parish Commissioners was entirely in line with BADRA. BADRA later withdrew when they realised that this was the case. Further, Mr Whittaker had no objections different to those of the other parties.

⁶⁸ See paragraph 27 in *In re Cussons* 2003, "The advantage of the petition of doleance is that it has been a single simple procedure, which, as described by Glidewell J.A. in *Re Nicholson* "is obviously a remedy of considerable

always has standing; secondly, a non party aggrieved will have standing only if the Attorney General consents; and thirdly, where a petitioner seeks only to address a public wrong and the Attorney General takes a neutral stance, there is only a discretion to proceed⁷⁰. If as in the case of *In re Cussons* there are what could be described as utilitarian objectives the case will clearly proceed. The only possible limit of the current system is the theoretical possibility that such cases could be “sifted” at the AG’s discretion. In *Cussons* it was recognised *obiter dicta* that the law could be expanded to allow standing even where the AG did object⁷¹. The author would welcome the courts to adopt this approach which would simplify the rules and prevent what Lord Diplock said would be a “grave lacuna” if such a technical rule prevented accountability⁷².

2.9 Proposed changes

12. The government is currently considering the creation of a new Ombudsman⁷³. This appears to be an informal mechanism for addressing complaints against government administration. However, alarm bells may start to ring when one reads the decision of the Deputy Bailiff in the Guernsey case of *Century*⁷⁴. He relied upon the existence of a similar Review Board⁷⁵ as a

scope and utility, and is intended to lead to a wrong being righted as soon as possible". To apply further tests or different attempts to analyse the circumstances where an applicant to a petition has locus standi may merely seek to inhibit the development of the law rather than to assist it. The statement as to the law given by Glidewell J.A. in *Re Nicholson* in his three stated propositions, correctly, in our judgment, describes the law, save for the deletion of 'it may be that' in the following sentence: "Thirdly, where a petition is brought by a private individual to address a public wrong, as in the case of *In re Kerruish*, and the Attorney General, though not giving his consent, does not object to the proceedings, it may be that the court has a discretion to allow the petition to proceed."

⁶⁹ An individual or company that has suffered or is likely to suffer “damage peculiar to himself”

⁷⁰ The exercise of discretion will take into account the credentials of the applicant

⁷¹ See paragraph 28, *Ibid.*, “We leave open the question whether the Court should now accept a discretion in the circumstances described above even if the Attorney General does object to the proceedings. In an appropriate case it might lead to an injustice if the only bar to the court proceedings was the Attorney General's attitude to the petition.”

⁷² Lord Diplock in *Fleet Street Casuals* approved at 28 in *In re Cussons*. That said, if a petition were prevented from proceeding solely on the basis of the AG’s decision there would be the fall back of making further petition of dolence of his decision.

⁷³ See paragraph 534 to 559 in the Early Publication of the Select Committee on the Petition for Redress of Grievance of Donald Whittaker, 9th February 2009; “Chairman (Steve Rodan MHK): 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”

⁷⁴ As referred to in *Bassington v HM Procureur* [1998] 26 GLJ 86. “The Deputy Bailiff in giving judgment in *Century* (above) at p.234 at first instance opted for “judicial restraint” rather than “judicial activism” to use phrases taken from de Smith woolf and Jowell on judicial Review of Administrative Action (Fifth Edn), chapter 1, giving as his reasons, first, the existence of the Administrative Decisions (Guernsey) Law 1986 which set up an Administrative Board to hear complaints; secondly, the smallness of the jurisdiction; and thirdly, the fragility of its institutions, there being no government, prime minister or cabinet. He feared a concerted attack by English lawyers acting at one remove through Guernsey advocates. The approach of the Deputy Bailiff could not be better expressed than in the following passage:- “However, with the smallness of our institutions what is apparently a serious failure to go about an act of government in the right way can be put right by a letter or a telephone call and not a judicially refined missile costing in time and resources an amount wholly out of proportion to the perceived wrong”.

⁷⁵ Administrative Decisions (Review) (Guernsey) Law 1986. As Dawes commented in his *Laws of Guernsey*, Hart Publishing (2003) at 46, “Apart from judicial review there is a Law which appears to have been an earlier attempt to provide a remedy against poor administrative decision making. This is found in the seldom used Administrative Decisions (Review) (Guernsey) Law 1986. By section 1 any person aggrieved by a decision or action of any States

factor in dismissing a judicial review application. It would be a grave shame if a similar consideration were adopted here.

13. Although the remit of the ombudsman is currently unclear, what is clear is that it would not oust the jurisdiction of doleance⁷⁶. The comments of Lord Donaldson⁷⁷ are particularly pertinent. He said, “(the judges) are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore your ouster Clause”⁷⁸.
14. Therefore, the new role would have the result of putting into existence two mechanisms of review of administrative functions. This would create the opportunity for arguments with regard to jurisdiction and abuse of process. A veritable feast of legal uncertainty which could only prejudice the ordinary citizen.

2.10 Conclusion

15. There has only been opportunity for a whistle-stop tour of the petition of doleance. However, it is averred that the current procedure provides a fair and just method for dealing with doleance well-suited to a small jurisdiction. It is the author's view that the partial adoption of English JR rules or the creation of an ombudsman can only complicate matters. It may be that in those circumstances Whittaker's fears of a system for the wealthy are realised but they are not a present.

committee may apply to the States Supervisor, or HM Greffier in the case of a complaint against the Advisory & Finance Committee. The application is considered by the Supervisor or HM Greffier and, if satisfied that the circumstances justify a review of the matter, he must refer the complaint to the Review Board[...] complaints will not be referred if the applicant has not a sufficient personal interest in the subject matter or if there has been a judicial remedy which has, unreasonably been utilized”.

⁷⁶ The role of Ombudsman would not oust the right to petition of doleance since the role of the judiciary in the separation of the powers cannot be ousted with major constitutional reform.

⁷⁷ On hearing of the government's attempts to force through Parliament watertite ouster legislation in the *Asylum and Immigration (Treatment of Claimants etc) Bill* (which sought to restrict the rights of the courts by ousting their powers of judicial review)

⁷⁸ *The Guardian*, 26 April 2005 as reported at 38 in Horne, H., *Judicial Review: A short guide to claims in the Administrative Court*, Research Paper 06/44, House of Commons Library, “Derry Irvine put his foot down implicitly and they abandoned that. [...] Had they successfully pursued the ouster clause then we certainly should have been in a very interesting constitutional crisis. If they really did that - and people like James Mackay (the former Tory lord chancellor) thought as a matter of wording it was wholly effective and stopped up every loophole - we would simply have to say: 'We (the judges) are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore your ouster clause'.

3.1 ACTION OF ARREST

3.2 Action of Arrest

3.2.1 Introduction

16. The action of arrest is a unique Manx remedy which is said to have developed in response to the island's unique geographical situation⁷⁹. The action gives a creditor with good grounds for supposing that their debtor is "about to leave the island" the right to arrest him⁸⁰ and/or his property⁸¹. What one may term the personal arrest and the proprietary arrest are separate causes of action. In both cases application may be made *ex parte* with supporting affidavit. Further, arrest is only available if the court is satisfied that the creditor has *a good cause of action over the debtor* and good grounds for supposing the defendant is *about to depart the island* based solely on affidavit evidence from the creditor.

3.2.2 Personal Arrest

17. To arrest his debtor a creditor must satisfy a Deemster by affidavit that he has good grounds for supposing that the debtor is about to depart the island without settling the debt *and* will "remain absent" without settling the debt or submitting to the jurisdiction of the Isle of Man. There are no cases which clarify the circumstances in which a *personal arrest* would be justified⁸². If the Deemster authorises arrest, the arrest is effected by a Police Constable who detains the arrestee in custody until he appears in court in respect of his debt⁸³. This must take place at the next available sitting of the court. Once the debtor has agreed to submit to the jurisdiction he must be released⁸⁴.

⁷⁹ See Deemster Doyle 60 in *Raad v Sturgeon*, judgment of 1 October 2003 [(1) 2003-05 MLR N-9] approving Deemster Hayward's comments.

⁸⁰ Section 1(1) Action of Arrest Act 1953 - "Process in an action for the arrest of the person of a debtor shall be issued by a Deemster on his being satisfied on the affidavit of the creditor or his duly authorised agent that such creditor has a good cause of action against the debtor and that the creditor has good grounds for supposing that the debtor is about to depart from this Isle and remain absent therefrom without settling the cause of action or binding himself irrevocably to submit to the jurisdiction of Her Majesty's High Court of Justice of the Isle of Man with respect thereto.

⁸¹ See section 3 of the Action of Arrest Act 1953 as amended by Preferential Payments and Other Acts (Financial Adjustments) Act 1973; The procedure for the arrest of property is slightly different

⁸² Although guidelines have been laid down for proprietary arrest in *Raad v Sturgeon*.

⁸³ See section 1(2) of the Action of Arrest Act 1953

⁸⁴ See section 1(4) of the Action of Arrest Act 1953

3.2.3 Proprietary arrest

18. Having once been or having been considered ancillary, the action of arrest of property is now enshrined in statute as an independent cause of action⁸⁵. There are two procedures available for proprietary arrest - an *ex parte* application along the lines of the personal arrest or a direct application to the Coroner stating an intention to make the *ex parte* application with “all due diligence”. In both cases the creditor must have good grounds for believing that his debtor is about to leave the island⁸⁶ and additionally that the debtor is “removing, or intends to remove” at least a substantial sum of the debt from the island and “does not intend to settle the cause of action”⁸⁷. At the *ex parte* stage, the creditor must also swear an affidavit setting out his case and stating that the cause of action “is just and reasonable” and that the “absence of the defendant from the Isle of Man will materially prejudice the plaintiff in the prosecution of his action”⁸⁸.

⁸⁵ This is clear from section 3 of the Action of Arrest Act 1953 as amended by the Preferential Payments and Other Acts (Financial Adjustments) Act 1973

⁸⁶ but not that he will remain absent as in the personal arrest.

⁸⁷ The factors relevant to the dissipation of assets are set out in *Raad v Sturgeon* 2003-05 MLR N-11, and at SJ 2003/119, judgment of 30th October 2004, paragraph [74](reported online online), “(1) the nature of the assets which are to be the subject of the proposed injunction and the ease or difficulty with which they could be disposed of or dissipated. The plaintiff may find it easier to establish the risk of dissipation of funds in a bank account or of moveable chattels than the risk that the defendant will dispose of real estate, such as his house or office. Nevertheless in appropriate cases injunctions can be and have been granted where the defendant's only known asset within the jurisdiction is his house. (for example if he has put it up for sale or otherwise indicated an intention to go and live abroad).

(2) The nature and financial standing of the defendant's business.

(3) The length of time the defendant has been in business. Stronger evidence of potential dissipation will be needed where the defendant is long established with a reasonable reputation than where little or nothing is known or can be ascertained about the defendant.

(4) The domicile or residence of the defendant. The court will be less ready to infer that a defendant who has been based in the Isle of Man for very many years and has a home or established business here will remove or dissipate his assets. On the other hand however if the defendant though based in the Isle of Man has no strong or permanent or well established links with the Island or no continuing commitment to the Island and there is an indication that he may leave the Island, the inference that there is a real risk that assets may be dissipated and a judgment may go unsatisfied in the Isle of Man may be more readily drawn.

(5) If the defendant is a foreign entity the country in which it has been registered or has its main business address and the availability or non availability of any machinery for reciprocal enforcement of Manx judgments in that country. If such machinery does exist the length of time it would take to implement it may be an important factor.

(6) The defendant's past or existing credit record.

(7) Any intention expressed by the defendant about future dealings with his Manx assets or assets outside the jurisdiction.

(8) Connections between the defendant and any other connected entities who have defaulted on judgments. This may be of particular relevance when considering companies within the same group.

(9) The defendant's behaviour in response to the plaintiff's claims. A pattern of evasiveness and unwillingness to participate in the litigation or raising thin defences after accepting liability or total silence, or late applications to vacate hearing dates, or discharging legal representatives, or failure to respond promptly or at all to correspondence, or the failure to disclose assets, or taking steps to transfer assets may all be factors which assist the plaintiff. The court however will have to have regard to the full picture and consider any information or points that may explain what would otherwise appear as evasiveness or unwillingness on the part of the defendant.

⁸⁸ and the “enforcement of any execution or Order of the Court consequent upon such proceeding”.

3.2.4 Purpose of the action of arrest

19. It has been argued that the purpose of the arrest is to ensure that the defendant submits to the jurisdiction⁸⁹. Deemster Cowley said of the predecessor act in *In re Lethaby*⁹⁰ at 396, “I think the fundamental idea of the Manx Chancery action of arrest was to ensure an appearance by the defendant, and that the arrest of his goods was an additional protection available to the creditor”. He later stated⁹¹, “the effect of this statute is, I think, quite clearly to establish that the arrest of the person of a debtor is purely and simply confined to the enforcement of his appearance, but that in addition there is an ancillary remedy under proper conditions and after *prima facie* proof to arrest his effects and await judgment of the court.”.

3.3 The Mareva Injunction (“Freezing order”)

3.3.1 Introduction

20. As in proprietary arrest the Mareva empowers a creditor to apply *ex parte* for an order restraining a Defendant from dealing with assets or removing them from the jurisdiction pending trial. The Mareva is an equitable interim remedy⁹² and as such the court will usually require an undertaking in damages⁹³ and consideration of the balance of convenience⁹⁴. In addition, the court must be satisfied of three Mareva-specific conditions: firstly, that the plaintiff has a good arguable case concerning *any* cause of action; secondly, that there is a real risk of the defendant dissipating assets⁹⁵ from the jurisdiction; and thirdly, that it would be just and convenient in all the circumstances⁹⁶.

⁸⁹ See section 1(1) to 1(4) of the Action of Arrest Act 1953 and the comments of Deemster Doyle in *Raad v Sturgeon* (2) at [...]; Deemster Cowley in *In re Lethaby* (ChD) 1921-51 MLR 386 at 396, “I think the fundamental idea of the Manx Chancery action of arrest was to ensure an appearance by the defendant, and that the arrest of his goods was an additional protection available to the creditor”; at 397, “the effect of this statute is, I think, quite clearly to establish that the arrest of the person of a debtor is purely and simply confined to the enforcement of his appearance, but that in addition there is an ancillary remedy under proper conditions and after *prima facie* proof to arrest his effects and await judgment of the court.”

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, at 397

⁹² Arising under section 42 of the High Court Act 1991

⁹³ Although this is not strictly speaking essential. See Lord Diplock in *Hoffman La Roche v Secretary of State for Trade and Industry* [1975] Appeal Cases page 295 as approved by Deemster Doyle at paragraph 37 in *Raad v Sturgeon* (1), “The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is refuse the application if he declines to do so.”

⁹⁴ See Lord Diplock at 510 in the House of Lords case of *American Cyanamid Co. v Ethicon* [1975] 1 All ER 504

⁹⁵ The factors outlined in relation to actions of arrest apply equally to *mareva* injunctions; see Deemster Doyle at [70] to [74] in *Raad v Sturgeon* (1) as well as headnote at MLR N-11, “In applications for orders under the Action of Arrest Act 1953, s3, and for a *Mareva* injunction, the court should consider the following factors”

⁹⁶ Deemster Doyle at 127 in *Bitel LLC v Kyrgyz Mobil*, CA2006/7. “To persuade a Deemster to press the button on one of the law’s two nuclear weapons namely a draconian freezing injunction (cf Donaldson LJ in *Bank Mellet v Nikpour* [1985] FSR 87 at 92) an applicant must satisfy the Deemster that:

(1) the applicant has a good arguable case against the defendant namely one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have been a better than 50 per cent chance of success (Mustill J in the *Ninemia Maritime Corporation* case [1983] 2 Lloyd’s Rep 600 at 605);

(2) there is a real risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets unless he is restrained by court order from disposing of them. The applicant must produce solid evidence on which the court

3.3.2 Purpose of the Mareva

21. The basis and purpose of a freezing injunction is to protect a claimant from the risk of improper dissipation of assets, which would defeat the efficacy of any judgment he might obtain⁹⁷. Although not being an independent cause of action like the action of arrest, the Mareva injunction has powers over property similar to the action of arrest.

3.4 Comparison of Action of Arrest and Mareva

3.4.1 Similarities

22. The above analysis shows that action of arrest and the Mareva injunction are two civil injunctions which share significant commonalities in relation to the restraint of property. Both remedies give a creditor the right to apply *ex parte* to seize assets within the jurisdiction⁹⁸ so as to prevent his debtor dealing with them. Further, the factors relevant to assessing risk of dissipation are equally applicable to both remedies⁹⁹. In both the action of arrest¹⁰⁰ and the Mareva injunction¹⁰¹ the court will perform a balancing exercise between the rights of the plaintiff and the rights of the defendant so as to afford fairness to both parties. Further, both methods have substantial requirements which act as safeguards to the rights of the defendant.

3.4.2 Differences

23. The two most profound differences are that the Mareva does not give a Plaintiff the power to apply for arrest¹⁰² and the action of arrest does not require an undertaking in damages¹⁰³ (whereas the Mareva does subject to exceptions¹⁰⁴). Moreover, the right to apply for an action

could come to the view that there is a real risk that the assets will be dissipated if the injunction is not granted; (3) it would be just and convenient in all the circumstances of the case to grant the relief sought.”

⁹⁷ See Deemster Kerruish in *Kakay v Frearson*, 5th October 2006 applied by Deemster Doyle at 129 in *Bitel LLC v Kyrgyz*, Dec 2006

⁹⁸ Although a Mareva can of course extend worldwide (see for example, . The action of arrest cannot.

⁹⁹ See Deemster Doyle in *Raad v Sturgeon* (2) at 70 -74

¹⁰⁰ See paragraphs 61, 62 *Raad v Sturgeon* (1), 1st October 2003; Repeated at paragraph 70 in *Raad v Sturgeon* (2), 30th October 2003

¹⁰¹ See Deemster Kerruish in *Kakay v Frearson* at [18], “the correct test is to consider objectively the overall justice” In Series 5, Laddie argued that the balance of convenience issue will need to be considered in most cases; *American Cyanamid Co v Ehticon Ltd* (No. 1) [1975] AC 396; It is always appropriate to consider the balance of convenience with regard to an interim injunction; see for example *Customs and Excise Commissioners v Anchor Food Ltd* (No.2) [1999] 1 WLR 1139

¹⁰² in the absence of test cases proving the contrary

¹⁰³ as clarified by Deemster Doyle in *Raad v Sturgeon* (1)

¹⁰⁴ The cross-undertaking in damages can be seen as a procedural safeguard which protects the defendant's article 6 rights. However, there are situations in which the cross undertaking can be dispensed with (the “dispensation rule”). In the recent English High Court case of *United Securities & Exchange Commission v Manterfield* [2008] EWHC 1349 (QB) it was argued for the first time that the dispensation rule was incompatible with the principle of equality of arms under Article 6. Sir Charles Grey dismissed that argument out of hand citing the principle that article 6 only protects procedural rights not substantive rights (Approving the principle as confirmed in *Holland v Lampen-Wolfe* [2000] 1

of arrest is limited to a very particular situation – a civil creditor enforcing against a debtor who not only has assets in the jurisdiction but has caused the defendant to believe he is leaving the island. In contrast, the powers of a Mareva are much wider extending extra-territorially¹⁰⁵ and the procedures are substantially different.

3.4.3 Summary

24. There are many similarities between the Mareva and the Action of Arrest in terms of the restraint of property and a balancing test. However, whereas the Mareva has a wider jurisdiction in relation to diverse causes of action the action of arrest has a very specific jurisdiction in relation to civil debt which only accrues in very narrow circumstances.

3.5 ECHR in Actions of Arrest

3.5.1 Proprietary Arrest

25. It is respectfully submitted that in *Raad v Sturgeon* Deemster Doyle only found the proprietary arrest to be compatible with Article 1 of the First Protocol to the convention¹⁰⁶. He based his view on the public interest in the cause of action based upon the island's unique geographical location¹⁰⁷. The author endorses such compatibility and affirms the purpose outlined at 3.14 above as evidence of a lawful public interest.

3.5.2 Personal Arrest

26. Unbeknown to some, the strongest Convention right against personal arrest is Article 1 of the Fourth Protocol which provides: “No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.” The Isle of Man has not signed up to that Protocol and in any event some commentators place weight on the words “merely” and

W.L.R. 1573 HL). Therefore, the defendant's inability to have a financial remedy for his costs in the event of the freezing order proving ill-founded was irrelevant. On appeal, the argument was not pursued (On appeal Waller LJ paragraph 27 reported [2009] EWCA Civ 27 commented that it was “rightly not pursued”).

¹⁰⁵ The two most significant powers of the Mareva are:- Firstly, that it is available in support of a good cause of action and requires no evidence of debt (Only a risk that the defendant will dissipate his assets) and Secondly, it can be used to freeze assets outside the jurisdiction and to support overseas actions (See section 56B High Court Act 1991 and *Securities and Investments Board v Braff*, 1996-98 MLR). The other ways that the Mareva differs are that it not available for small sums, it is available to any party (not just the debtor), is available against companies, requires proceedings to be issued promptly (not within 48 hours), allows ancillary orders to be attached to Mareva (See for example, *Petition of Asset Management (in Liquidation)* – discovery of assets on a worldwide basis.

¹⁰⁶ See for example, headnote to *Raad v Sturgeon* (1), 2003-05 MLR N-9. “Nor did the procedure under section 4 breach the First Protocol to the European Convention of Human Rights, art. 1, guaranteeing the peaceful enjoyment of property, since it was provided for by law and was in the public interest because of the geographical location of the island”; Section 4 details the form of order available in relation to section 3 of the Act.

¹⁰⁷ See *Raad v Sturgeon* (1)

“inability”. Accordingly, it is argued that an ability to pay coupled with a refusal to pay could attract imprisonment¹⁰⁸.

27. It is submitted that the question posed *obiter dicta* by Deemster Doyle in a recent imprisonment for debt case¹⁰⁹ is most relevant to personal arrest. i.e. is the personal arrest compatible with Article 5 of the ECHR?

3.5.3 Article 5 ECHR

28. Article 5 is a right that is engaged at the point of imprisonment. There are 6 exceptions¹¹⁰ but arrest for a civil cause of action could only conceivably fall in to 5(1)(b)¹¹¹ which provides that ,

“No one shall be deprived of his liberty save in the following cases and in accordance with a *procedure prescribed by law*: (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;”

¹⁰⁸ P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd edn (1990), 488-489 as discussed in terms of Scottish law in 'State of ratifications of human rights instruments', E.L. Rev. 1996, Supp (Human rights survey), 51-62

¹⁰⁹ See Deemster Doyle at paragraph 13 in *Kewley and Kewley v Megson*, CLD, 3rd April 2008 (reported online only) - “The petitioner would have to answer the following questions:-

1 is imprisonment for civil debt compatible with Article 5 of the ECHR?;

2 Is it in accordance with the procedures prescribed by law?;

3 would it fall within paragraph 1(b) of the Convention; would imprisonment be a proportionate response?”

This was in the context of an application seeking imprisonment for debt. The island’s Imprisonment for Debt Act 1928 gives a creditor the right to apply for a debt-defaulter to be committed to prison for up to 6 weeks on evidence of non-payment of a debt. By law the creditor need only prove that the defaulter had means of paying the sum due under order and that he has neglected or refused to pay it. Alas, even the de minimus requirements proved too much for the two ardent pursuers of the imprisonment of their fellow man made famous by the case law. Therefore, His Honour had no need to consider whether imprisonment for civil debt was enforceable in the face of article 5. It is the author’s view that this act must be abolished since it fulfils no purpose except punishment since the imprisonment does not extinguish the debt. However, a review of the usefulness and legality of that Act is beyond the scope of this paper.

¹¹⁰ Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

¹¹¹ As indicated by Deemster Doyle in *Kewley*

29. At first glance there is *prima facie* compatibility with the wording of the section. The acts are made by law¹¹² and they have a clear procedure¹¹³. The terms “legal” and “prescribed by law” refer to conformity with national law and procedure and are for the national courts to interpret and apply such law¹¹⁴. Furthermore, a “wide margin of interpretation” is afforded to the decisions of domestic courts¹¹⁵.
30. However, the more fundamental question is – “Can arrest or imprisonment ever be proportionate responses to a failure to fulfil civil contractual obligations?”¹¹⁶. Any restriction on a freedom guaranteed by the Island under the Convention must be “proportionate to the legitimate aim pursued”¹¹⁷. A measure will satisfy the proportionality test only if three conditions are met¹¹⁸:-
1. the legislative objective is sufficiently important to justify limiting a fundamental right
 2. the measures designed to meet the objective are rationally connected to it (they cannot be arbitrary, unfair or based on irrational considerations.
 3. The means used to impair the right must be no more than is necessary to accomplish the legitimate objective
31. Is it averred that there is a sufficiently important legislative objective which can be derived from the statute and the history of the action of the arrest. That objective is, a fair means of forcing debtors to appear for their debts to Manx citizens before fleeing the island. Like the proprietary arrest, this can also be justified based upon the island’s unique geographical location. In particular, the lack of border controls make it unusually simple to leave the jurisdiction¹¹⁹. The action of arrest was once open to abuse¹²⁰, but over time it has developed

¹¹²The Action of Arrest Act 1953 was lawfully enacted by Tynwald

¹¹³See section 1 of the Act, *Ibid.*

¹¹⁴ In the relatively recent case of *Worwa v Poland* (2006) 43 E.H.R.R. 35, the ECtHR held at paragraph 58¹¹⁴, “The Court recalls that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. It is, in the first place, for the national authorities, notably the courts, to interpret and apply domestic law but the Court can and must exercise a certain degree of control.”; See also paragraph 58 in *Bozano v France* (1986) 9 EHRR 297

¹¹⁵As noted by Deemster Doyle notes in *Raad in Suturgeon*(1),

¹¹⁶ This is a question that has not been considered in the case law of the ECtHR.

¹¹⁷ See para 49 in *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754 in Pannick, Human Rights Law at 3.10, page 69

¹¹⁸ See Privy Council (Antigua and Bermuda) in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69

¹¹⁹ See letter from Lord Goodlad Chairman of the House of Lord Constitutional Select Committee to the Chief Minister, February 2009, “Letter from the Chairman to the Chief Minister, 25 February 2009 , “The Constitution Committee of which I am Chairman is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In connection with the first of these tasks, the Committee has been engaged in correspondence with the Government on the Borders, Citizenship and Immigration Bill which is currently under consideration in the House of Lords. The Committee would like to seek

into a statute with many safeguards to protect the debtor's interests¹²¹. In particularly, release is obtainable under rapid and certain conditions¹²² and the actionee may be awarded damages if the actioner does not pursue his action with due diligence¹²³.

3.6 Conclusion

32. For the reasons set out above the action of arrest should be retained in its current form. Cynics may see the action as a means of avoiding undertakings in damages in Mareva injunctions. However, the court has made it clear that an arrest action will not be sanctioned on that basis alone¹²⁴.
33. It may be questioned whether there is any need for personal arrest given the other nuclear options available. However, it is averred that subject to the many safeguards, the action is a unique means for securing incontrovertible service of an action and thus speeding up the determination of rights.
34. Further, in the modern age there is a tendency for single individuals to be indebted to large classes of people. For example, at present the whereabouts of the notorious Alan Stanford¹²⁵

your views on Clause 46 in Part 3 of the bill which proposes to amend the arrangements for the common travel area that exists between the United Kingdom, the Republic of Ireland, and Jersey, Guernsey, and the Isle of Man. It seeks to amend the Immigration Act 1971 to make travel between the different parts of the common travel area subject to immigration control. I have enclosed a copy of the Committee's correspondence with the Government on this issue. As the Bill is currently under consideration in the House of Lords we would appreciate as early a reply as possible to allow the Committee to make its report to the House".

¹²⁰ The action of arrest has been part of the common law of the Isle of Man since time immemorial (Deemster Cowley at 393 in *In re Lethaby*) or more specifically since no less than several years prior to 1736 (the first written evidence of the right to an action of arrest is contained in the Fourth Law of 1737 agreed at Castle Rushen in 1736 which refers to "acons of arreast have for several years past been commenced in the Court of Chancery of the Isle"). It is interesting to note that the first four "arrest acts" all dealt with historical abuses of this empowering cause. The preamble to the Fourth Act of 1737 (not recorded by Deemster Cowley; see First Volume of the Isle of Man Statutes) notes the many "groundless and vexatious" actions were commenced and prosecuted without any "just" cause ("Fourthly, And whereas many groundless and vexatious Accons of Arreast have for several Years past been commenced in the Court of Chancery of this Isle, and prosecuted without any just Cause of Accon appearing when the same came to an Issue, and yet the Defendants had notwithstanding been put to great Difficultys to find Bail, or otherwise lye in Prison, and sometimes Vessels and Merchandizes have been arrested till the Accon came to a Hearing, whereby diverse Inconveniencys have happened, especially to trading Persons; be it therefore ordered, declared, and enacted by the Authority aforesaid, That if any Person or Persons whatsoever shall hereafter bring any Bill of Accon, then and in such Case it shall be lawfull for the Defendant so injured to bring his Accon against such Complainant for the Costs and damages sustained by him by Reason thereof"; Fourth Law of 1737, Statutes of the Isle of Man, Volume I); and the Arrests Act 1748 records that wrongfully "detention of many honest people" by "unjustified" actions of arrest. As a result, both acts provide those wrongfully detained with the right to sue for damages and costs.

¹²¹ The most notable one being that release can be obtained upon agreeing to appear in the action for the debt.

¹²² See section 1(3) and 1(4) of the Action of Arrest Act 1953. It is unlikely that a few days imprisonment could occur under this system.

¹²³ See also section 8 of the Act. There is a duty to proceed with diligence or costs may be award to debtor.

¹²⁴ See *Raad v Sturgeon* (1)

¹²⁵ The owner of the Stanford Financial Group a multi billion dollar global wealth management group who stands accused of running a massive Ponzi scheme. In November 2008 he staged a Twenty20 match between England and

the self-styled saviour of English Cricket¹²⁶ is currently unknown. Where the arrest of an individual¹²⁷ could speed the determination of the rights of multiple Manx creditors that would be another factor in favour of personal arrest.

35. The court has shown itself increasingly willing to balance the interests of the petitioner and the defendant in actions that may engage human rights. However, to prevent the personal arrest falling foul of the arbitrary leg of proportionality as well as to provide further safeguards to defendants, it is averred that a balance of convenience test could be ascribed to a High Court Directive.

the Stanford Superstars, an all-star team of Caribbean players awarding the victorious Superstars \$US20 million (\$31 million).

¹²⁶ <http://www.halifaxcourier.co.uk/sports-mailbag/Cricket39s-saviour-Sir-Allen-Stanford.5016918.jp>

¹²⁷ meeting the statutory criteria for arrest.

4.1 PETITION FOR RESTORATION OF THE STATUS QUO

4.2 Introduction

36. The petition for the restoration of the *status quo* is an ancient Manx common law remedy. It is a very specific remedy which can be used if a person's land is damaged or encroached. The right to the petition expires after six months. The requirements for a petition were clarified by the Manx appeal court in *Guylar v Young*¹²⁸. A petitioner must establish a *prima facie* case that a right existed, either a right of ownership or a right of easement over land¹²⁹, and that the right had been infringed, and nothing more¹³⁰. On proving that case, the petitioner is entitled to an "order for the restoration of the *status quo*", that is, an order for the restoration of the state of affairs prior to the alleged infringement. Such *status quo* orders have ranged from demolishing an extension¹³¹ to re-erecting a whole building¹³².
37. The substantive issues are not to be determined at the summary stage¹³³. The defendant to the petition has the right to challenge the proceedings in the Chancery Division¹³⁴ by cross petition. On such hearing, the court may uphold the order, accept a party's undertaking to restore the status quo and/or grant damages in lieu of the order¹³⁵.

4.3 Nature of the order

38. The petition whilst proceeding summarily is a full mandatory order. It is averred that it is neither correct to describe the order as interim or interlocutory relief, since there will be no return date unless the defendant initiates a further substantive hearing. Therefore, in contrast to interim injunctions, the burden is shifted to the defendant to prove his cause of action.
39. The author avers that although there being no reported reference to such, the *status quo* petition has the potential to be a draconian remedy. The cases show that the threshold for

¹²⁸ *Guylar v Young* 1952 – 60 MLR 23 (SGD)

¹²⁹ In comparison with the common law action for trespass to land there is no need to show undisputed ownership
Lace v Teare 1961-71 MLR 32 (CLD)

¹³⁰ p29 *Ibid.*, "I think the point is that the petitioner must establish the existence of his right, whether it be a right of ownership of land, or whether it be a right of easement over land, before he can obtain an order, and he must also establish that that right has been infringed, and nothing more"

¹³¹ See *Simmons and Simmons v Saunders* 1981-83 MLR 42 (CLD)

¹³² See *Faragher and Sengoles v Watterson*, Common Law Division (Ramsey), June 26th, 1893, unreported, referred to in *Guylar v Young, Ibid.*

¹³³ See *Simmons v Saunders, Ibid., Guylar v Young* (1)

¹³⁴ *Simmons, Ibid.*

¹³⁵ *Young v Guylar* 1952 – 60 MLR 86 (ChD). In the leading case of *Guylar v Young*, the cross petitioner carried on in contempt of the court order, and was ordered to pay substantial damages as well as the whole costs of both proceedings.

establishing the petition is particularly low. For example, in *Guyler v Young* a plan of a carriageway marked in yellow but not referred to in the deeds was sufficient to establish a *prima facie* case for a right of way. Such trifling evidence produced an order for a whole building to be removed. Accordingly, to determine whether it should be retained it is useful to compare it with an interim injunction which could in theory be available on the same set of facts.

4.4 Interim Injunction

40. The High Court has the power to grant an interim injunction before judgment where it considers it just and convenient to do so¹³⁶. The court applies the American Cyanamid principles¹³⁷. Further, it is now established that the decision is more accurately an assessment of whether granting or withholding the injunction at that stage is more likely in the end to produce a just result¹³⁸. In contrast, justice has no inherent role in a *status quo* petition. In contrast, in *Chohan* the court approved the Chadwick principles¹³⁹ which provide a cautious approach to mandatory interim injunctions.

¹³⁶ See Section 42 of the High Court Act 1991 -“(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.”; Order 38 of the Rules of the High Court of Justice 1952 - “In any cause or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court may grant the injunction, either upon or without terms, as may be just.”

¹³⁷ The principles laid down by Lord Diplock in the House of Lords case of *American Cyanamid Co v Ethicon Ltd.* [1975] A.C. 396 (“the American Cyanamid Principles”). That approach has been variously approved in the Manx courts (see for example Deemster Kerruish in *In re Poyiadjis* at [270], Deemster Kerruish in *Cambridge Gas* at [18] to [19]; and Deemster Cain in *Locke v Bellingdon Ltd. and ors.*, 1999-01 MLR [N-19]. The test is firstly, is there a serious question to be tried, secondly, are damages an adequate remedy and thirdly, the balance of convenience.

¹³⁸ See paragraph 64 in the Privy Council in *Gujadhur v Gujadhur* (PC Appeal No 51 of 2006) ; approved by Deemster Doyle in *Chohan v DHSS*, CP 2008/90 (reported online) at paragraphs 60 to 61.

¹³⁹ Deemster Doyle in *Chohan and Khan v DHSS* approved Chadwick J in *Nottingham Building Society* case [1993] FSR 468 (approved by the English Court of Appeal in *Zockall* [1998] FSR 354) where he reviews the various authorities at page 472 onwards and having reviewed the relevant case law he summarised the principles :

"In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted."

41. The Manx law as it has developed for example in *Chohan* recognizes the restrictions that the law imposes on the rights of the defendant. A mandatory injunction carries a greater risk of injustice than other remedies. Accordingly, the court ought to consider whether it feels a “high degree of assurance that the plaintiff will be able to establish his right at a trial” before granting the remedy. The court will only grant mandatory injunction if the risks of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted.

4.5 ECHR Considerations

42. It is clear that the courts have a duty to consider the law in line with the ECHR. It is submitted that as per the action of arrest the status quo petition engages Article 1 of the First Protocol¹⁴⁰. However, there can only be a deprivation of property in the public interest. In contrast to the action of arrest there would appear to be no such public interest in this case. Further, if, as is possible, a petitioner sought to remove a habitation, Article 8 would be likely to be engaged.

4.6 Conclusion

43. As a Manxman the author feels a certain affinity with local laws which are largely unique. However, that affinity is soon put to one side when considering a law which restricts the rights of the defendant without a lucid *raison d'être*. It is averred that the evidential burden is misplaced. The court does have a duty to weigh competing interests, but that duty is only confused by the *prima facie* ease with which the status quo criteria are met.

44. Although many learned Deemsters have discussed this ancient Manx remedy, none have stated a peculiarly Manx feature which justifies its retention. The author avers that the only public interest would appear to be the guarantee of property rights. However, it is argued that such rights can be protected by the courts through the injunctive relief provided by the interim relief available under the high court rules. Therefore, the petition should be abolished.

45. In any event, the 6 month limit is arbitrary. If the action was to be retained, the author would propose that the limit is a short time limit extending from the date of the applicant's notice of proposed works.

¹⁴⁰ As in the Action of Arrest, above.

5.0 SUMMARY

46. Throughout this paper the author has found himself in the position of Brown's Manx radical unsure whether or not to swing the reforming axe. However, in the end, the author's conclusion was quite simple. The above analysis has shown that the petition of dolence and action of arrest are useful and should be retained in their current form and the petition for the restoration of the *status quo* abolished. Further, in order to provide certainty to the law, it may be advantageous for the courts to prescribe a directive detailing the balancing act that will be performed in determining an application for a personal arrest since the author well recognises its potential restriction on personal liberty.

Word count: 4496

Paul Rodgers