**Speech by Lord McGhie at the CPA Scottish National Conference on Tuesday 24 June 2014.**



I was very happy to be given a chance to speak about the working of LTS.

I assume that most people here will have a basic idea of the role of the Tribunal and I intend to chat about it from two different angles. Firstly, by setting it in the context of disputes resolution and secondly by trying to give something of the flavour of how we work rather than the formal detail.

But I start with a little formal detail. The decision making work of the Tribunal is done by the members: myself, Ralph Smith QC our new legal member and Drew Oswald and Douglas Gillespie our surveyors. Ralph is full time. I am also chairman of the Land Court so am really only part time but I am in the building full time. The surveyor members are part time. We normally hear cases with a lawyer and surveyor sitting together but combinations are possible depending on the nature of the case.

The administrative work is carried out by our clerk Neil Tainsh with the assistance of Doug Ballantyne and Eli do Rego. Mr Tainsh has a law degree and both he and Doug Ballantine provide a high degree of specialist input in relation to some of our jurisdictions and can be expected to have a reasonable understanding of the nature of the issues which arise in relation to Compensation claims. Eli deals with much of the routine administration. You might find any of them on the end of the phone. Most serious discussion of procedural issues would be with Neil Tainsh. Members work closely with the staff.

I want to look first at the work of the Tribunal in the broader context of disputes resolution. I'd like to correct the idea of "Access to justice. I think reference to "Justice" is an emotive and misleading way of putting things. Like many, many rights which citizens have, compensation for compulsory purchase is a creature of statute. It is driven by policy. Tribunals, such as the Lands Tribunal are not there to provide justice. They have quite a specific job. They are there to determine the facts – preferably agreed or established in evidence - decide what the applicable law is and apply it to these facts. When deciding what the law is there is some room for concepts of fairness and reasonableness. Because it can be assumed that Parliament did not intend an unfair or unreasonable result the language of a statute often requires a meaning which would not be obvious on first reading. But, that apart, a Tribunal deciding a compensation claim has little to do with "justice" or fairness in the popular sense of these terms.

The context in which we should see the Tribunal is as one of the tools for resolution of disputes about compensation. It may not often be the most appropriate tool. Thinking of things in terms of working tools helps identify suitable procedures. I think it important to see the work of the LTS in the context of dispute resolution as a whole because we try to see our work in the same context. We are there to resolve disputes. The Tribunal has a great deal of flexibility and so I do not have a lot of formal stuff to tell you about the Tribunal itself

Potential disputes can be resolved in many ways. Some methods will not be appropriate in the context of compensation claims. In some contexts there may be statutory constraints which affect conduct of negotiation. But awareness of the range of tools or techniques may help limit matters which ultimately require do require to go to a Tribunal or arbiter.

Basic analysis starts with the proposition that the choice of tool to resolve a dispute must depend primarily on the nature of the dispute. So, the start point is to identify the dispute as precisely as possible. Get past

the broad dispute: we want a million and they only offer a fiver. There is nearly always some point of fact, policy, or principle which is the sticking point. Usually planning. The focus must be on defining that sticking point as precisely as possible. This may not take you far. But it is essential to consider it.

We will all have had the experience of starting to discuss a problem with a colleague and then finding that half-way through the explanation the answer has become obvious. That is because simplifying matters for a new audience forces us to look at things a different way. You must start by trying to identify the dispute yourself but the key-note to effective dispute resolution is honest communication. Precise identification requires communication. At one end of the spectrum, good communication may clarify issues in such a way as to show that there is no real dispute on essentials. This will allow settlement. At the other, co-operation and communication may show an irreconcilable dispute. Then parties then need to consider whether compromise is possible. If parties can see that there is an honest dispute that might go either way, some compromise will often be the best way forward.

I would stress that there is no good reason why different dispute resolution tools should not be used on different aspects of a complex claim. So when I talk of tools for dispute resolution, I am not necessarily talking about resolution of the whole dispute.

The primary way of resolving disputes is by negotiation. Good advice is to remember that negotiation is well described as the art of building bridges over which the other side can retreat with dignity. Similarly as John Sturrock of Core Mediation said in the Scotsman yesterday, going in with your best offer and saying you are sticking to it, is a high risk tactic. It is implicitly aggressive. Even if it is a perfectly good offer the other side's reaction will be hostile. They will resist it if they can. Leave room for negotiation because it allows both sides to feel they have "got something".

One thing which is important to keep firmly in mind is the distinction between systems designed to help parties agree and systems which force parties to accept some third party decision. I was taught to keep the expression ADR (Alternative Dispute Resolution) for the methods which lead to agreement as opposed to methods which committed parties to accept the decision of a third party. But I am afraid it is now well fixed as meaning any alternative to the litigation methods provided by the state: courts and tribunals.

In any event, Tribunal is clearly in the class of binding third party decision. Many ADR methods fall into that category, including some modern online methods. But in traditional terms the obvious forced acceptance methods are arbitration and courts. This is often talked of in terms of a distinction between arbitration and litigation. But it should not be forgotten that arbitration is a form of litigation. In practical terms parties are engaged in a lawsuit.

There is no fundamental difference between arbitration and litigation as a means of resolving disputes. Both involve the parties being committed to accept a decision of a third party. Both involve procedures which require them to set out their claims in a formal way and require the arbitrating body to decide the identified issues on the basis of evidence properly put before him or her. In particular, there may be little practical difference between tribunal procedure and arbitration procedure. You can tailor an arbitration in various ways. We can also adapt our procedure to meet the needs of the parties. If they wish the Tribunal to consider only limited matters we can agree. Indeed we have power to act as arbiters and under this head can look at any issue parties agree to put before us.

The main practical difference is the cost. The tribunal provides independent neutral expertise in surveying issues and in legal matters with skilled office back up. The cost is really borne by the state. No matter how complex and lengthy a hearing may be, the hearing fee cannot exceed £5,000. In an arbitration the cost of the arbiter, the arbiter's legal adviser or clerk, accommodation and all clerical support services are paid for by the parties. So, although arbitration is usually described as a method of ADR I think this misleading. It involves a third party imposing a binding solution in much the same way as normal litigation. It does not offer any improved way forward.

There are other ways of having to agreeing to be bound by the decision of a third party The obvious one is the reference to an expert. Parties agree to leave it entirely to him, or her, to investigate and decide. That can be quick, it is usually much cheaper because the expert's fee is usually very much less than the cost of lawyers and experts in a litigation. In the context of compensation for compulsory purchase there is an intention to let parties take advantage of the "expert decision approach" by making provision for the independent advice of the District Valuer or modern commercial substitute. But it is not binding.

There are other dispute resolution systems where parties agree to be bound by an independent decision. Some take advantage of the neutrality of the computer to provide more sophisticated methods of the concept of tossing a coin. Various companies offer these on-line.
I have no practical experience of using them but I think some sound quite attractive. For example, in Double Blind bidding parties are allowed a series of offers. The other side will not see the offers. The computer assesses them in turn. If the offers fall within an agreed range of each other, the computer is authorised to split the difference. Various degrees of sophistication with different numbers of bids or a split which favours the side which finds acceptance after fewest bids. Whether these techniques are suited to compensation claims in the CPO context is another matter. But awareness of them may help. In a complex compensation claim any tool might be suitable to deal with part.

What I see as the true alternative to litigation are the methods which provide a formal structure to help parties reach their own agreement. One example was what used to be called **Early neutral evaluation**. The sides put an agreed statement of the facts to an independent person for an opinion. Common example is the joint memorial for opinion of counsel. Giving the parties an independent opinion often leads to settlement either because it causes one or other side to revise their expectations or simply because it provides a dignified way of conceding.

Most common is **mediation.** The great advantage of mediation is that it provides a formal structure for discussion. I understand that in family law mediation the mediator may be able to guide the parties as to the law but in most mediation the mediator has no concern with the merits and need have no knowledge of the relevant law. A trained mediator will follow an established formal process designed to allow parties to come to terms with their feelings as well as to get a full understanding of the issues and implications of the dispute process. The mediator helps parties communicate face to face but also acts as a go-between. It requires a high awareness of what can be disclosed and what is confidential. But it allows parties to end up with a realistic understanding of the strengths and weaknesses of their position and the implications of deciding either to compromise or fight. Often it is enough to awaken both sides to the opportunity cost of litigation as well as the cash risks.

I think that a modern practitioner ought to be familiar with the basic concepts of mediation and able to advise the client about it before any entering any litigation process be it by court or tribunal or arbitration. The client may need to be assured that there is nothing "New Age" about it. Some get confused with "meditiation"! The value is that it provides a well tested formal structure.

There has been a strong movement, particularly in English courts to force people to try mediation. Some litigants have been found liable in expenses if they did not agree. I am not persuaded by this thinking. I assume that professional advisers now realise the value of mediation and it is up to them to make their clients well aware of this. More important, my own practice at the bar showed that sensible discussion between professionals could produce similar results. The problem in my time was that this often did not happen until the day of the hearing. What I used to do in divorce cases was arrange for both sides to consult counsel in Parliament House at the same time. Counsel would negotiate and take back results to clients. Note this was not a joint meeting.

I think it important to see the work of the LTS in the context of dispute resolution as a whole because we try to see our work in the same context. We are there to resolve disputes. The more precisely the dispute is focused the more efficiently we can perform our task. Litigation is undoubtedly expensive. That is not because the Tribunal costs a lot. The cost is due to the use of lawyers and experts. Everyone agrees that the ideal tribunal would be one that could reach a fair result without much formality. But people's ideas of a fair result vary. When a party applies to the Tribunal they are entitled to expect that they will get a decision based on careful examination of the facts and law bearing on the issue in dispute. A tribunal cannot simply decide to ignore the issues and go off following their own notion of fairness. They must consider the evidence before them. But parties are entitled to expect that their legal advisers will exercise their skill and judgment in selecting the material to be put before the tribunal. Poor lawyers tend to bung everything in. Unlike their clients, they have little to lose by this. Good lawyers are selective.

To give you an understanding of how the Tribunal now actually works in practice, it is fair to say that we see flexibility as a key-note. We want to find the best procedure to identify and deal with the real issues. We do have a great deal of procedural flexibility and so I do not have a lot to tell you about rules and procedures. If anyone here is remotely interested in the history of the Tribunal, the Lands Tribunal Act 1949, and all the various jurisdictions the tribunal now has they can have a hunt through our web site.

In procedural terms there are broadly three ways of dealing with the issues. Parties are entitled to have their day in court. They can present their evidence and their arguments at a hearing. So that is the normal format for most disputes. But where parties agree, a case can be decided on the basis of written submissions or on written submissions plus a site inspection. Many cases in our other jurisdictions are dealt with in this last way.

It is worth spelling out that when we agree to proceed on written submissions we will then provide an opportunity for such submissions. We will have regard to pleadings and productions – including expert reports – but the written submissions are the equivalent of the submissions which would normally be made at the end of the hearing. They can deal with the detail of written evidence and with legal issues. Dealing with matters on paper is harder work for the Tribunal. We cannot test arguments in discussion. It is much easier to winnow out poor arguments face to face. There may be cases where we would not agree to do things on written submissions if we thought that particularly difficult issues were involved. But written submissions may be cheaper or more convenient for the parties.

If it is clear that there is some preliminary issue which would either resolve the whole case or help the parties resolve other issues, we can deal with that as a preliminary. Such procedure is very common where that is a pure issue of law.

We rely a great deal on the judgment of the lawyers in deciding whether to allow a preliminary legal debate. Such a debate adds an additional stage to the process. It therefore causes initial delay. But if it is clear that the legal question is at the heart of the dispute it will ultimately be quicker and cheaper to have it resolved by debate rather than after a full hearing. It might be easy enough for the tribunal to identify a legal issue which will settle a case one way of another. But often resolution of a legal issue lets parties enter discussions afresh after the legal position has been clarified and a wider settlement may be agreed. We have no way of knowing whether that is likely and we do tend to rely on requests from parties in deciding whether this should be allowed.

It is possible to have a preliminary proof on one issue. We are always a bit cautious about this approach. Problems may arise if witnesses have to go over the same ground in a different context. However, a separate proof may be sensible in some cases.

Of course, debate or hearing is the end stage of the process. Obviously matters must start with a written application. Application form is in statutory form under Schedule 1 of the Lands Tribunal Rules. It is a very simple format. Indeed it might be thought to leave too much scope. A poor application is difficult to answer. The critical part says simply: "Give a concise statement of the nature of the dispute and of the grounds on which compensation is claimed ". Courts operate a more explicit structure crave, facts, heads of financial claim, pleas in law and

I have given thought to trying to have this revised. Fortunately, or perhaps unfortunately, it has not given rise to any great difficulty and no very obvious opportunity or pressure for revision has arisen. Applicants in bigger cases usually have advisers who understand what is required.

Once the application is in the Tribunal will control future progress of the case by a series of orders. If the application is poor, we may simply tell the other side that it has been received but say they will not need to answer until the applicant sends a revised version. Once the answers are in parties are allowed a period to adjust.

We have not followed the English route of having elaborate rules governing fast track and other procedures. We do not have a volume of cases that requires such an approach. Mr Tainsh is able to consider each case and discuss with members if necessary to try to fix the most efficient procedure. in the bigger cases he would usually invite proposals from the parties.

Written pleadings have an obvious place in defining the scope of the hearing. They give fair notice of the issues to be dealt with. However, it is usually pretty obvious what is to be dealt with. We tend to assume that little material presented on either side will be completely unexpected by the others. In compensation cases the parties will have exchanged reports. The important exception is comparables. The other side has no way of knowing which comparables are to be relied on unless they are told. Accordingly the tribunal is quite restrictive in not allowing detailed discussion of other subjects without explicit notice.

However, pleadings cost money and waste time. Our aim is to encourage full pleading at an early stage with little opportunity for further revisal. We have had good experience in rating cases of experts conducting the equivalent of adjustment of pleadings by working from a spreadsheet. As matters became clarified, the spreadsheet was easily revised. It is plainly a better use of time for the parties to be working towards narrowing the issues in the way that best suits their professional practices rather than attempt to keep formal legal pleadings up to date. The main thing is to have parties co-operating as much as possible

right up to the day before the hearing, if necessary to try to focus as precisely as possible the issues which the Tribunal will have to determine.

In most cases the staff will follow the approach of trying to fix a hearing as soon as possible. We do not routinely attempt case management by way of procedural meetings. Pure procedural meetings cost money. They take a lot of judicial time. For example, in the Court of Session something in excess of 90% personal injury claims will settle without a hearing. No judicial time is spent on these cases. If case management was required the judges would to have to take the time to become familiar with the detail of all these cases. The system works well because the professionals on each side know what they are doing. If parties can agree direct that is preferable.

My own practice had been to assume that professionals know what they are doing. I have rarely attempted to push parties to mediation or even to active negotiation. I have assumed that the lawyers or surveyors will have done this. However, if time permits, I would seek an opportunity to study the files in advance of the hearing and draw attention to particular problems which might have to be addressed. I might do so by a formal order or by giving suggestions to the clerk as to an appropriate letter.

Our retired colleague John Wright tended to an opposite view. He was always anxious to steer parties to mediation. He was keen to have procedural meetings. There is little doubt that parties are often quite slow to engage in full discussion and some hints of persuasion may be required. The new team may well want to take a more positive role in case management. We are all agreed that experts should meet and try to decide precisely what points of dispute there are between them and the reasons for such dispute. We might invite a formal joint statement about this in appropriate cases.

By way of illustration it might be added that in the current round of rating cases, where a comparatively limited number of firms are involved in the bulk of the cases, we have had group meetings designed for general discussion of issues and for management of the current outstanding cases as a whole. If we ever came to have a number of similar compensation claims, a similar process would probably be useful.

Put shortly, the tribunal is always open to suggestions.

I want to conclude by saying a few words about experts. It seems to me that that the distinction between an expert witness and an expert adviser is often lost sight of. I think that the expert who has been conducting negotiations on behalf of the client will seldom be capable of being treated as an expert witness, in the sense that this term is used in the courts. That is to say that, where the expert has been heavily involved in negotiations, there is something artificial in the idea that he, or she, can turn into a witness whose prime duty is to the Court or Tribunal. We do not pay. The client does. Inevitably the expert will try to do his or her best for his client. However, what we do expect from any professional in the witness box is honesty. The expert should not say anything which gives a misleading impression of his true views. As you may be aware, lay witnesses are asked to take the same oath as the expert. They are to tell “the truth, the whole truth, and nothing but the truth”. Laymen are often given no chance to tell “the whole truth”. They are told to answer the questions. An expert may well realise that he or she will have to expand or correct something if it gives a misleading impression.

It is obviously important that the expert is given a proper opportunity to tell his client the whole unvarnished truth as soon as possible. This will allow the client and his lawyers a chance to reach the best settlement they can in full knowledge of the strengths and weaknesses of their position. The expert must make it clear that he or she will have to tell the whole truth in the witness box. But, all of that said, we

recognise that an expert who has been acting for one side in negotiation will have a bias, conscious or unconscious. This does not invalidate the evidence. We know where he is coming from, so to speak, and can assess the evidence with that in mind. A wholly independent expert might, however, carry more weight.

Ideally, any expert should aim to try to explain things to the court or tribunal in such a way as to allow the tribunal to draw the necessary inferences for itself. An expert who relies on "opinion" is not nearly as persuasive as one who points to facts and the inferences to be drawn from such facts.

We invited questions and the main thrust was the need for a simplified procedure which would be cheaper and less intimidating. It is unfortunate that the Tribunal is regarded as intimidating. We hope our web site will help familiarising people with the Tribunal and how it works. I was glad to have an opportunity of speaking. As far as cost is concerned the Tribunal itself is not very expensive. The problem is that parties cannot and should not be forced to accept a casual decision based on "fairness". If they are to have a proper decision based on careful examination of all the evidence and arguments advanced there is an inevitable expense.