THE SCOTTISH LAND COURT

PLAIN GUIDE TO LITIGATION

A DIY Manual for Novice Litigators

The Scottish Land Court
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WARNING

Although this guide has been prepared by experienced litigators working at the Court, it has no official status. It is not to be read as if it was a decision of the Court itself. It is not, in any way, a substitute for the Rules of Court. It is simply a guide.

TYPESETTING

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Preface

The layout of this Guide follows the course of a typical litigation. After an introduction, the section on basic stuff deals with how a straightforward application is run, controlled by the Court. We then deal with written pleadings. These are dealt with under several heads: 1. General; 2. The Application; 3. How pleadings work; 4. How to set out the statement of facts; 5. Answers; 6. Adjustment and amendment; and 7. Practical matters.

The next broad chapter covers preparation for hearings. It deals with formal matters such as the Hearing Order. It covers the different types of hearing and matters such as the importance of pleadings in relation to hearings. It explains how parties should approach disputed facts. It touches on the importance of fair notice and explains how hearings about legal issues are dealt with. It then covers evidence, dealing separately with witnesses and productions. The need, in some cases, for intimation of legal precedents or statutory material is discussed.

We then deal with the hearing and subsequent matters, under various headings. We look at the aim of examination of witnesses and way the Court approaches the conduct of the hearing. We deal with how evidence from witnesses is taken, including discussion of leading questions and techniques of cross examination. We look at the particular difficulty you face giving evidence in your own case.

After most hearings the Court will have an inspection. After the decision you may have a right to appeal.

A major concern for most folk is the risk of liability in expenses and that is covered.

We stress the advantage of taking professional advice for parts of a case, at least. It is very valuable to have some independent assessment of the prospects of success. We also stress the importance of missing no opportunity to consider ways of settling the dispute without going through a full litigation. We touch on mediation which is a structured way to help people discuss things effectively.

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Introduction

People who work in courts do not talk about "DIY" litigation. In Scottish courts, people who conduct their cases without a lawyer are known as "party litigants". In England they are called "litigants in person". But they might well be called "DIY litigants". This Guide was initially intended simply for them. But, it has grown a bit and we hope it will also be of interest to lawyers who find themselves involved in litigation without having had a chance to acquire much experience. Put shortly, this Guide is for people who want to get an understanding of some of the basic thinking underlying the various formal rules and procedures governing litigation practice. Although it is intended to cover litigation in the Land Court, it tries to deal with the theory behind litigation practices generally. Where we are speaking of aspects of practice in the Land Court which might not apply in all other courts we normally use the word "Court" with a capital letter.

For ease of reading, we have made free use of the first person plural, "we", but this is used in a loose sense. This Guide is not expressing any "official view" of the Scottish Land Court. Like all courts, the Land Court procedures are governed by its own Rules of Court. This Guide does not attempt to set out any of the specific Rules; it is a general guide to help an understanding of why there are rules. It does not replace the Rules. For completeness it may be noted that we are in the process of preparing new rules for the Court but these should not affect the material in this Guide.

A lot of stuff is available to help the traditional DIY enthusiast. This Guide is not quite the same. For a start, people involved in DIY in the courts can hardly be described as "enthusiasts". But, more important, this is not so much about "How to do it" as about "Why it is done". The intention is just to explain a bit about the theory behind the various steps of procedure to give people a better understanding of what everyone involved should be trying to achieve at each stage. A bit of "How to do it" material is included as part of the overall explanation but we make no attempt to deal with precise rules, time-tables and the like.

Some types of litigation are comparatively easy for people appearing without legal assistance. In the Sheriff Court, various pamphlets are available dealing with the steps of procedure in Small Claims and Summary Causes. Although, we go on to explain that actual procedure in the Land Court is not difficult for a layman, the Court is, essentially, dealing with disputes over rights related to tenancies of land and these tend to be a more complicated type of litigation than small cases in the Sheriff Court. If your case is in the Sheriff Court you may find some assistance in this Guide but your start point ought to be the Sheriff Court publications – available from that Court or their web site. Do not be put off by all the matters of detail we have tried to cover for Land Court purposes.

DIY litigants are not "enthusiasts" because they are almost invariably driven entirely by cost. Unlike the average DIY worker, they have no opportunity to start on easy things. They will be caught up, as complete beginners, in matters which may well be of great importance to them. As the next section makes clear, it is possible to carry on a Land Court case without knowing much about rules or procedures. But we make no apology for dealing with matters in some detail. The more you understand the easier the process should be.

Inevitably, court procedures involve matters of detail which need names. The names are part of the ordinary English language but because most people are not used to courts the words may not be familiar and the dictionary definitions are usually too short to be entirely helpful. We try to explain most names in the Guide itself but, as part of our work with new Rules, we prepared a "Glossary". You can find that on our web site. It covers most of the unfamiliar words you might come across. You might find that Chambers Dictionary also helps on occasion. (It seems to have more Scots law terms than other dictionaries.)

People do have different views about practice and procedure. We are always aiming to find the best way of doing things. We think that this Guide is reasonably reflective of good practice. We shall try to keep it up-to-date. Our Principal Clerk would be glad to have any comments on it.

We hope to show that procedure is largely a matter of common sense and that Land Court procedure presents no undue difficulties as a DIY exercise. Unfortunately, it is necessary to stress from the outset that although you can expect to limit expenditure on your own case by doing without the help of a lawyer, you cannot avoid the risk of liability to pay all the other side's legal expenses if you lose. Doing without a lawyer may prove a false economy. We deal with expenses towards the end of this Guide. You should be sure you understand the implications before you start.

If you do not want to represent yourself but do not want to employ a lawyer, the Land Court will usually allow you to be represented by a friend or relative. Alternatively, you might be allowed to be represented by a member of some other profession, but the Court will want to be satisfied that the person involved is a suitable person to conduct a litigation. Such a person will not be entitled to charge you for his or her work unless the Court agrees.

Basic stuff

We start with some simple "How to do it" material. Fortunately, the Land Court is relatively easy to use. All an applicant really must know is how to complete an Application Form. If necessary, the Court staff will give guidance on the right form to use and some guidance as to how it should be completed. Staff will be prepared to give procedural guidance throughout. Once the application is in, subsequent procedure will be spelled out by the Court in a series of formal orders.

It is quite important to keep in mind the difference between the Court's administrative staff and the Court itself, but we will come back to that point.

For some of the more straightforward cases, the application may need do little more than identify the land involved, in other words, the subjects in question, and describe what the applicant wants the Court to do or decide. Many crofting applications are in that category. A DIY litigant in such cases has no real need to get involved in the detailed theory discussed below. However, we hope that, even in the simple cases, some explanation of why things are being done will be of interest.

After the Application is in, the Court will tell the parties, stage by stage, what has to be done. The first stage is usually intimation. The Court will arrange for a copy of the application to be sent to everyone who might have a right to oppose it and will tell them that, if they do oppose it, they must send their Answers to the Court within a specified time. A person who responds to such intimation is known as a "respondent". For simplicity we shall go on to discuss matters as if there was just one applicant and one person opposing. It is not uncommon for there to be more than one respondent and the court orders will be adapted to take account of this.

The Application and Answers are the first stage in what we call the "pleadings". The pleadings are the formal written statements setting out a claim and response. Once each side has seen the other side's written statements the court will usually make an order allowing a period for each to respond. That stage is known as "adjustment" of pleadings. The idea is to identify as clearly as possible what is in dispute so that it can be seen what the court has to decide.

Once the parties have been given a chance to focus their dispute by adjusting their pleadings, an order will be sent fixing a date for a hearing and telling parties what to do about any documents or written material they wish to rely on when presenting their case at the hearing.

Sometimes a hearing will be limited to discussion, or debate, about a question or questions of law. Either party can ask for a case to be heard this way. Sometimes the Court will suggest it. The order fixing a hearing will make it clear if the hearing is to be limited to a debate. If the order does not refer to any limited purpose, there will be a full hearing.

A full hearing is the stage when you and your witnesses tell the court what they know about matters in dispute and the other side gets a chance to challenge or clarify that evidence and lead evidence of their own. You will have a chance to question or challenge witnesses led for the other side. You will then have to present your arguments based on all the evidence to explain to the court why it should find in your favour. The court will then take time to consider the case and prepare a written decision with its reasons.

The court will then deal with expenses. The State provides the court and charges only modest fees. The main expense comes from lawyers' time and the time of any expert witnesses. Party litigants may have little expense of their own but must always be aware that the successful party is entitled recover their expenses from the other side. This does mean that party litigants must expect that, if they lose, they will have to pay for the other side's lawyers and experts.

More "How to do it" stuff – the Rules

The formal procedure of any court is governed by a series of rules. They tell parties what they are expected to do and what they can expect the court and the court staff to do in the normal case. They set out the powers the court has to conduct the case. Although a party litigant in the Land Court should be able to manage quite well without detailed knowledge of the Rules, it may make sense to have a look at them to see if any provisions are of particular help. These Rules can be looked up, or a copy downloaded, from our website at www.scottish-land-court.org.uk/rules.html. Note that new Rules are being prepared but it may be some time before they are introduced.

It is important to stress that, although some of this Guide may appear to take the form of instructions as to what is best practice, it is not intended to replace the actual Rules of procedure. This guidance is aimed at helping understanding not at giving a description of the rules of law or procedure.

Written Pleadings

1. General

This part is intended to deal with various questions about the way the written statement setting out your case should be completed. It may be enough to remember that you should always try to put your side of the case clearly. The rest tends to follow. But it is worth looking in more detail at what is involved. It is helpful to keep in mind the idea of pleadings being a joint effort by both sides to identify, as precisely as possible, what it is that the court has to decide.

Court staff can give a good deal of advice. But they cannot act as your lawyer. They cannot become involved as advisors on the merits: that is, they cannot tell you whether you have a good case or a bad one. They cannot tell you what to do to help win your case. They will not be able to assist with the detail of pleadings.

2. The Application

Perhaps the most obvious point about the application is that it must say what it is that the court is being asked to do. You must make this clear. This part of an application is often referred to as "the crave". That is an old fashioned sort of term but it describes what it is. You must set out what Order you are asking the court to make.

The Court has printed forms for use in the more common kinds of case. The Court staff can give guidance as to the right form to use for your case. But it may not be easy for them to say much more. After they receive your application, the staff will sometimes be able to tell you if it does not meet a minimum standard in the information it contains or the way it has been completed. They might also be able to tell you if you are asking for something which the Court does not seem to have power to deal with or where you have not set out enough facts to show that there is a legal basis for the Order you want the Court to make. But often these matters raise questions of law which may not become apparent until challenged by an opponent. To ensure that you do meet a minimum standard you need to know enough of the law to set out a competent crave or request; that is, one which the Court has power to deal with, and set out enough by way of supporting fact to show that you might be entitled to the remedy you crave.

A court such as the Land Court does not have power to decide every question that it is asked. We use the word "jurisdiction" to explain the range of matters any particular court can deal with. The jurisdiction of the Land Court is set out in various Acts of Parliament. The Acts give the Court its powers. If the Court has not been given power to deal with a particular topic, it has no jurisdiction to make Orders dealing with that topic. Another way of putting this is to say that it is not

competent to deal with the topic. An application asking a court to do something which is not within its powers is said to be "incompetent".

Sometimes a court is asked to make an order which would be within its powers but the applicant cannot provide or, in any event, has not provided, enough material to show why he or she is entitled to seek such an order. In that case the application may be said to fail the test of "relevancy". It may include a lot of detailed facts but none relevant to the question.

Some types of application present special pleading challenges. An example is an application to fix rent of a farm under the Agricultural Holdings legislation. While renting of crofts usually requires little by way of formal pleading, the renting of an agricultural holding normally requires the presentation of a lot of detailed information. Most of this falls into the category of evidence and does not need to be set out in the pleadings. Where it does, it can be useful to use schedules or spreadsheets. Discussion of this is beyond the scope of this paper. Although what is said below may give guidance to the pleading in rent cases, it is not aimed at such cases. If you are involved in a holdings rent case, you should make special enquiry with the court staff to see what the current guidance is.

The rest of this chapter deals with what you should have in mind when setting out the facts you rely on to support your request or crave. Some special application forms contain guidance as to the specific types of information required. But it is up to the applicant to make sure that enough is said to justify the claim they are making. Although the Court staff will not be able to give guidance about whether a claim is a good one or not, they will check the initial application to see that the minimum requirements for detailed information are satisfied. You may be asked to supply further information before the application is allowed to proceed to the next stage.

The "Statement of Facts" is where you set out the material upon which your crave is based. The aim of written statements on each side ("the pleadings") is to give fair notice of the basic elements of the claim and also to allow the parties to agree what is admitted or agreed and try to identify what is actually in dispute. If that is done sensibly, it should minimise expense by making sure that the court only has to deal with matters which really are in dispute.

3. How pleadings work

Before considering how best to set out the material in the Application it is helpful to know a little more about the "pleadings" stage of a case. This applies in relation to the initial Application and to the Answers.

Overview

The parties start by stating their respective cases in the Application and Answers. There is then a process known as "adjustment" when each side can revise their statements in light of the opposition's statement. They can add more detail, correct errors and set out their responses to things said by the other side. Once the adjustment is complete, everyone should be able to see what the real disputes are. A

decision can then be taken as to the most efficient procedure to resolve outstanding matters.

It is necessary to strike a balance in pleadings. You must give proper intimation of the essential aspects of your case: the facts you need to prove to justify the remedy you seek. But you do not need to set out every last detail. The strict legal rule is that you must set out all the main facts you rely on to establish your case but not the evidence you will rely on to prove these facts. That is a sensible rule to keep in mind. But sometimes fair notice needs a wider approach. It is not easy for laymen to decide what facts are so essential to their case that they need to be disclosed in the pleadings and what matters are simply being relied on as evidence. Even if it was possible in a Guide like this to tell people the precise point of distinction, we do not think that a rigorous application of the rule would help the main aims. Even experienced solicitors find this difficult. But the more you understand about the different aspects of pleading, the easier it may be to strike the right balance. There is no doubt that written pleadings and the adjustment process can lead to a great waste of time and money if the balance is wrong. All involved must do their best to limit this.

The aim of pleadings

The main aim of written pleadings is to give fair notice of the basis of the case. We look at this first, but the aim of identifying the real issues should not be forgotten. By allowing parties to see clearly not only what is disputed but what is not disputed, good pleadings can save a lot of wasted time. It is important that parties understand precisely what it is that they are actually arguing about.

The aim of fair notice is to ensure that when parties come to a hearing they can be fully prepared not only to present their own case but to answer the other side. Pleadings are an important tool in setting the boundaries of what any hearing is to be about. People cannot expect simply to come along and tell the court all their grievances. There has to be some form of notice to let the other side prepare their answers and gather any evidence necessary to support their side of the dispute.

The Land Court is anxious to ensure that cases are decided on the basis of the true facts and the proper law. We make every effort to try to ensure that procedural rules do not get in the way of that. We know that the parties are seldom strangers to each other and that there are few cases where a party would be genuinely taken by surprise. But it is vital to realise that procedural rules have an important part to play to ensure fairness. If it appears that a person is, indeed, taken by surprise on any significant matter, the court may either refuse to hear the new material or allow extra time for him or her to prepare to answer it. The problem of balance is that attempts to avoid risk of criticism of not giving fair notice can lead to people trying to put every little detail into the pleadings. The time, effort and expense of this is seldom justified.

It may be helpful at this point to say that pleadings are not a place for setting out all the evidence you will rely on to establish your case. They are not a place for

setting out arguments in support of the case. They are intended to give notice of the basis of your case. They are not intended to serve the purpose of trying to persuade either the court or the opponent that a case must succeed. A clear statement of the basis of your case might well be quite persuasive in itself but you should not attempt to bolster it up with arguments. That is not the purpose of pleadings.

Written submissions

There is sometimes confusion between "pleadings" and "written submissions". Pleadings are the formal written statements of what the applicant is asserting and the respondent's defence. If the pleadings are used to include attempts to persuade or present arguments in support of the case, they can easily become so complicated that their primary purpose is lost. In a court, the stage of presenting arguments is known as making "submissions".

Submissions are intended to persuade the court to find in your favour. They are usually made orally. A "submission" is just a coherent argument. For example, the stage of "closing submissions" is when you present your arguments about the effects of all the evidence which has been presented to the court and explain to the court why it should find in your favour. At that stage you might, for example, set out the reasons why you say that the court should prefer the evidence of your witnesses to the evidence for the other side. It is also the stage when you tell the court what you say is the correct legal approach to the facts in your case. Submissions after the hearing of evidence are almost invariably referred to as "closing submissions". They are the last stage of a hearing. Submissions may, however, be made at other stages of a case. The word is used to cover all types of oral presentation in court except the stage when witnesses are giving evidence about disputed facts. Where a hearing is a debate about a question of law, the arguments are referred to as "submissions".

In some cases, we may ask for a written outline of submissions to be sent in before a hearing. This is intended to save time at the hearing. Advance warning allows both the court and the opponent to consider the arguments fully and helps ensure that they fully understand all the points made at the hearing of the oral submissions. It saves time at the hearing by allowing the court to look, in advance, at any previous decisions of a court which may be relied on by the parties as supporting their argument. But sending in a written outline of submissions is not the same as making "written submissions".

That expression, "written submissions", is usually used only when it is suggested that the Court should deal with a case on paper without an oral hearing. When this is agreed, the parties will be given an opportunity to set out their whole arguments or submissions in writing. The submissions will, of course, have to be based on the case set out in the pleadings but this process gives an opportunity to put full arguments in writing. Written submissions may contain reference to previous court decisions and reference to any provisions in an Act of Parliament on which the case is based. Written submissions can make reference to any pieces of

documentary evidence relied on to support the case. They will set out on paper all the arguments thought necessary to persuade the court to find in your favour.

Disposal of a case on written submissions may be appropriate where the facts are agreed or where the dispute is about the meaning of documents or about a pure point of law. They are not appropriate when there is a dispute about fact. Dealing with a case on written submissions will usually be cheaper than a hearing but it is not necessarily preferable. Preparation of full written submissions can be time consuming and it is more difficult for the court to be sure it has fully understood an argument when it cannot ask questions. An argument is usually easier to develop fully when tested in discussion with the court.

It is important to understand the difference between "pleadings" and "submissions" when talking about the court deciding a matter on written submissions. If that course is agreed, it does not mean that the matter will be decided on the pleadings. What will happen will be that parties will then be given a chance to set out any arguments in writing to support the pleadings. The court will consider these written submissions, in private, along with the pleadings and any agreed documentary evidence and issue a decision without having to have a formal hearing.

Choice of procedures

Once the essentials of a dispute can be identified, a decision can be made as to the most appropriate procedure to follow to resolve it. This will usually involve a decision as to whether it is worth holding a separate hearing to decide any legal questions or whether the real dispute is about facts, or about a mixture of facts and law, so that the best course is to have a full hearing to establish the facts before arguing about the law. Debates on law are usually much easier to arrange. They are shorter than a full hearing and do not require attendance of witnesses. So, fewer people are involved and it is usually easier to find suitable times for a hearing. A debate will usually be much cheaper than a full hearing. The role of pleadings in clarifying the issues is therefore very important.

However, even where there are real issues of law, there is usually some dispute about fact and after the pleadings have been adjusted the normal assumption is that a full hearing will be needed. Good pleadings allow solicitors to estimate accurately how long the hearing is likely to take and suitable arrangements can then be made. This, of course, is not so easy for party litigants but the Clerk of Court will be happy to discuss this at the appropriate time.

4. How to set out the Statement of Facts

Although we are dealing at this stage with the completion of an Application, most of what we say also applies to other forms of written pleadings. It is always helpful to aim for simple language and to avoid any attempt to use big words just because it seems right to try to use them for important things. The simple aim is to set out the important material as fully and clearly as possible and in separate, short, numbered

paragraphs. This process helps you see that you have thought things through properly. It makes it easier for the other side to identify what they dispute. It is easier to work with an Application which is carefully prepared in this way. It allows the opponent to answer each point fully and clearly. It helps avoid misunderstandings.

You should follow an identifiable order either dealing with a logical sequence of issues or simply dealing with things in chronological order. Be straightforward and businesslike. It is always worth drafting pleadings first and then going back later to have a fresh look at them before sending in the final version.

Making your case easy to answer

You may think that the last thing you want to do is make your case easy to answer! But, if you have a good case, the clearer the pleadings the better. You do want to set out your averments in a straightforward way so that you force the respondents to be straightforward in their replies. Generally speaking, Answers have to adopt the style of layout chosen by the applicant. If the Statement of Facts consists of a few big paragraphs with a variety of facts squeezed into each, the material set out in the Answers will also be squeezed into the same type of paragraphs. When the applicant comes to adjust in response to the Answers he will not be able to abandon the whole scheme of the original. New material will simply be squeezed in – with the result that each paragraph grows to be a great amalgamation of indigestible facts. The Answers will, necessarily, be the same.

On the other hand, if the initial case is set out in a series of short paragraphs dealing with specific topics, the drafting of both Answers and adjustment is much easier. Brand new material can be added at the end as new paragraphs, or inserted as extra paragraphs using numbers such as 1A, 1B etc, to avoid disrupting the original pleadings and knocking the numbers in the Answers out of kilter.

It is worth bearing in mind that all assertions will be scrutinised by real people on the other side – not just lawyers! It is important to realise that your opponents are likely to be fighting the case because they genuinely think that they have the better legal rights. They will seldom be litigating just to be difficult. (They may, of course, be litigating mainly in the hope of persuading you to reach a compromise agreement.) If you can recognise that your opponent is not acting out of "pure badness" or "pig headed stupidity", it should be easier to discuss a sensible compromise. But, if your pleadings say something which is plainly wrong, misleading or even just exaggerated, this may lead your opponent to think that you are the pig headed one. Errors or exaggerations in pleadings not only lead to extra expense in being challenged and corrected, but can add to the aggravation factor. All unnecessary aggravation tends to increase cost and reduce the chances of sensible agreement. Where a case is set out accurately and moderately, the other side may reply in kind. Parties may then find it easier to understand that there is a real question between them which needs a sensible answer rather than an emotional squabble.

We often find that Applications contain very little detail. This may be because it is hoped that the mere raising of the action will force the other side to give serious consideration to the problem and reach an agreement. There may seem no point in drafting a lengthy application if it is not likely to be opposed. But this may be a false economy. Once it is clear that a case has to go to court the aim should be to set out the relevant facts as clearly and completely as possible and as soon as possible. That allows the other side fully to understand the case it has to answer at as early a point as possible. Faced with a clearly stated case an opponent has to make up his mind whether opposition is worthwhile. In other words a well stated claim helps ensure that if there is opposition it will be because there is a genuine issue to be resolved and not because there is any misunderstanding.

If the application is in skeleton form it is likely that the answers will be the same. Both sides will then realise – or be told – that they need to set things out fully. They will often adjust by deleting the first statement and replacing it with a much more elaborate statement. That will mean that their opponent has to do the same. The expense of the first statements will have been wasted.

The legal basis of a case

We do not insist on formal "pleas in law" in the pleadings. This is partly because many Land Court cases raise issues which are purely factual. For example, if the Court is asked to determine a boundary or fix a croft rent it is often the case that no legal points are in dispute. But in some types of case but it will be necessary to say why you think you are entitled to the Order you are asking for. This may involve setting out briefly the legal propositions you are founding on.

The legal basis of a case can be set out at the end of the Statement of Facts under a separate heading of "Pleas in law". That is how it is done in other Scottish courts. The name does not matter. You could call them "legal contentions". Sometimes a legal proposition can simply be set out as part of the narrative of fact. If for example, you were making a claim based on a provision of an Act of Parliament, you might refer to the section in question and then just go on to explain why your case was covered by it. In most cases a separate statement of the legal basis of your claim is best set out at the end but the aim is clarity not legal formality. The legal contentions upon which you rely must be based on the facts you have set out.

Setting out clearly the legal basis of your case forces you to look closely at the case you are presenting. It helps the court see in advance what issues are likely to arise and this is important when deciding on the best procedure to follow.

It is important to stress that there is a difference between setting out the main legal propositions on which your case is based and actually setting out the arguments you will advance in support of them. Pleadings are not intended as a place for argument. You will see above some discussion about written submissions. That may help explain why we do not expect to find lengthy argumentative material in the pleadings. That is not their purpose and it leads to confused pleadings which can hide more than they reveal. If you want to persuade your opponent of the

strength of your case, you can do so by sending him a letter setting out your arguments. You should not do so in the pleadings.

It may seem sensible to try to put your whole case, arguments and all, into your written pleadings so that your opponent cannot complain of ever being taken by surprise. But this tends to create its own problems. Experience has shown that simple pleadings are best. If you keep in mind the difference between pleadings and arguments it should be easier to avoid the type of pleadings which are so convoluted that no one really knows what case is to be made. Remember that the main aim of pleadings is to give notice of the basis of your case and to do so in such a way that the parties together can identify what is agreed and what is in dispute. Inclusion of argument or unnecessary reference to evidence makes this much more difficult.

Referring to documents

There is a difference between documents which are founded on, in other words relied on as creating a legal right of some sort, and documents which are simply relied on as evidence to support a case. A written agreement such as a lease would be in the former category; most documents fall into the latter category. An expert's report is a good example. You might tend to think of it as showing the "basis" of your case, but it is really just a piece of evidence.

We refer again below to different types of material which might be sent to the Court. It will all go to the Court staff in the first instance. Material which is to be founded on or relied on as part of the evidence in the case should be put in formally as productions. We talk about "lodging" material when it is done in a formal way even that word is not actually used. This can be contrasted with, say, letters dealing with procedure which are not part of the evidence in the case itself.

Documents which are founded on as the basis of a case in the sense that they are essential to the right being claimed should be lodged, that is, sent to the court along with the application or response. They should be referred to in the pleadings to the extent necessary to explain what they are and why they are relied on, but need not be quoted in full.

A report is different. It should simply be lodged as a production. If that is done in good time it will usually be accepted as giving sufficient notice of the facts it contains. It may be referred to in the pleadings but no purpose is served by incorporating it as part of the pleadings. Lawyers sometimes say in their pleadings that a particular document or report is "adopted" or is "incorporated and referred to for its terms for the sake of brevity" – they might even put the last bit in Latin and say *"brevitatis causa"*. Unless a document is relied on as the basis of a legal right there is seldom any need to incorporate its terms in the pleadings and we suspect that in most cases when lawyers purport to "adopt" a report, this is done without thinking about the implications.

As an applicant, you might mention a report in your pleadings to draw attention to it but do not try to "incorporate" or "adopt" it as part of the pleadings, just because you have seen this done in other cases. Adopting a report in this way

without repeating its terms expressly is seldom helpful. You realise this immediately you find yourself trying to answer such a form of pleading. One problem is that reports often contain a lot of opinion evidence which does not require to be answered in pleadings. However, a report may very well set out a lot of factual detail. Many of such facts may be so obvious that, taken individually, you would not see any need to give notice of them in formal pleadings. Putting them all in not only creates work but also tends to distract attention from more important matters which might be in dispute. However, the real difficulty is that facts in a report are seldom in a format which can easily be answered. Accordingly, it is virtually impossible to use the pleadings to identify what is agreed and what is to be determined by the court.

If there is material in a report which you would like an opponent to answer, you might adopt some identified part of the report if it lays the material out in a way which allows that to be easily done. If that is not possible – and it seldom is – you should repeat the essential material in your own pleadings or identify it in a way which forces your opponent to deal formally with it and allows him or her to answer each point in a clear way. Time spent on this will not be wasted.

Often the only way to respond to a report produced by an opponent and purporting to be adopted as part of his pleadings is for your own expert to prepare a report in answer and to incorporate that. This is seldom helpful in clarifying issues.

It is important to keep in mind that pleadings are not a place for submissions. You do not need to try to use pleadings to persuade the court that the opponent's report should be rejected. You do not need to set out the reasons for rejecting all the points made by an expert in a report. As long as it is clear from the report that you are denying the essential point, the reasons for rejection of individual arguments can be left until the hearing or until you are asked to lodge a written submission. You can always write a letter to your opponent if you wish to persuade him that his arguments are bad.

5. Answers

The above comments apply, as appropriate, to the Answers. You should try to answer all the points made. You should also set out your own side of the case as clearly as possible. But the aim is to give notice of the essentials of your position; not to present your case in all its glory

Drafting Answers may well be more difficult than drafting the initial Application. The simple approach is to answer every point made by the application and then put in your own material by way of explanation. But it is very easy to get tangled in a confused mixture of admissions, denials and explanations. So, various techniques have been developed to try to make things clearer. If you can manage to adopt these techniques, that would be helpful for everyone. But we stress that the aim is always clarity not formality.

As long as you can make your own position clear enough, it does not matter what words you use to express things in the written pleadings. Keep in mind that although the word "pleadings" may tend to convey the idea of presenting pleas to the

court, the purpose of pleadings in Scottish courts is to give fair notice of the case. As we have said it is not the place for argument. You are not pleading in that sense!

For a DIY litigant, the natural thing would be to try to answer each assertion in turn. If short paragraphs have been used this approach works quite well. You admit what you know to be correct and deny what you dispute. But there may be things lying in the middle. You may not be comfortable with the idea of admitting what you do not know even if you cannot actually deny it. You have to decide whether you are prepared to accept such a matter at face value or whether you want to leave your opponent to prove it if he can. Some things you will not be sure about. They may be fine as far as they go but need some explanation.

Various phrases have come to be established as convenient ways of setting out your attitude to the other side's case. The way lawyers deal with the problem is to answer each paragraph separately but do so by setting out the material in distinct categories. They will start by admitting every point which they know from their client to be correct. They might then list any individual assertions that are "believed to be true". These would be things that they were prepared to accept without any qualification. They next list any of the opponent's assertions which are "not known and not admitted". That is the same as saying that the opponent will have to lead evidence to prove such assertions. They will intend to test the evidence by cross examination but will not be able to lead any positive evidence to disprove the point.

The last category is the things that are denied. They would not normally be listed. Although we make an effort to avoid Latin expressions in the Land Court, you will usually find that lawyers cover the last group by saying "*Quoad ultra* denied". This means that "anything beyond the various items expressly mentioned in any of the previous categories is denied". You can see why we allow the Latin!

Grouping matters in this way helps make it clear what is disputed and use of a general denial at the end saves having to deny things line by line. It also avoids the risk that you might fail to deny something. This approach is helpful if a lot of material has been squeezed into one long confused paragraph. It is not so necessary where the material to be answered has been set out in short paragraphs.

If there are bits of your opponent's case which you find ambiguous or obscure you can ask him to explain, or clarify, or admit any matters which he really ought to be able to admit. Lawyers make clear what they are doing by using the word "call". For example: "The applicant is called upon expressly to admit or deny that he accepted a payment of rent on 4 January". Opponents are not automatically obliged to answer such calls. They may think they have already provided sufficient information or that they are being called to deal with something that has really got nothing to do with the case. But, used appropriately, such calls can helpfully clarify specific points or focus attention on evasions or vital gaps in the opponent's case. If you want to force a recalcitrant opponent to answer a call on a point you think important you can ask the court to pronounce an order requiring such an answer.

Explanations can usually be inserted point by point, by way of specific answer to each statement made by the Applicant. But there may be circumstances where you

would wish to add quite separate material of your own. You might do this by adding some paragraphs with new subparagraph numbers rather than trying to force new material into a framework which was not designed for it.

That approach might be particularly appropriate if faced with the task of drafting Answers to an Application which has been set out in skeletal form. The aim should be to provide as full a statement of your own position as you can, as soon as you can. This cuts down the delay and expense of extensive subsequent adjustment. Even if an application is brief, it may be possible for the respondents to set out their side of the case fully in their first answers. This should force the applicant to set out their case in detail by way of reply. It is important to keep in mind at all times that pleadings on each side should be drafted, if possible, in a way which makes them easy to answer. In an ideal world, pleadings would be regarded as a joint effort.

This comes back to the main point that parties should always consider resolving as much as they can by agreement. Litigation should be the last resort and only used to decide serious matters. Even if you cannot agree everything, no effort should be spared in trying to see what you can agree. You might find that involving a third party would help this process. Various commercial firms offer a service as "mediators". Their skill lies in helping people work out things for themselves. Even if you do not think your dispute requires professional assistance you might be able to find someone both sides respect and invite his or her assistance. Sometimes it takes just a few questions from an outsider to show parties where agreement may be achieved. An aim might be to find a way to work for the future without necessarily conceding anything about the past. But even if full agreement is not achieved, outside assistance is often the key to progress.

Even where positive agreement is not possible on some issue, it is always worth trying to reach a compromise on minor points, even if just for the purposes of the litigation, to ensure that the expense of litigation is limited to the points of importance. If you take the approach of simply leaving everything to the court, you may win on the important point and end up paying some of the expenses because you lost on some minor point you would not have thought worth arguing about on its own.

Advanced pleadings!

The real enthusiast might want to consider another expression commonly used by lawyers in pleadings: "Believed and averred". It is so often used incorrectly that the only advice for a party litigant is to ignore it. It is an expression which should only be used where you are making an assertion which is an inference from something else and where it is something the opponent might have actual knowledge of and you could not. It is not for DIY use. If you are asserting something as a fact which you intend to prove, you should do so plainly. What you believe is not relevant unless you can explain the basis of your belief.

6. Adjustment and amendment

Changes to the initial Application or initial Answers will normally have to be made as part of the normal pleading process to allow parties to identify what is really in dispute. They are also often needed simply to bring matters up to date. We have two names for the process of changing pleadings. Once the Answers are lodged, the first stage is known as the "adjustment" stage. The Court will issue an Order giving parties permission to make changes to their pleadings within a fixed time. This means you can make any changes you think necessary. What you say is up to you. The intention is that you respond to any material in your opponent's pleadings so that it becomes clear what your own case is, and what precisely is in dispute. As we have said, the aim should be to get your case fully set out as soon as possible. Usually, the Court will allow a period for one side to adjust and then a period for the other to adjust in response. In most cases some adjustment is needed but ideally one exchange of adjustments should be enough. Repeated adjustment is a major cause of wasted expense and delay.

"Amendment" is a similar process but the different name is used because it takes place under direct control of the court. Instead of being given time to "adjust", which lets you make any change you want, you have to tell the court and your opponent precisely what changes you wish to make. The court can refuse to allow them. This more formal approach is used when the change relates to important features like adding a new party or changing what you want the court to do at the end of the case: in other words, changing the crave. However, its most common use is when someone wants to make further adjustments to their pleadings at a late stage; perhaps at or shortly before a hearing. The court has to decide whether it is fair to allow some new material at that point and, because specific permission for the proposed changes is required, we give this type of change the separate name of "amendment".

Late amendment is not always a bad thing. In many cases, the nature of the dispute will be clear from the beginning and it may be as well to fix a hearing as soon as possible. But there are nearly always changes or developments in course of a litigation. For example, there may be informal discussion leading to agreement on parts of the case. Or, there may have been new material arising from change of circumstances and further examination of available evidence. Revision of pleadings at a stage close to the hearing is usually more focused than that carried out at an earlier stage. But it can be unfair if one side has made full preparation for a hearing and is then faced with an opponent changing his or her position.

Parties must try to get their pleadings in good order as soon as they can. If they have to tidy up by asking to be allowed to amend, they will usually be expected to pay the expense of that process – although this is always a matter for the discretion of the court.

7. Practical matters

Nowadays, the easiest way to adjust is to use a computer and show the changes in some distinctive way. You might use italics, or bold, or different fonts or colours. You can show deletions using different types of "strike out". When you intimate these adjustments to the court you can send a copy with the changes marked and a clean copy. This allows everyone to see at a glance what new material they have to deal with. The different styles of change can be shown as examples on the top of the front page with the dates they were made. It is important to keep a track of when specific changes were made because this may have a bearing on assessment of the reliability of the case which is ultimately presented.

It is possible to use the old fashioned method of making the changes on a copy of the original and using different coloured pens to show changes made on different dates. This can work well enough for a few short changes. When there is a long adjustment process, things can get very confusing. There may be many colours and many bits of paper, glued or stapled on to the original. A major problem with this approach is the difficulty of making accurate copies for the court and the other side.

Some practitioners adopt the lazy style: "Adjust by deleting the previous Statement of Facts in full and substituting "X etc". This may be quite a sensible thing to do if you are making radical changes to your pleadings. It is commonly used when there has been a change of lawyers and the new lawyers want a fresh start. However, if the new version is repeating most of the original with the new material simply fitted in as appropriate, this technique does not highlight the changes and this can be irritating to both opponent and court. The opponent may have to start his Answers afresh to be sure he has covered everything. That can be a complete waste of time and expense. So, this practice should be avoided. If used inappropriately it may lead to a special ruling on expenses.

If only one or two changes are proposed it may be simpler to make them by spelling out what the specific changes are. For example, you might simply write to say that you want to delete from line 4 on page 3 starting with the words "The X" down to line 9 ending with the words "the Y", and substituting therefore: "Z etc."

It is the practice in some courts, after the adjustment stage, to have the Application and Answers printed up together. The result is in a book or pamphlet form with statement 1. followed by answer 1. and so on. This book is called the "Record" – pronounced as in "recording". The stage when adjustment stops is called the "closing of the record". You may occasionally hear mention of "closing the record" or of a "closed record" as a way to refer to the stage after the time allowed for adjustment has ended. But the Land Court does not require the final pleadings to be made up in this way. We do, however, like a clean top copy from each side showing their pleadings as adjusted.

Some other points

As we have seen, the pleadings are the formal written statements of the case on each side. Normally this means the Application, with its Statement of Facts, on the one

side, and the respondent's Answers on the other. These two documents as adjusted will be the "pleadings".

In some cases, it may be convenient to have another document or set of documents. For example, it might be easier in straightforward cases to have the applicant produce a simple written Response to the Answers rather than have a process of adjustment. Sometimes a particular problem will arise in the middle of a case and the court may ask for a separate statement setting out the contentions on that specific separate issue. We usually call such a statement a "minute". (It may be worth explaining that lawyers use the word "minute" to describe any formal document which is to go before a court if it doesn't have a more specific name.)

One special example of a separate additional document being used in an existing action is where the respondent wishes to make some separate claim against the applicant. If that claim arises out of the same facts and circumstances as the original application, it may make sense to allow it to be added to the original court process. This allows all the issues to be sorted in the one action. The respondent's own claim would go in by way of a separate document called a "Counterclaim". An order would then be pronounced giving the original applicant an opportunity to lodge Answers to the Counter-claim. Separate adjustment of the Counterclaim and Answers would be allowed.

Assertions

Distinction must be made between things said in pleadings; things said in letters to the court clerk and statements made in the witness box. All involve assertions of one sort or another but they have quite different effects.

Statements made in written pleadings are usually referred to as "averments". Pleadings are not part of the evidence. However, material in pleadings may come to be used by the court in reaching its decision. The Court is always entitled to rely on averments which have been admitted. Admitted averments are part of the evidence in the case. Sometimes it will be clear that a party is relying on what he has said in his pleadings and, in effect, adopting it as part of his evidence. The court will have regard to that. The court may also refer to pleadings where they are different from the evidence given in the witness box. The contrast may suggest that the evidence is not reliable. Changes in pleadings as part of the adjustment process may also be referred to as suggesting that a particular case is not reliable.

A distinction must also be made between what is said in pleadings and statements made in ordinary letters to the court. It is important to stress that letters are dealt with by the court clerk not by the court itself. Letters are not part of the case. They are neither pleadings nor productions. When the Court prepares for a hearing it will read all the pleadings and see the productions. But it will not read all the office files. Accordingly, anything intended to be relied on at a hearing must be covered by the pleadings or lodged as a production.

It is a common mistake for inexperienced litigants to want to tell the court their side of things at every stage. But letters to court staff will only come to the

attention of a court if they contain some formal request which needs attention by the court. If such a request is made it should be set out at the start of the letter and the rest of the letter should be limited to material supporting that request. Material intended for the clerks should go in a separate letter.

Sometimes litigants will put requests or suggestions in a letter which can be taken as being no more than things for the clerk to consider. The problem usually arises in relation to minor procedural issues. If you want the Court to decide on a matter you must make it clear that you want the Court itself to make a formal decision. Lawyers use the expression "moving the court" to refer to the process of formally asking the court to do something. The formal request is known as a "motion". The Court does not insist on technical formality where intentions are clear, but it is always easier to identify intentions expressed in a formal way. If you are not comfortable with a formal term such as "motion" or "moving the court" to do something, you should just say that "the court is asked to order" whatever it is you want. If you think the matter can be dealt with on your written request you should say so and give any written arguments in support of your request. The Court will tell your opponent what you want and give them a chance to answer. The Court will either decide on the written material or fix a short hearing to consider that particular request.

8. Striking the balance

You must be sure that the crave spells out exactly what you want the court to do or decide. If things change in the course of the case you should be alert to the need to ask to amend the crave. It should be precise and without excessive detail.

But in the Statement of Facts you have to strike a balance between giving enough warning and cluttering up pleadings with material which can properly be kept for a hearing. Remember that you will always be given a separate opportunity to present your arguments; either in writing or as part of a hearing. The aim of giving fair notice may require some judgment. Solicitors learn by experience – but often get it wrong! There is no need to spell out all the background and no need to spell out every minor point of disputed fact. But on important aspects it is better to give too much notice than too little. Ask yourself whether the other side would be caught be surprise if you raised a particular point without having set it out in the written pleadings. Land Court cases usually involve disputes between landlords and tenant. In other words they involve people who are well known to each other. A lot of the material relied on will be obvious to both sides. It is comparatively rare for parties to be genuinely prejudiced by want of notice.

Further reading

Serious students might want to be directed to McPhail on Sheriff Court Practice 3rd Edition at Chapter 9. They will find a careful discussion of the law relating to pleading practice in the Sheriff Court and a wealth of cases illustrating the various

points. The DIY Land Court litigant is warned that some of the material might be misleading as it relates to the formal requirements of the Sheriff Court.

Preparation for Hearings

This chapter tries to answer the questions which arise in relation to preparation for hearings. A later chapter deals with how hearings are conducted. But it may well be enough, in a simple case, to turn up at the hearing and just say what you have to say about your application or the grounds of your opposition to the other side's case. If you are in doubt about anything you could refer to the Rules of Court or contact the officers of the court. The court staff will be able to guide you as to the correct procedure and will usually be able to explain procedures to you.

1. The Hearing Order

The Court staff will usually discuss the date of hearing in advance with a view to accommodating the requirements of both parties if possible. A formal order fixing the date, time and place of hearing may not be issued until quite near the hearing when all details have been agreed. But, if agreement is not possible, the Court will just have to fix a date and parties and witnesses will be expected to be there.

You should tell the court staff immediately if any special difficulty is expected over the date, time or place. A hearing can be an expensive process. It can normally be assumed that the most important thing is to make maximum use of court time to avoid waste of expense. This means that the convenience of individual witnesses must take second place. Witnesses are expected to be available at any stage in the hearing. But it is often possible to accommodate particular difficulties if they are drawn to the attention of the court in good time.

Date

Because of the nature of Land Court work we can usually allocate only one case for any particular day. In addition to the day or days fixed for the hearing, the Court tries to allow itself some time to prepare and some time to consider its decision. In other words, a time slot is allocated which is wider than the hearing itself. Once a slot has been allocated to one case, it is not available for any other. That is the important point. Where there is a late cancellation, the Court can usually make use of the time to do other work but it will not be able to use the time to hear cases. In other words, the time slot is lost to other parties. That is why the Court will be slow to agree to any postponement of a hearing. It will not do so without very special reason. Agreement of parties is not a special reason.

That is also why the Court seeks to encourage parties to discuss settlement of cases in good time before the hearing. If a case is to be settled it is helpful to other litigants if this can be intimated to the Clerk soon enough for other cases to use the time released. Some cases need only short hearings and even a few weeks notice can make all the difference.

Note that the date and time fixed for the sitting of court is sometimes referred to as the "diet". So, expressions such as "the diet is discharged" mean simply that the hearing is not to go ahead on the day which had been fixed.

Place

You should check that the proposed venue is appropriate. The place of hearing will have been selected having regard to the convenience of parties and of the Court and will take account of the availability of suitable venues for such a hearing and the nature of the points in dispute. The Court may well have discussed this in advance but, unlike the date, the Court is always prepared to reconsider the venue in light of any change in circumstances. The Court will have regard to overall cost and to questions of convenience including the question of whether the Court will have to visit the land in question. Where Edinburgh based lawyers are involved the overall cost may be less when a hearing is in Edinburgh. This will have to be balanced against cost and inconvenience to witnesses. But, put bluntly, it would be cheaper to pay for your own B&B in Edinburgh than risk the extra costs of lawyers having to travel and stay at a place more convenient to you.

If you think that either you or your witnesses may have any difficulty in getting to the hearing you should advise the court staff as soon as possible. Arrangements can be made to take evidence from people at or near their own homes where a special need can be shown. This should not be seen as an easy option. There are practical difficulties in finding enough space for the court and lawyers to be able to hear and note the evidence and, in any event, a witness can find this exercise very intrusive. So, it is better to aim to take evidence out of the witness's home, if possible. If a witness simply cannot travel to court, consideration should be given to the possibility of using a suitable room in a local hotel, hall or even solicitor's office.

Time

The Court is flexible over sitting hours. We usually start on the first day at 10am and sit until about 4.15pm but we can start earlier or finish later to suit the convenience of parties – and the times of flights and ferries. In some places, for example, the first day's hearing might start at lunch and go on into the evening. Later in the sitting, we try to start each day as early as possible to make best use of available time.

Note that if a witness faces any special difficulty of timing, it may be possible to arrange to hear the evidence of that witness at some fixed time. As always, the important thing is to raise the matter with the court staff and the other side as soon as possible.

2. Types of hearing

Proof

Where the Order refers simply to a "hearing", the Court will expect to hold a full hearing at which all issues in the case can be dealt with. That is often referred to as a "proof". It is the stage when the parties get an opportunity to prove their case. In Scotland, we only use the word "trial" to refer to criminal trials or jury cases but it may help you to think of the proof hearing as being like a trial.

Where the hearing is to be a proof, the purpose is to allow the various parties to lead evidence in support of the case each has set out in the written pleadings. The hearing is the only time you will be given an opportunity to give evidence yourself or lead evidence from witnesses in support of your case. You must be prepared to present your whole case to the court and that, of course, includes dealing with anything you dispute about your opponent's case.

This means that some time well ahead of the proof you will have to sit down and think about what evidence, including which witnesses, you are going to need. Ideally, of course, you should think about what evidence and witnesses are available to prove your case before you ever get involved in the litigation. But, inevitably, things look different in light of the exchange of pleadings. You should be able to see from the written pleadings what matters of fact are in dispute and be prepared to put evidence to the court to support your side. You should be familiar with your opponent's pleadings and productions and prepared to present any evidence to challenge, contradict or explain that material.

It is obviously important to be clear about what is agreed. If this is not clear from the pleadings you should check with the other side. There is no point in taking time to present evidence about matters which are not in dispute. If there is something in your pleadings which you think your opponent should be agreeing, you can ask them specifically. If there is no adequate response you could consider asking the court for an order compelling your opponent to admit or deny that particular point. Of course, it might often be simpler just to assume it was disputed and lead your own evidence to be on the safe side.

As we have said, one aim of the pleadings is to allow parties to see what is in dispute. But it is very common to find that parties realise they can agree a lot more than they have set out in the pleadings. It is common to find them coming along on the morning of the hearing with a statement of other points they are agreed about. This may be called a "Joint Minute" because it is usual to refer to formal statements as "minutes" and a "joint" one is simply a minute agreed by the parties jointly. It could be referred to simply as an agreement.

All courts are keen to encourage agreement – even at the last moment. It is helpful for the court to be informed of any agreements as soon as possible and even at the last minute, as this may well shorten the time the court has to spend in preparation.

It is up to you to decide what evidence to present to the court. You must decide who should be asked to give evidence. You must decide what documents should be put before the court. You have to make any enquiries to trace possible sources of evidence. The court may be able to help you by ordering people who have relevant documents to send them into the court. If your witnesses are happy to attend the hearing and give evidence voluntarily and you feel you are able to trust them to do so you can do that. But if you want to compel their attendance you can ask the court to order them to attend.

It is very common to hear a witness, under cross examination, say that if they had known about some point they could have brought something to prove it. This may range from a diary to full business records or might simply be an invoice or similar piece of paper. It is not uncommon to find witnesses trying to fish in their handbag or briefcase to find a paper they want to tell the court about. But such bits of paper, if they are to be referred to as part of a witness's evidence, should be put in formally as productions. If the first mention of some written material is when the witness is actually in the courtroom, the judge will often tell them to put it away and not refer to it. This is because there are Rules which require written material to be intimated in advance of the hearing. It may be very unfair to the other side to have something popping up at the last minute. If the court does decide that, in the interests of overall justice, this material can be produced, there often has to be a delay to have copies made for the other side and the court. Delay costs money. The lesson is clear. When talking to your witnesses about their evidence you should think about all the points which might arise and ask if they have any material to back up what they are saying. If so, you should try to get it, and put it in to the court, in proper time as a production.

If the witness is reluctant to let you have the original material, ask for a chance to make copies. Lodge the copies in time and then make sure he or she brings the originals to court on the day in case there is any dispute about the copies. If you know a witness is likely to have relevant written material – such as accounts or other records – and the witness refuses to let you see it or have it, you can ask the court to compel the witness to produce the material. You must do this well in advance of the proof.

A witness may refer to something which some other person might be able to prove. For example if a particular sequence of dates was important, a witness might try to pin down a date by reference to some other event. For example, he might remember it as the day the cattle feed was delivered. An invoice from the feed supplier might be helpful. If the matter was important, the court could order the supplier to produce his records of the delivery. As always, a balance must be drawn. Some supposed supporting evidence might raise more questions than it answered. There would be little point in proving the date of the feed delivery if the main dispute was whether the witness was telling the truth or not. Some things are obvious. Where matters can easily be checked it can be assumed that a witness would not run the risk of conviction for perjury. For example, if a witness says

something happened on his birthday, you might question whether it took place on that date but you would not expect to need a birth certificate to confirm the birthday.

Debate

The Order may say that the hearing is to be limited to a special purpose. That purpose should be clear from the terms of the Order but the common alternative to a "proof" is a "debate". A debate is a hearing of legal arguments. Usually legal questions are tied up with questions of fact and are dealt with after a proof: in other words, we usually need to know precisely what the facts are before it can be decided how the law applies. However, there may be cases where the answer to a legal question would dispose of the whole or part of the case without need for time to be spent hearing evidence. At a debate the party challenging the legal basis of the other side's case has to assume, for the purposes of the debate only, that everything the other side says is true. They have to argue that even if it is all true, it is not enough to establish a good case in law. If they succeed with such argument, there would be no point in the expense of a proof. Even where there is a dispute about facts, parties are often able to settle cases by agreement or compromise after a court has given a view on the legal questions.

If the Order says the hearing is to be a "debate", there will be no question of taking evidence from witnesses and, accordingly, witnesses need not attend. The court will hear legal submissions only. Sometimes the Court will, itself, decide that a debate would be the best way of making progress even if no specific legal dispute has been clearly identified by the parties. You can expect to find the reasons for this to be set out in a Note attached to the Order.

If you think that the answer to a legal point might save significant time arguing over questions of fact or allow settlement, you should bring this to the attention of the court staff as soon as possible. Even after an order has been made fixing a proof, the Court is willing to consider fixing a debate instead. It is not uncommon for people to come to realise at a late stage in their preparations for a hearing, that the real dispute is a question of law. It is better to raise the matter at the last minute than go ahead with an unnecessary proof.

Restricted hearing

Occasionally a proof will be restricted to some specific question. Usually attempts to deal separately with particular disputes of fact cause more trouble than they are worth. But if you think that time and effort might be saved by dealing with issues in turn, you should not hesitate to suggest this to the other side or ask the court to consider it. The Clerk might be able to give advice or you could make a formal motion to the court to have procedure considered.

3. Role of pleadings

When preparing for hearing, the main thing to remember is that the formal pleadings are the basis of the case which will be considered by the court at that hearing. Pleadings do not include all the various pieces of correspondence between the parties and the court officials. Copies of the pleadings and productions will have been prepared for the members of the court which is to be hearing the case. They will have seen and studied that material. They will not have studied the correspondence files kept by the officials. So it is important that all details of the case which is to be made at the hearing are incorporated in some way into the pleadings.

4. Disputed facts

You should always try to have a clear idea what disputed issues you need the court to decide. The Court does not want parties to get bogged down in written pleadings. But we do encourage parties to use written clarification. If there is any real doubt about any assertions of fact or law made in the pleadings, remember that you can write to your opponent to try to clarify matters, or, if the point is important, move the Court to require an answer on the point.

Often it is only at the stage of preparing for the hearing that the real issues are clearly recognised. There are many reasons for this. It may seem obvious that parties should not engage on any litigation without having given full consideration to the strength of their own case. But, however convinced you are of the justice of your own position, it must always be remembered that the strength of your case can only be measured by reference to your chances of persuading the court to find in your favour. You can only assess that by considering, not only the quality of evidence you have to support you, but also the quality of evidence your opponent may have to support their side. In short, whatever the apparent strength of your position at the beginning, you must keep assessing it in light of developments. Your opponent will be doing the same. Try to keep putting yourself in his or her shoes.

People often get caught up in litigation without having had the time, or opportunity, for a very rigorous scrutiny of such matters. When preparing for the hearing things become much clearer. For example, it may become obvious that only a few points are actually in dispute. There may be no facts worth disputing. Or, it may become clear that you will have no evidence to challenge some point and as a "damage limitation" exercise you may have to try to see if a tolerable version of the facts can be agreed.

At risk of undue repetition, we stress that, before the hearing, parties or their solicitors should try to discuss what is really in dispute. Where appropriate a joint minute might be used to clarify some matters. Sometimes, instead of trying to narrate what is agreed, it is easier to try to set out for the Court a statement of the particular questions which the Court is being asked to answer. Indeed, it is always a good exercise, when preparing for a proof, to write out such a statement for yourself. Even if you cannot agree things with your opponent, you can use it as a check list to

see what evidence you need to persuade the court that you are right on each of the disputed points.

At the start of the hearing the Court will often try to make sure that it has a sound understanding of what is truly in dispute and what is not. It may adopt the course of setting out a list of points of fact or law which seem to be agreed or which are not likely to be disputed. It is very important to realise that this does not mean that the Court has reached a conclusion on any such material or that it thinks that parties ought to agree any parts of it. On the contrary, it is our experience that this process often shows the Court that certain points which seem agreed or unimportant on the written pleadings are indeed contentious and important. The process helps prevent the Court from going into the proof with any mistaken assumptions. If the Court does suggest that one or other party may face an uphill task on one point or another, this is no more than a warning that the point is a difficult one and will need proper argument. In other words, the reason for any preliminary discussion is to try to ensure that there is no misunderstanding, either by the parties or the Court about the nature of matters which the Court will have to decide.

5. Fair notice

As we have said in discussing the pleadings, it is important to give fair notice to your opponent of all the matters you intend to rely on. If there is a doubt about whether adequate notice has been given, the court may hear the evidence and grant an adjournment to allow the other side time to consider it. Even a fairly short adjournment can lead to lead to waste of expense. Short delays may mean that a case which might otherwise have been heard in one day is forced into a second day.

The aim of all courts is to try to prevent any party using the procedural rules to gain a supposed tactical advantage over the other. We seek to provide a fair opportunity for each side to present their case fully. If parties co-operate, much time and expense can be saved.

6. Legal issues

Sometimes the order for hearing will specifically ask you to put in a separate note of your legal arguments. We have mentioned that above in trying to clarify the meaning of "written submissions". It does not happen in all cases because in many cases the dispute is only about questions of fact and in other cases, it may be fairly obvious what the line of legal argument will be. Every step in a court process involves expense and we try to be satisfied that each step is justified in each case. Where the Court does ask for a note of the legal propositions to be advanced, it expects to have details of the statutory provisions which are said to apply and the names of any previously decided cases or legal text books which are relied on.

Cases and textbooks are referred usually to as the "authorities". Use of this expression does not, of itself, mean that they have any special power or weight. If a previous case has been decided on some relevant point of law, the weight to be given

to it will depend on the court which decided it. The Land Court must follow any decisions made by the Inner House of the Court of Session. It is not bound to follow decisions of other courts. But, of course, any previous decision is likely to be used as a guide and is likely to be followed unless there is good reason to depart from it. Broadly speaking, a court is not obliged to follow the views of the authors of legal text books. Material in such works may well be a good start point but when an author is covering the whole of a broad topic they cannot be expected to have examined particular issues with the care which will be expected in a court hearing. You should not approach litigation assuming that a simple statement in a text book will necessarily be a sound basis for your legal claim. Still less should you hope to rely on some statement made in a newspaper, or by an important person, or even in official guidance. The court may look at what such guidance says but the main question will be whether the guidance is accurate.

Put very shortly, if you are relying simply on what has been said in official guidance you ought to be consulting a lawyer rather than risking DIY. If your claim is based on an Act of Parliament or set of Regulations, it is the Act or the Regulation you must be able to rely on, not some guidance on it by another person. There may be a possible claim against that person if the guidance is wrong but this raises issues which require careful legal analysis and which are usually outside the Land Court's jurisdiction.

Even if the court makes no order requiring intimation of legal arguments, parties should give careful thought to the possibility of providing the other side with a note of their arguments. A good argument might persuade an opponent to withdraw before the hearing. Litigation is not a game. A party who keeps a legal bull point until the end of the case may find the court asking questions in relation to expenses.

7. Evidence

A court decides cases on the evidence properly available to it. That is sometimes referred to as the "evidence in the cause". This means the material presented by the parties. It usually takes the form of written productions and the testimony of witnesses as given at the hearing.

In the Land Court it is common to have an inspection of the land in dispute. The Court will be entitled to treat the evidence of things it sees or is shown on inspection as part of the evidence in the cause.

There should be no difficulty understanding that a court pays no attention to local gossip – unless that has been discussed or examined in open court. It should be equally obvious that the same applies to what has been said in the newspapers. A court cannot be taken to be aware of any public comment which may have been made about a particular issue unless the material is brought to its attention in an appropriate way as part of the evidence in the cause.

Of course, the Land Court is an expert court, entitled to use its expertise as appropriate. The Court's wide experience of crofting and agricultural matters helps

it reach a quick understanding of issues and helps it evaluate evidence. However, you can expect the Court to tell you of any special information or any special experience it has relative to the issues in your case so that you or any expert witnesses have a chance to comment on it. A court will not try to decide a case on evidence which has not been available to the parties in open court.

8. Witnesses

When preparing your case you will realise that some things can be vouched by written material, such as letters, invoices, plans or whatever. On other matters you will need to have evidence from witnesses. You can ask anyone to be a witness. For example, if you believe that your opponent or, perhaps, an employee of your opponent, would be bound to support any important part of your case you could have him compelled to give evidence.

Evidence given in court is the best type of evidence but it is possible to rely simply on a written statement by a witness. Evidence in court is best because the other side has a chance to test it. If a witness stands up well to questions, the court is likely to place much more weight on their evidence than if it had simply been presented on a piece of paper. If you do want to consider using written evidence it would be sensible to have it taken formally by a solicitor as an affidavit. But written evidence is really best kept for formal detail that would not be expected to be open to challenge. If you can find a witness who supports your side of any disputed point you should certainly aim to have that witness give evidence in open court.

Some practical points

i. You should follow rules of court or any specific order of the court in relation to intimation of witnesses or productions.

ii. If you think that any of your witnesses might have difficulty in giving evidence or in attending the hearing venue, you should notify the court staff as soon as you become aware of this. That will make it easier to make practical arrangements to avoid embarrassment and difficulty for witnesses with disabilities.

iii. Except in the case of very old people the court may need a letter from a doctor to explain why such arrangements are necessary. It should be noted that many private houses are not very suitable the taking of evidence – not enough room and not enough writing surfaces. If a witness may be too infirm to travel to the place appointed for the hearing but able to go somewhere nearer home, consideration should be given to obtaining use of a suitable room in a local office, hall or hotel. The timing of the taking of such evidence should be discussed with the court staff. It could be taken in advance of the hearing, during the hearing, or after the other evidence but it will, almost certainly, need to be heard before the stage of closing submissions.

iv. The Gaelic language has always had, and continues to have, special standing in the Land Court and you can ask to use Gaelic in any part of proceedings before the Court. The Court would only refuse such a request if it thought it would be unjust or unfair to grant it. You should contact the clerk in good time to discuss this. But it is important to realise that the language of the Court is English. Even although we have a Gaelic speaking member, all the evidence must be able to be understood by everyone. So, if evidence is to be given in Gaelic, arrangements will be made to have an interpreter. Similarly if any party or witness does not understand or speak English to a comfortable level the clerk should be advised in good time for arrangements for a suitable interpreter to be put in hand.

v. It is usual to ask all the witnesses to attend at the start of the hearing but it may be obvious in many cases that some witnesses will not be required to give evidence until a later time or day. It might well be possible in discussion with the clerk and the other side to agree that some witnesses should not come until later. We try to accommodate the convenience of witnesses where possible. We obviously want to avoid having people hanging around unnecessarily, but court time is expensive and it is very difficult to predict how quickly things will progress. Where a witness lives or works near the court, it may be sufficient to have them on the end of the telephone ready to come quickly. Delay which simply gives time for a coffee break is not a problem but there is always a risk that small amounts of time lost can create the significant extra expense of pushing the case into a further day.

9. Productions

The term "production" includes items such as letters and other documents, photographs and maps which you wish to use as evidence in the case. It also covers physical things. Anything which can be brought to court as evidence is known as a "production". If it is too big to bring to court, arrangements can be made for it to be made available for inspection elsewhere.

Time limits and late lodging

Sufficient copies of each production should be lodged within the time limits set out in any court Order or Rules. If you do not meet the time limits, the court will not take account of your material unless you get special permission to lodge it late. Leave will not necessarily be given unless the other party or parties consent, or good cause is shown. The other side is likely to object if they have not had a chance to study your material and make preparations to answer it. The Land Court also likes to look at material in advance.

If the court does allow material to be lodged late and considers the material likely to be important, it is very likely to offer the other side an opportunity to take time to consider it. This may require adjournment and a further hearing. This causes

extra expense and the person bringing the late material will almost inevitably have to pay for this, whatever the outcome of the case.

Recovery of documents from other people

If a party wishes to rely on documents which are in the possession of someone else, arrangements can be made to order that such material be made available for inspection. If you wish to ask the court to make such an order you must specify which documents or types of documents you wish to see. You will have to satisfy the court that the documents are likely to contain material which is relevant to the case. This means that you will have to start by pointing to some statement in the written pleadings which ties in with the material you want to see. Broadly speaking, you will also have to persuade the court that there is some reason to think the material will be worth recovering.

You should try to make arrangements for this in good time. Once the party who has the documents, (known as the "haver"), makes them available in response to the court order, they will usually be held by the Principal Clerk. It is then for you to decide whether you want to lodge them in court as part of the productions. This is because the haver does not always know what is relevant to the case and may well send in many more documents than are needed. Only you can decide what material you want to use to support your case. You will need to be careful, however, that you do not unfairly pick only the best bits. If parts of a series of correspondence are to be relied on, the court will usually wish to see the whole of the correspondence.

Reliance on written material

It is the general practice of the Land Court to take documents at face value. That is, to accept documents as being what they appear to be and to treat copies as equivalent to originals unless there is some doubt about this. To allow this to be as flexible as possible there is no formal requirement for challenge in advance but parties should be aware of the point and give each other notice of any intended challenge where appropriate.

It is usually unnecessary to lead much evidence about documentary material. The Land Court will regard itself as free to study all the productions lodged and draw reasonable inferences from them in light of the whole evidence in the case. This approach saves a good deal of time and prevents parties being caught out by any special "rules of evidence". Note that some other courts may have a different approach.

It is important to realise that there may be cases where documents are not all that they seem to be. Photocopying and computers allow easy creation of pieces of paper. The Court is aware of this problem. The weight to be given to written evidence will always be a question of context and circumstances. A document which is spoken to by a witness explaining where it came from, and what it is, will be likely to receive more weight than one which is left to "speak for itself".

Although the Court will feel free to look at all productions and use them to help reach a decision in the case, the Court will also regard itself as free to ignore any document unless the party who lodged it as a production actually makes some reference to it at the hearing. This is partly because the meaning of some documents may not be clear unless the whole context is understood. If a party has not explained to the court why they say that the document is significant, the court may think that it cannot safely decide what to make of it. It is also possible that a great many documents will be put into court as productions. The court will not wish to study them all unless it is told why each is important.

If you are not happy about a particular piece of written evidence produced by another party you can tell the court, briefly, why it is challenged. Where any party does question a production lodged by another party it will be for the person lodging the document to lead proper evidence to show what the document is, who made it, when it was made and so on. In other words it will be up to the person relying on that evidence to satisfy the court that it is reliable.

There may be cases where it would be sensible to ask the other side in advance whether there will be any dispute that a document can be taken at face value. There is no point in the expense of bringing a witness just to tell the court about a document if this can be avoided. Similarly, a late challenge to a document may give rise to adjournment and extra expense and any intention to argue that a document is not what it seems to be should be intimated to your opponent as soon as possible.

What is meant by accepting a document at face value can be a confusing matter. It is important to realise that there is a difference between accepting a document as being what it seems to be, and accepting the truth of what is said in it. A court may readily accept a document at face value; that is, being what it seems to be, and yet be slow to accept that what it says is correct. An example may help make the point.

Take a boundary dispute and an argument about whether a certain fence had been moved. Assume a photocopy which looks like a copy of a letter sent by "Mary". If there is an address and a date and no specific challenge a court might accept that it showed that someone called "Mary" living at that address had written it on the date shown. That is not the same as establishing that what was said in the letter was true. The court would have to look at other circumstances to help it decide whether any reliance could be placed on what it said.

Some of this is very obvious. For example, if the letter simply said that "Davie moved the fence ten yards to the North", the court would need to hear some other evidence to show that the fence being referred to was the same fence as the one in dispute. But perhaps less obvious is the need for evidence to explain how the writer of the letter came to believe that Davie moved the fence. That might be a matter of circumstances. If there was good evidence to show that someone called "Mary" was the working crofter her statement might get more weight than if she had been a summer visitor.

A court can accept a document at face value and yet place no weight at all on its contents. You should always be prepared to lead any other evidence you have, to explain and support any significant document. If it is just a copy you should be able to show why only a copy is available. You should explain why the author of a document is not available to give evidence in court.

When preparing for a proof, you should identify the important points in dispute and try to find the strongest evidence you can about these points. Deciding what evidence to lead and what reliance can be placed on written material can be difficult and the advice of a solicitor might be worth having, in any case of complexity.

Visual aids

Some productions are important for their value as evidence about facts in dispute. For example, an old map may be important in showing what the land was like at the date of the map. Other productions may have no value in relation to the merits of the dispute but be intended just to help the presentation of evidence: to help the court get a good understanding of the significance of other evidence. For example a modern map showing things as they are at the moment would not prove what they were like in 1886. But it might well be of great assistance to the court. The difference between documents being used as evidence to prove something and documents – typically plans and photographs – being used simply as aids to understanding should be kept in mind. The Court will nearly always accept late introduction of productions to be used as visual aids although, as always, it is sensible not to leave things late. It is worth discussing with the other side what aids are necessary. This may save duplication of effort.

The following remarks apply to use of productions as visual aids in the Land Court:

i. Any evidence given at a hearing requires to be understood by the court and by the other side. Plans and photographs are good for this.

ii. In any event, a map or plan is nearly always necessary in the Land Court because the Court will always wish to have clear identification of the subject land.

iii. If you intend to make much reference to a large map or other large document, consider providing a display board so that it can be shown to everyone at once.

iv. If the Court is sitting out of Edinburgh you may have to provide appropriate equipment yourself so please discuss this with the Clerk. Technology is helpfully producing better and more portable devices and the Court will try to help. It has a laptop and projector which can be taken to most venues. If material can be copied to a memory stick of some sort it will usually be possible to display it. But it cannot be assumed that appropriate devices will be available.

v. If you want to use items such as a projector or a video or DVD you should tell the Court clerk in good time before the hearing.

vi. To avoid wasting time in court it is obvious that you should check in advance that all equipment is working properly and that any videos, tapes and DVDs are of sufficiently good quality to be likely to be of assistance.

vii. Although the Court will nearly always inspect the subjects after the hearing and will try, if convenient, to have a look at them beforehand, there is no doubt that good plans and a few well chosen photographs will normally speed up the leading of evidence. Even if it is difficult to find a photograph illustrating the precise matters in dispute, photographs are generally helpful in allowing the court and the witnesses to understand what is being talked about.

viii. By contrast, our experience has been that videos tend to delay the proceedings and seldom provide enough positive assistance to justify the waste of time. This is partly because videos are not always as clear to a viewer as they seem to be to the person who made them. But the main problem is that the process of examination and cross-examination of different witnesses about something shown on video can be a fiddly business with much winding and re-winding. It may be that DVDs will come to prove more useful. But parties should not attempt to use them without proper practice and should sure make sure they have good quick means of identifying and accessing the relevant sections.

Note that these comments apply only to photographs, videos and DVDs which are provided as visual aids. Photographs, videos or other recordings showing the state of things in the past may, of course, be valuable pieces of evidence on the merits of the dispute even if they are of poor quality.

Lists of productions

The main aim is to get productions in on time. But some thought might also be given to the fact that when the productions come to be referred to in the course of a hearing, it helps if they have been lodged in a sensible order. If all else fails, an attempt at chronological order should be made. It may well be sensible to hold back productions until a complete set in sensible order can be lodged. Precious time can be lost if witnesses have to move back and forward in a big bundle of papers. In some circumstances, where the productions have initially been lodged in random fashion, it might be worth preparing a duplicate set in workable order. That will depend on the importance of the documents and the number of witnesses who may require to look at the same papers. It would only be justified if the time and expense were likely to lead to significant saving of court time.

Where both sides are relying on the same exchange of correspondence or duplicates of the same plans, it would be helpful if they could discuss matters and avoid unnecessary duplication. Here again, it must be recognised that the time spent on this might not lead to much saving of court time and it is always a question of circumstances how evidence can most efficiently be presented.

In the Land Court, the staff prepare an inventory of all material lodged as productions. Each will be given a court number and be listed in the inventory. When preparing to present a case in court, you should make sure you use the number on the Court inventory when you want to refer to a document. This is to avoid risk of confusion and the risk of losing your place if you have to change your numbering when you are actually in court.

10. Legal precedents or statutory material

A court will often ask that a list of cases, legal text books, or statutes that might be referred to during submissions should be supplied before the hearing. (As we have said, legal cases relied on as precedents are referred to, sometime rather optimistically, as *"authorities"*.) It would be usual to have copies of the list sent to the other parties. Nothing is to be gained by attempts to take the other side by surprise. It is worth observing that the Land Court will be receptive to requests for adjournment where a party is caught by surprise on a point of law. The Court does not want to have to make decisions without parties having an adequate opportunity to comment on the appropriate legal issues.

Intimation of authorities in good time will give the court an opportunity to look at them in advance. This reduces the time spent on reading out cases or Acts of Parliament at the Hearing. It also makes it easier for the court to be sure that it is following submissions as they are made. It must be understood, however, that advance intimation of authorities is not a substitute for making full submissions at the hearing. Courts like to hear proper statements of reasons for relying on any particular case. It is very important that all litigants understand that the aim of the court is to apply the correct law to a proper understanding of the facts. The court wants to have a full discussion of any difficult points with the assistance of both parties. That can only happen if the court has a chance to consider matters carefully, before or at the hearing. All too often, the full implications of a point only become apparent when the court comes to consider its decision in private after the hearing. It then has a choice between forcing the parties to incur further expenditure by fixing a further hearing or making the best of things on the basis of such submissions as it has heard. Early intimation of authorities minimises this difficulty.

It may be stressed, however, that any requirement to intimate authorities is not normally intended to prevent you referring to other cases at the hearing. Preparation for submissions inevitably goes on right up to the last minute. Thinking changes. New points come to mind. A litigant can always refer to any relevant case in his submissions whether intimation has been made or not. When both sides are preparing argument on the same issue they ought to become familiar with the same authorities. If an opponent is surprised by a new authority, we shall try to allow time for him or her to consider it.

Copies of authorities

It is helpful to have copies of any material which is thought particularly important. When a hearing takes place in Edinburgh, the Court has easy access to Session Cases, Scots Law Times, Scottish Land Court Reports, standard text books, and its own unreported decisions. However, when the Court is sitting out of Edinburgh, it may be restricted in the number of authorities it can transport. Accordingly, it is usually helpful if an appropriate number of photocopies of all the authorities can be provided. You may assume that the Court will always have available to it a copy of the Crofting legislation or of the Agricultural Holdings (Scotland) Acts, as appropriate, and a copy of its own Rules. If there is any doubt about copying of material, the Clerk should be consulted in good time.

Agreement

We refer above to the need to try to identify disputed facts and to agree as much as possible. This can apply to legal matters. Sometimes you may decide or agree to drop a particular argument at a late stage. One reason for this is that, as the facts become clearer in light of investigation of evidence and the exchange of information, it often becomes clear that potentially doubtful points of law will not actually affect the final outcome. In any event, if you do decide to give up a part of the case which, on the face of the pleadings, seems disputed or likely to be disputed, it is important to tell the other side as soon as possible. For example if you have set out two or three "pleas in law" or "legal contentions" – as mentioned above in our discussion about pleadings – and you later decide that you will not try to argue one of them, you should let the other side know. This is a matter of courtesy and courtesy helps ensure that litigation is conducted in a harmonious way. But it also saves time being spent on preparation of argument to meet that plea. Time costs money. It might be you who would end up paying for it. The Court would also welcome intimation of such matters where appropriate. As we have said, the Land Court does rely on its advance preparation to try to shorten the time spent in the hearing and it does not wish to waste time on matters which have been agreed.

The Hearing and Subsequent Matters

1. Preliminary

In any Land Court case, the clerk will be available on the day of the hearing, before the court starts, to deal with any questions about procedure. You should aim to be at the court in good time before the start of the hearing. This not only allows you to familiarise yourself with the place but gives time for discussion with the clerk and with your opponent. There are often questions about late productions, minor late amendments or questions about the availability of witnesses. Sometimes the clerk will be able to tell you that the court will want to start the hearing by clarifying some particular points and that will give you time to think about them.

Although discussion of settlement should take place long before the door of the court is reached, it is well recognised that the prospect of actually appearing in a court room is often a further stimulus to sensible discussion between parties. It is an unfortunate fact that this may be the first time the parties have been together in the same building since the dispute started. The court will usually be prepared to delay the start of a case to allow discussion of late settlement proposals or to allow a party to consider the implications of any new material or information. But loss of actual sitting time can be very expensive for the parties. As we have already said, there is a risk that any time lost during the hearing might push things into another day. It is not easy to predict when that will happen and accordingly the aim is to minimise even short delays. So, it makes sense for both parties to arrive in good time to deal with last minute problems and any last minute proposals before the hearing starts.

Names

Once the hearing starts, the Court does try to be as informal as possible. But experience shows that a degree of formality is helpful. It lets both sides know clearly what is going on. When the Chairman or Deputy Chairman is sitting he can be addressed formally as "My Lord" or "Your Lordship". Other Members of the Court should be addressed as "Sir". But it is not necessary to worry about this. Polite witnesses will get a polite hearing whether they use the correct formal words or not. If in doubt, do not trouble to use any such names. Just speak direct and tell your witnesses to do the same.

Traditionally, lawyers in court would refer to each other in formal terms as "my friend" or, if the reference was to a member of the Faculty of Advocates, as "my learned friend". However, a DIY litigant should normally use the usual Mr X or Ms X and that is increasingly the practice of lawyers, too.

It may be helpful to know that lawyers sometimes refer to a court as "the Bench". The litigants or pleaders may be referred to as "the Bar". You need not ever use such terms yourself. You can refer to the court as "the court".

Using a friend

DIY litigants often benefit from having a friend with them who is familiar with their case but not a potential witness. The friend might sit beside them and give advice or simply provide moral support by their presence. We comment below on ways a friend can help when you are giving evidence yourself. The Court is flexible in allowing friends to play a part in the hearing. If the friend is to do more than provide moral support, the Court will wish to be satisfied that they will contribute constructively to the overall course of justice. Very occasionally, the Court may refuse to allow some person to become involved but that is a rare occurrence and a genuine friend will normally be welcomed.

2. The purpose of a proof

The proof is the opportunity for witnesses to give evidence and for their evidence to be tested. It is expected that all the evidence will be led at the one hearing. You will not get a second chance. All the evidence from each witness must normally be led in one continuous stage. Occasionally, a court may agree to having a witness recalled to deal with some new point but that is unusual.

Because a witness is only allowed one opportunity to give evidence, it is important to cover all the ground properly. This, of course, is particularly important when you are trying to establish your own case. You do not want to risk leaving something out. But it gives rise to a particular difficulty when you are cross examining. Because it is not normal practice to recall witnesses, you must give the other side's witnesses a chance to comment on the substance of any evidence you expect to lead. That is known as "putting your case to the witness" and we discuss it further below when looking at some of the basic techniques of cross-examination.

3. Conduct of the hearing

We do not require "opening statements" from each side but in the Land Court we may very well start by trying to clarify what the real issues are and this means you will need to be ready to tell the Court what you see as the main issues. You may find that opening questions from the Court will open your eyes to some aspect that you had not fully considered. If so, the Court would usually agree to take a break to allow you to think about it. Such a break is usually called an "adjournment".

You must not be put off by any questions from the court. The aim is simply to make you think clearly about particular issues and help to ensure that your arguments are properly understood. Whatever you may fear, questions do not show that the court has set its mind against your argument. As we have already said, even when the court uses an expression such as saying that you "face an uphill battle", this is no more than a warning that you will have to present proper arguments on a particular point. Courts are very used to forming a preliminary impression on a particular point but coming to an opposite view once they have heard all the arguments. They are very well aware that cases often turn on points which are not

clear on first reading. They do not attempt to reach a final decision until all the relevant evidence has been heard and all relevant arguments have been considered.

Parties may be asked if they can agree which side should start. It is usually for the person making the application to the court to start by leading his evidence. But sometimes it is clear that the real issues will be more easily tackled if the respondent goes first. A party litigant may well find it easier if his opponent starts. That leaves him free to concentrate on the points which are important to him without having to worry too much about legal formalities.

4. Evidence from witnesses

The witnesses in turn go into the "witness box". In the Land Court they are normally invited to sit at a table rather than go into any box because it is usual to have to make reference to plans and documents. They are then asked questions to bring out the material they know relevant to the matters in dispute. This stage of having the witness questioned by the party who has asked him to go into the witness box is known as "evidence in chief". After that, the other side will have a chance to cross-examine. Cross-examination is not limited to challenge of what the witness has said in their evidence in chief. You can ask a witness about any matters relevant to the case.

After cross-examination, the first questioner has a chance to re-examine. The intention of re-examination is simply to let you clarify issues raised in cross-examination. It is not to give you "a second bite at the cherry". It gives a chance for further explanation of anything said in answer to cross-examination.

It is important to keep in mind that the aim of questioning witnesses is to put evidence before the court which will either positively support your case or minimise the weight of material which is against you. You want your own witnesses to be clear and persuasive and to give evidence which has a bearing on the case rather than rambling on about other things. When you are cross-examining, you want to make sure that evidence from the opponent's witnesses is properly tested. You might simply want to get an explanation from a witness which would limit the adverse effect of their general evidence or you might want to challenge it as fundamentally wrong. You have to find ways of asking questions which allow your purpose to be achieved. We return to this below under headings of "examination" and "cross-examination"

Always remember that you are involved in the exercise of placing evidence before the court. You are not taking part in a general inquiry or investigation. In other words, there is no point in simply having witnesses tell a court everything they know. They must be helped by questioning to deal only with matters relevant to the matters in dispute.

The Land Court is fairly flexible in its approach to taking evidence from witnesses and applies no hard formal rules. For example, if you find it necessary to raise some entirely new point in re-examination the Court may well allow this and simply give the other side a chance for further cross-examination. But the Court will

usually need to be satisfied that the omission was accidental and that there was no attempt to gain a tactical advantage of some sort.

Leading questions

You may have heard that there is a rule that you should not ask "leading questions". This will not be a problem if you keep in mind that if you do put the words in the mouth of your witnesses, their evidence will not sound as persuasive as it would if they were left to give the account in their own words. The Land Court does not apply a hard rule. But all courts want to hear evidence at its best and you should avoid leading questions in taking evidence from your own witnesses. There is no difficulty when questioning a hostile witness. We shall go on to discuss the differences between "evidence in chief" and "cross-examination". It is difficult to understand fully what to do about "leading questions" without a good grasp of these differences. But we think it may be helpful to start by saying a little more about the idea of leading a witness.

The idea of "leading" a witness is used in two senses. We talk about "leading evidence" in the very general sense of bringing a witness to court and asking questions to put the evidence before the court. We also use it in the more restricted sense of guiding or directing – like leading a horse.

In ordinary speech, people occasionally use the expression "that's a leading question", in quite a different sense. They mean a question which will lead into examination of some difficult area or lead to some embarrassing disclosure. However, lawyers use the term "leading question" to describe a question which in itself directs the witness to the answer. In other words, it is a question which tells the witness what the substantive facts are. "What did he say?" would usually be an "open" question. It leaves the evidence of what was said to come from the witness. An example of a leading question would be: "Did he say he would pay £1000?". That is an example of the questioner telling the witness, and the court, what the important fact is. A question which invites the answer "Yes" is often a leading question in the lawyer's sense.

The effect of a "leading question" is that the important material is introduced into the evidence by the questioner and not by the witness. That means that it loses its value. You have probably heard expressions like: "You put the words in his mouth" or "He just agreed with everything you said". That is a common way of assessing such evidence.

Some people find it easier to understand the point if we talk of "closed" questions instead of "leading" questions. You can contrast "open questions" and "closed questions". The range of direct answers available to a closed question will be closed in the sense of being very limited. The natural answer to such a question will usually be "yes" or "no". An "open" question invites a witness to explain things in his or her own words. Closed or leading questions are used a lot in cross examination.

It is often said that you must not use leading questions when taking evidence-in-chief. That is a sound enough guide – although it only applies to evidence relating

to contentious matters. But it might be better expressed as "you must not lead your supporting witnesses". In some cases, it may almost be a matter of chance whether a witness is led by one side rather than another. The court always has to assess the evidence as best it can and will have regard to the whole context in which it was given. The important point to keep in mind is that if you put words in a witness's mouth the court is likely to attach much less weight to the answer than if the witness told us the story in her or his own words. You must try to get your own witnesses to tell the court the important things in their own words. That makes the evidence more persuasive.

We cannot tell you all about "leading questions" in a guide like this. But, broadly speaking, if the witness is in your favour you should not lead. You should aim to ask a question which lets the witness know what you want him to tell the court about but does not tell him what he is to say. It is useful to keep in mind the standard interrogative questions "What, where, when, how, and who". Other helpful expressions are: "Tell the court" and "Describe for the court".

A little care is needed with the other standard question, "why". This is fine when you are asking witnesses about their own reasons but should be avoided if it is likely to have them guessing or speculating about matters outside their own knowledge.

Evidence in chief

If you want to present evidence from a witness, you tell the court who it is you want to give evidence. The clerk will then bring the witness from the witness room into the courtroom. The presiding judge will ask the witness to take the oath; that is, formally to swear to tell the truth. The witness will then be asked to sit down and you will be invited to ask the witness questions. Your aim is to get your own witnesses to tell the court the important things in their own words. Your difficulty is to find a way of leading them through their evidence; in other words directing them to the relevant matters and stopping them from going on too much about matters which have nothing to do with your case.

The problem is that it is not always easy to let a witness know precisely what you want them to tell the court about. Usually, of course, they do know. Many, many lawyers have been heard asking questions on the lines of: "Did something happen last year?" and getting a perfectly good answer which does refer to the case in dispute. But it is better to try to be more precise. Think in advance of the questions you will use to direct the witness to the things you want him or her to give evidence about. Remember you can always put unimportant or undisputed evidence in a leading way. It is quicker and easier for the witness and the court if that is done. So, you can use leading questions to set the scene. You might approach things by referring to something which is admitted or obviously not controversial. For example, you might say, "It is admitted that there was a meeting between the landlord and the tenant on 4 January last year, did you know about that? Then ask the witness to tell the court how he knew or ask the standard interrogative questions

as appropriate. Did he know what happened; how did he know; can he tell the court who was there, what was said etc.?

If you find that you simply cannot get the witness to answer open questions you may have to move to more leading questions. That will weaken the force of the evidence but it may be better than nothing. A witness you have asked to give evidence may turn out to be unfriendly and determined to be unhelpful. Once it becomes clear that the witness is hostile in that way, leading questions may be the best, if not the only, way to get the evidence out. The questioning can be treated as cross-examination.

You may wish to ask your witness to tell the court something about some of the documents which you have lodged with the court as productions. You should have a note of the number of that production. When you ask the witness to "look at production number 1", the clerk will pull that production out of the bundle of productions and hand it to the witness. In other words, the witness will not need to come with a copy and indeed, should not come expecting to refer to any material their own. Many witnesses come with brief cases full of their own copies of things. They will not normally be allowed to refer to them. Everything referred to in court must be openly available to all parties and the court. If anything is to be relied on by a witness as a written source, it should be lodged in good time as a production.

Cross-examination

It is an old joke that when cross-examining it is not necessary to examine crossly! But it is important to keep this in mind. A witness led by your opponent may be able to give evidence which will help you. He or she may be quite willing to concede some points or accept qualifications to their evidence. You are more likely to get helpful answers from friendly questions than by adopting a hostile tone just for the occasion.

Obviously, much depends on the nature of the evidence they are giving. You could hardly be expected to be too friendly to someone whom you are accusing of telling a pack of lies. But in many cases the witness may be trying to give evidence in a straightforward way and be perfectly willing to give evidence which supports your case, if asked in a straightforward fashion. It may be worth repeating the point that in cross-examination you can ask the witness about anything relevant to the case. You are not simply challenging what he or she has said in chief. Let the witness give the evidence if it helps you. It is not uncommon for a witness to be led to talk about a subject which helps one side and then to find that when asked about another subject the evidence on that second subject is very helpful to the other side. Where a witness is helpful you might want to avoid leading questions and give the witness every chance to put things in their own words.

That said, it is usually more sensible and effective to use leading questions when you are cross-examining. Even when trying to get evidence which is helpful to your case, your concern is usually to get an answer which fits your case, rather than to set up the witness as particularly persuasive. So, you can put your version of things to the witness in a way that requires the answer "yes" or the answer "no".

Indeed, when cross-examining it is easier to think in terms of putting propositions to the witness rather than asking questions. That is the quickest way. It is also the easiest way of making sure that you put your own case fairly to the witness for comment. If you force the witness to answer your proposition type questions clearly by a "yes" or "no", you will have to give them any chance they need to give an explanation or qualification. But the court will be watching for this. Do not be alarmed if the court interrupts to give a witness a chance to qualify some answer.

As explained above, it is not normal practice to bring a witness back to the witness box. It is, therefore, important to give them a proper opportunity to comment on anything they might be expected to know about. This applies if you intend to lead evidence which is or might be inconsistent with the evidence the witness has given. If you challenge or dispute evidence given by any witness you must make that clear by your own questions to the witness so that they have ample opportunity to clarify, support or change what they have said.

We will go on to say a bit more about standard techniques of cross-examination. But we do not want to intimidate a DIY litigant by making it sound too complicated. There are various ways of getting the evidence out of a witness. Many cross-examinations are conducted like a conversation, or more often, an argument, between examiner and witness. That approach needs no particular skill. It makes life very hard for the judge who often has no idea what particular aspect of the general chat is to be relied on. It is often hard to take proper notes of the evidence elicited in this way. But in a simple case, it may serve the purpose well enough.

A court would not expect a DIY litigant to be able to use all the techniques we describe below. Good cross-examination is welcome because it not only allows the examiner to present the evidence in the best way for his or her own case but it also saves a great deal of time. It makes the task of the court much easier. However, it takes both an understanding of technique and experience in using it to fit the needs of particular cases and the challenges of particular witnesses. When appearing without a lawyer, you will just have to do the best you can, guided by common sense. The court may be able to help clarify matters as you go.

However, there are some techniques of cross-examination which have been shown to work effectively and as there is little material available to the general public dealing with them, it is worth taking time to describe them and provide a brief explanation of why they are appropriate.

Some basic techniques of cross-examination

1. Use leading questions.
2. Use one fact per question.
3. Use language precisely.
4. Get an answer which meets the question.
5. Put your own case clearly for comment.
6. Never answer a question from a witness.

7. Do not expect too much.

These are not rules. But they are useful tools. An experienced examiner may well have better tools for particular circumstances. A good example is that, if you are cross examining a helpful witness you might want to make the most of his or her evidence by using open questions to let witness do the talking. But these tools are part of an experienced examiner's tool-kit and there are good reasons for them.

1. Think in terms of leading questions, in other words, of propositions rather than questions. If you want to establish a fact in evidence you should, when cross examining, think in terms of simply putting it to the witness for agreement. The evidence gets weight from the fact that it comes in the form of an admission. As we have said, you are not carrying out an investigation. You are presenting material. You should know what facts you want to put before the court. In effect, you are telling the witness what you think the fact is and asking him to confirm it. You can do this by stating the fact and adding a question such as; "Is that correct?, "Do you agree?", "Isn't it?" or simply by inflection of the voice show that it is a question which invites confirmation.

For example, it is more effective to ask: "It was raining at the time, wasn't it?", rather than "What was the weather like?". Or to say, with a suitable questioning inflection, "The road was 4 metres wide?" rather than "How wide was the road". The leading question will nearly always prove the most efficient way of getting out the material you want the court to hear. It is very useful for simple points. It provides better control on more complex issues.

The usual pattern would be to bring out the background facts by putting questions as a series of propositions and then inviting the witness to confirm some conclusion you want to draw from these facts. Ideally, you want the witness to find that once he has accepted all the undisputed facts he has to accept a conclusion which is in some way different from what he has said in his evidence in chief. It may be that you can force him to accept that what he said was wrong but often your aim is simply to get him to accept that he might be mistaken: see tool 7, do not expect too much.

2. Keep questions to one essential fact. If you use composite questions or vague expressions, the witness will choose the easiest bit to answer and this may open up an area which is either unhelpful or a waste of time. For example, it is not uncommon for an examiner, trying to seem friendly, to slip into a conversational style. For example, you might hear something on the lines of; "I think the weather had not been very nice for a day or two, can you tell us what it was like when you were talking to Mr Brown" That would allow the witness to discuss whether the weather had, or had not, been "nice". The answer could cover a lot of ground, including typical weather in that place and typical weather for the time of year. If the questioner was fortunate the answer might come to a conclusion: "I think it had been wet that morning". In short, asking questions with two or more parts can lead to much waste of time, often over issues which are of no great significance. Where the issues are of importance, composite questions make it extremely difficult to tie the

witness down. The examiner thinks that this is because the witness is being deliberately evasive but the reality is that any witness will tend to choose to answer the bit that is easiest.

3. Do not use ambiguous terms by accident. It may very well be that you do wish to get the witness to accept a proposition in ambiguous terms because that will make it easier to fit your own evidence. If so use an ambiguous term by all means and be prepared to deal with whatever answer you get. But a good examiner is aware that using ambiguous terms or "judgmental" expressions allows a witness to discuss the meaning of the word rather than answering the intended question. So, use of very clear language saves time. Instead of expressions like "The weather had not been very nice?" the question should set out the examiner's position explicitly: "It had been raining heavily for the previous three days, had it not?". "Petrol is expensive in the Highlands, isn't it?" may invite a discussion of comparative costs. "Petrol was then £2.00 a litre in Dingwall?" invites simple agreement, or perhaps, "I do not know, it would be about that". That may be all you want the court to hear.

4. Get an answer to each question. If your question contains one proposition, it is comparatively easy to see whether the answer really meets the question. If it does not you can, politely, repeat it until the witness does give a proper answer. You can then move on. This may seem slow to start with but ultimately it can save a great deal of time. Once witnesses come to realise that they will always be pressed to answer each question, no matter how simple, they tend to listen more carefully to the question and to try to answer it. Indeed, most witnesses are remarkably quick to learn the ropes. They realise that precise answers are needed and they do tend to take more care.

It is worth adding that courts are often puzzled by examiners who move on without getting an answer to the specific question they asked. It is very common to hear a question like our example: "What was the weather like when you were talking to Mr Brown" being followed by an answer on the lines that "I think it had been wet that morning". The examiner then moves on to another point. The witness has not said what the weather was like at the time of the meeting. The court is left wondering whether there was any point in the question. If it was worth asking what the weather was like at the time, the witness should be pressed to answer the question. If it was not important to know, why bother to ask?

Sometimes, of course, an answer contains something more useful to the examiner's case than the expected answer. It is tempting just to follow the witness's answer. But it is usually safer to insist on the witness answering the question put, and then coming back to follow up the useful answer.

5. You must make sure that you give the witness a chance to comment on anything you or your witnesses will later say if it is something that the witness could be expected to know about. It is not always easy to know what is required. Sometimes the whole of the witness's evidence in chief is an answer to what your witnesses are going to say. If you deny all of what has been said but realise that the witness is not going to change their mind you may think there is no point in specific

questioning. But, generally speaking, you must make it clear that you do not accept it. You might put a question: "You have said X, if the court hears evidence from other witnesses that X did not happen, can you give any explanation?". Another approach might be: "If Mr Y gives evidence that X is not correct, do you accept that he might be in a better position to know than you?". Obviously, this is very much a matter of circumstances. If X is a point which is disputed in the written pleadings, that may be enough notice. But it may be safer to make an express challenge. You want to avoid a situation at the end of the case where your witnesses has said X and your opponent can say that if his witnesses had known that was to be said they would have been able to comment on it. Perhaps the key to this is to remember that you must ask the earlier witness questions on essential points to be spoken to by a later witness of your own, even if you know perfectly well that they will not agree.

6. It is a sound rule never to answer a question from a witness, however innocuous it may seem. To do so can be the start of a slippery slope. Once you answer one question, your cross examination can easily degenerate into an argument. You lose control of the content. It is, at best, embarrassing to answer an easy question and then realise you do not want to be caught by a subsequent more difficult one. It is best to establish quite clearly that it is for the witness to answer and the examiner to ask questions. If the witness's question seems reasonable and needs an answer, an experienced questioner will simply build the answer into his own next question. The court will often intervene to help a party litigant deal with questions from the witness but this is not guaranteed.

7. Leave well alone. Once you get an answer which fits your own case, consider carefully whether the possible benefit from trying to improve it is matched by the risk of having it watered down.

It might be worth adding that, in the past, professional lawyers were allowed to use a great variety of techniques to bully or belittle a witness. It was often thought that a bullying or hectoring manner showed a high level of skill. Nowadays the emphasis is on politeness and, indeed, bullying and belittling are regarded as improper. Another typical feature of poor cross-examination technique is the practice of interjecting comment into questions. This is now widely recognised as unprofessional and inappropriate. Where there is no jury, a court can simply try to ignore it but it can be a little irritating. The function of all questioning is to elicit evidence to be used as a basis for persuading the court to find in your favour. Comment disguised as examination is unhelpful and inappropriate.

Expert witnesses

Cross examination of expert witness should follow the same principles but it can present special problems. In fact, DIY litigants usually avoid the difficulties which many lawyers create for themselves when faced with experts. Some lawyers seem to think their task is to show that the opposing expert is either an idiot or a charlatan. They adopt a hostile tone. They try to get the witness to say he is wrong. Adopting an aggressive tone has two consequences. It keeps the witness on his guard

throughout. It also conveys to the judge that the pleader thinks that the witness is open to personal criticism. As the cross-examination goes on and no valid personal criticism emerges, the judge tends to come to sympathise with the witness. Fortunately, party litigants are usually more realistic. They often recognise that the best they can expect is to get the expert to admit that things are not as clear cut as their report or evidence might suggest. They would never dream of taking a hostile tone because they recognise that the expert knows more about it than they do, so all they do is try to get him to agree some things that help their case.

That is a sound approach and in this Guide little more need be said than that DIY litigants usually have the right idea instinctively. However, it might be helpful to put things in more formal terms.

A sensible approach to cross examination of experts

Whatever you expect to achieve by the end of the cross-examination, it is a good idea to think of things in five stages.

1. *Getting material which supports your case or your own expert.* You might, for example, put to the witness the various matters on which you suggest that they are essentially agreed, framing your questions to get the best you can out of this. For example, an expert will often agree that your own expert is well known and well regarded. You could take the precaution of asking your own expert what they think the other will say – and also check what your expert might say about the other.

2. *Trying to qualify the evidence given to take some adverse weight off it.* This approach is not an attack of the expert's evidence but simply an attempt to show the court that it is not quite as strong as it might seem. A good example would where a witness has used a word like "most" and is persuaded to accept that he means no more than something over 50%.

3. *Showing that some of his evidence is based on material for which he is not responsible.* An expert will usually have had to rely to some extent on particular instructions or assumptions as to the state of fact. He may have had to accept his client's account of the facts. If he agrees that his expert opinion is heavily dependent on a particular assumption based on material provided by someone else, it might be easy to get him to accept that, if different assumptions were made, his evidence would be quite different. It may be worth noting that when you talk about "assumptions" to a layman he often becomes defensive, thinking that you are criticising him for jumping to conclusions. But expert witnesses recognise that all evidence is based to some extent on "assumptions" and when the detail is spelled out they should not have any problem with use of that word.

On the other hand you should note that experts do have difficulty with the word "wrong"! They might agree that another view of matters might be preferable, but they will rarely concede they were "wrong" and, in fact, there is usually little point in trying to get them to do so.

4. *The next stage is that of challenging the reliability of the witness.* The aim is to do this as neutrally as possible to avoid forcing the witness into a corner where he will be forced to fight for his reputation. But he might agree, for example, that the real

issues in the case now appear to be outside his main area of expertise. That type of question allows the expert to accept that the nature of the dispute has changed. That is not his fault. You are not challenging his evidence but he might accept that your man is more of an expert on the particular topic. This will provide a good basis for your closing submission that the evidence of your own expert witness should be preferred.

5. *The fifth stage is where you openly challenge the honesty, ability or good faith of the witness.*

Some inexperienced lawyers seem to think this is what it is all about. DIY litigants would seldom fall into that trap. The fifth stage does not often arise. However, it might, on occasion, be necessary to get into this area. It might become clear that the witness has accepted some assumption as to facts which he could have checked. You might want to get him to admit that he should have checked. You might find an inconsistency in his report which fatally impairs the main points in it. But bear in mind that this does not necessarily involve an attack on the witness's moral character. If it is clear that the evidence is outside his proper area of expertise you might need to press him to accept that it is misleading for him to purport to give expert evidence. You sometimes have to show that he has forgotten the proper role of an expert and has being doing his best to help his own side by stretching matters as far as he can. That will involve implied aspersions on his character. But, by and large, it would help a lot of professional cross-examiners to realise that the occasions when they can positively "destroy" an expert are very few and far between.

Back to basics

We referred to some basic techniques above and at number 2 we mentioned use of single fact questions or propositions. When cross-examining an expert it is important to try to avoid compound questions. Careful preparation is required. Where an expert has the choice of which part of a question to answer, they will invariably go for the one they think easier to deal with. A skilled "expert witness" will know that your knowledge is almost certainly much less than his own and he may try to push you into areas you know little about. This, actually, is more of a problem for a lawyer. Lawyers usually start knowing nothing whatever about the expert subject. They will have prepared some material thoroughly but are likely to know little or nothing about related matters. As a DIY litigant directly involved in the case, your knowledge may be every bit as detailed as the expert. But, in every case, ways have to be found to keep the witness to the relevant topic. Short questions are best. When dealing with complicated topics this is not easy. You may be able to work out a pattern which allows you do deal with one issue at a time in a sequence of questions but sometimes it may not be easy to establish a logical sequence. If you have to deal with two inter-related matters you might put one as hypothesis or assumption so that the witness has to accept one part of the question and deal only with one variable at a time. You might tell the witness for the purpose of the question that he must assume or accept that X is true, if so does he agree Y? Once

you have established whether he agrees Y, or established what qualifications he wants of Y if X is true, you can go back and deal with X.

Any hypothesis should be carefully framed and used consistently. Minor changes in the way you express the fact or facts to be assumed, have a tendency to invite the witness to start his answer by dealing with the change and its implications rather than the intended question. You cannot expect to cross examine from a list of carefully prepared questions. Things change and if you are stuck to a script you may indeed be stuck. But, careful preparation of the wording of your main questions is advisable. On some matters you may have to work out a careful sequence of detailed questions but, generally speaking, you should think of such a sequence only at the preparation stage. It will let you establish a mental framework to work from and to allow you to put the important questions clearly and in a sensible way.

Summary

A DIY litigant could not be expected to master all the points we have discussed above. Where a litigant is struggling to put questions in the best way, the court may well be able to help. But take comfort from the thought that we find that sensible examination often seems to come more naturally to laymen than it does to some lawyers – particularly those whose expectations are too high. In any event, we hope that awareness of some of the issues will help in preparation for the hearing.

Re-examination

After your witness has been cross-examined, you will have a chance to ask any further questions. That would let you give the witness a chance to explain or qualify any evidence given in cross. You want to let the witness do the explaining. You should be careful at this point not to use leading questions; that is, not to put words in the witness's mouth. That always makes evidence less valuable but this effect is worse in re-examination because the whole point is that you would like the witness to change something he has said in cross-examination. The questions you do ask should be related to something the witness has been asked about in cross examination. Re-examination is not intended to let you bring out fresh evidence on new topics.

One main benefit of re-examination is that it allows a witness to say things which a skilled cross examiner may have been able to prevent. So, when you are listening to your witness being cross-examined you should be alert to note any occasion where it has seemed that he was about to add something to his answer. If you think that what he would have added is likely to be helpful you can remind him of the question and ask if he wants to add anything.

Giving evidence in your own case

As a DIY litigant you face one particular problem: that is, the problem of giving your own evidence. In most cases, you will be required, yourself, to give evidence about some issues of fact. Unlike all the other witnesses, you will not have an examiner's questions to guide you. Note that you will be asked to move into the

witness box to give your evidence. This helps make the distinction between giving evidence and making submissions. After you have given evidence, the other side will have a chance to cross examine you. At the separate stage of final submissions; that is, after all the witnesses have given evidence, you will have a chance to make your submissions about the evidence and the law. But at that stage you cannot introduce new facts.

If you are giving evidence in the witness box in you own case, you must do your best to stick to giving evidence of facts, and more importantly, you must say all you have to say about factual matters. You will be allowed to use notes to remind you what to say and help you work your way through any productions to which you wish to refer. Remember to use the Court's numbers to refer to productions. You should keep your arguments and legal submissions for the stage of closing submissions.

The court will understand that it is not always easy to keep these matters separate and it can be expected to guide you to some extent. An overlap of evidence and argument in the witness box is not a major problem. The problem arises at the stage of making closing submissions. This is the opportunity for you to comment on all the evidence which has been given as well as being the proper time to advance your arguments about how the law supports your claim. Although you may well want to refer to what you have said before in the witness box, you cannot give new evidence about factual matters when making closing submissions.

If you do raise some new issue of fact in your closing submissions, your opponent will ask the court to ignore it. If it seems too important to ignore, your opponent will be allowed to cross examine you or even lead further evidence to contradict you. Obviously, this can cause extra delay and expense. As we discussed above, other witnesses would normally have been allowed to leave after giving their evidence. In short, it is important to identify clearly all the facts you want to tell the court about. You should prepare for the hearing by trying to keep these separate from the argument about why you should win on the basis of these facts. You should make sure that all the facts are covered when you are giving evidence in the witness box.

You might find it helpful to have a friend in court who is not going to be a witness but who will help you cover the ground. For example, such a friend might have a list of the points you intend to make and be able to check them off as you deal with them. Another useful role for a friend is to keep track of productions. If you can find someone prepared to study the productions and get a good working knowledge of them, such a friend may be able to identify them for you as you give evidence. That saves everyone's time and takes a bit of the strain off your task in the witness box. Bear in mind that although it may be easy enough to keep track of the productions you intend to refer to when you are giving your own evidence at the stage of "evidence in chief", it is not so easy when you are being cross examined. An example of the useful role of a friend is when you find yourself wanting to refer to a particular letter as an answer to cross-examination, a friend who understood your

case could probably find the number of the required production for you and tell the clerk what production is required. The Court will try to help you make best use of a friend in this way.

A person giving evidence on his own behalf often finds the stage of "re-examination" quite difficult. Obviously you are not going to examine yourself. This is best seen as a chance for you to clarify any points which you feel might have been rushed over in the cross-examination.

Other points

We have referred above to written evidence. It may be worth repeating that the evidence of witnesses is best given orally in court. This allows assessment of the witness, particularly when answering questions in cross-examination. Evidence which has been tested by cross-examination is the strongest type of witness evidence. However, evidence can be presented as hearsay evidence or given on paper either by way of formal affidavit or even a simple signed statement. The weight to be given to written evidence given in these ways will be a question of circumstances. An affidavit is a written statement, usually prepared by a solicitor from information the witness has given, and then formally completed by the witness taking an oath that it is true. The importance of putting a witness on oath is that telling lies on oath is a criminal offence and can be prosecuted. Telling lies is not itself a crime and, so, it is not always easy to establish that a person who has made a false statement on a piece of paper is guilty of an offence. This is one reason why affidavit evidence is likely to be given more weight than a simple written statement. A written statement can be a useful way of giving formal evidence on matters which are not expected to be disputed but it is better to have the witness in person, if possible.

If a written statement has to be relied on, it is, in practice, more likely to receive weight if there is supporting evidence showing why the witness has been unable to attend. Where the evidence is in the form of a letter or report which has not been prepared specially for the hearing it is useful to provide evidence of the precise circumstances in which the statement came to be made and evidence of why the writer's evidence should be relied upon.

The Land Court will usually feel free to take account of all productions which have been lodged and to treat them as being what they bear to be. But it is important that you draw attention to all the documentary evidence you wish to rely on and tell the court which parts you think are of any particular significance. That can be done as part of your submissions if the material is straightforward and your comments are simply drawing attention to the words used. However, if you wish to give any explanations as to how some written material came to be prepared or explain where it came from or anything about it, this should be done from the witness box as part of your direct evidence.

You can, of course, take such notes as you wish during the proceedings. However, it is not possible in practice to take notes when asking questions. The sensible course is to have a list of the points you wish each of your witnesses to cover

and try to tick it or change it as the evidence is given. It is impossible to take notes while giving your own evidence. That should not be necessary when making your own statement because you can work from a prepared note, as we have discussed. When being cross-examined you may, possibly, be able to make a brief note of some of the things you want to come back to at the "re-examination" stage but it is not easy to do this in practice. This is where it is useful to have a friend to assist. The friend could be asked to take a note of your cross-examination evidence or at least to take a note of any points they think you should return to when at the stage of "re-examination". The Court would normally allow a brief adjournment to allow you to have a look at any such notes.

The public is entitled to be present throughout the hearing. However, people who are to be witnesses are usually kept out of the hearing room until they give their evidence. This is because evidence from a witness who has not heard what another witness has said is likely to prove more persuasive than evidence from someone who has had an opportunity to tailor his evidence to fit what has gone before. You should make sure that anyone you might want to give evidence is asked to leave the courtroom unless the court agrees otherwise. It may be noted that the court is unlikely to agree if the other side objects but that even if the other side agrees, the court may decide that, in your own interests, it is better that the witness should not be there.

You should not discuss with witnesses anything that has been said in the court while they have been excluded. The reason for excluding them is to avoid their evidence being influenced by what they have already heard. It may be difficult to avoid discussing the case with relatives or friends but if they are to be witnesses you should tell them specifically that this must be avoided. Where there has been such discussion it is often quite difficult to hide this when the witness comes to give evidence and it does weaken such evidence.

5. Inspection

The Land Court may well wish to inspect the property involved in the dispute. This is usually done at the end of the hearing but may be fitted in at some other stage. The emphasis is on practical convenience. The purpose of the inspection is to ensure that the court has fully understood, or can fully understand, the evidence and to allow the court to make its own assessment on any matters falling within the scope of its expert jurisdiction. It is not an occasion for hearing new evidence. The Court is frequently content to inspect unaccompanied if parties are agreeable and if the Court is satisfied that it will not be necessary to have witnesses present to identify any particular features spoken to in evidence. If the Court does ask to be accompanied it will normally wish to have a representative from both parties. Certainly, it will not want to have a representative from one side without giving the other an opportunity to be represented.

If the area to be inspected presents any difficulties of access, you should consider whether it will be necessary to provide specialised transport for the court

e.g. boat or all-terrain vehicle. Any known hazards should be pointed out to the court staff in advance.

At inspection the court will engage in normal polite chat but do not be surprised if they discourage conversation. An inspection is not the time for new information or new argument to be put to the court. Any conversation should not be about the case. If the court wishes specific items to be pointed out they will ask. But usually the court will have a good idea what they want to look at and there will not be much need for talk.

6. Decision

The Court is unlikely to reach a decision immediately and will, in any event, have to prepare a written decision. This can be expected within a period of about six weeks but could be a little longer. It depends on how busy the court is and, of course, on the complexity of the particular case.

Appeals

If you think that the court has reached the wrong decision, appeal processes may be available. You are strongly advised to seek the advice of a solicitor for any possible appeal and we mention appeals mainly to act as a warning that there are important time limits. You should be aware that an appeal does not allow you to have a second shot at the case. In order to be successful on appeal you will normally have to show that the Court has gone wrong on some identified question of law.

Appeals against a decision of a single member of the Court will be heard by the Chairman or Deputy Chairman with two other members. The timetable appears in the Land Court Rules. Appeals from the Land Court to the Court of Session can be made, in some types of case, by an application for a special case to be stated by the Land Court for consideration by the Court of Session. Appeals under the Agricultural Holdings Acts must be made direct to the Court of Session. These matters are all regulated by Rules of the Court of Session and guidance may be available from the clerks at that court. Time limits for requesting a special case are very tight and you should seek advice without any delay if you intend to challenge the Land Court's decision.

It has not been necessary for the purposes of this Guide to say much about how the Court organises its business. But in the context of appeals it may be helpful to explain that the Court has power to allocate work to one or more of its members. When such a delegated court is sitting, it is known as the Divisional Court. That is because of the old practice of dividing the country into areas and allocating different members to each. Appeals from the Divisional Court are usually to the Full Court. Appeals against decisions of the Full Court go to the Court of Session.

Expenses

When intimating the decision, the Clerk will, if directed by the Court, invite parties to make submissions about expenses. That is the normal practice and the normal rule is that expenses follow success. **It is very important to understand this and its implications for party litigants**. We look further at these implications below. The losing party will be found liable to pay the expenses properly incurred by the winning party in fighting the case. This is not a punishment for losing but simply that expenses are an important part of any litigation and it would not be much of a victory if the side which won on the merits did not also win expenses. There are various ways of expressing the rule. The idea is that the person who caused the litigation should pay for it. This may allow scope for argument that time was wasted on some parts of the case. If so, and if that was really the fault of the winning party, there might be some modification of expenses.

The question of expenses is dealt with in two stages. First of all, the court decides who should be liable to pay for expenses. The next stage is to decide what is allowable as a charge for all the pieces of work done. That is a separate matter which is not dealt with by the court but by a separate official known as the Auditor of Court. Under the Rules of the Land Court, our Principal Clerk is also the Auditor.

Any argument about who should pay must be made at the first stage. Where parties are in dispute over different issues and one side wins on some points and loses on others, it may not be easy to say that any one party has been successful overall. The Court may have to take a close look at who won what, what time was spent on that, and then decide what bearing that should have on the overall award. A very broad approach is taken to expenses. But the basic rule – that the successful party is entitled to recover expenses from the other – governs most circumstances. There are situations where a winning party's entitlement may be modified because of the way they have conducted the case. But a broad approach is always taken, partly to avoid the risk of disputes over expenses themselves giving rise to additional expense.

At the second stage, the Auditor can be asked to scrutinise the accounts to check that only proper claims are made and proper amounts charged. In the Land Court the usual rule is that the rates to be charged by solicitors are those covered by the Table of Fees for the Sheriff Court.

A successful party litigant is entitled to be paid something for his time. There is no set scale. The Rules of Court provide for the Auditor to assess the appropriate rate of remuneration in each case. The Auditor will consider the level of any earnings lost by the DIY litigant in taking time to present or prepare the case. Usually the Auditor will wish to fix remuneration by having regard to the time an experienced practitioner would take. So you could not expect to be paid for all the hours you have had to spend getting to grips with the law. You will not be paid at

lawyers' rates. Part of the reason for that is that lawyers' rates have to cover their training and their administrative backup. Where you are represented by someone other than a solicitor, the Court will control what such person can charge you, if anything, and what can be charged against the other side if you are successful.

It is not always easy for a layman to know whether particular items of work are properly to be included in an account. However, you can include all things you did in connection with the litigation. If the paying side disputes any items, the Auditor will be able to decide what is to be allowed and how much is to be allowed.

A particular problem for DIY litigants is that although they may decide to save expense by acting on their own behalf, the other side may quite properly think that the issues in the case are difficult enough to justify employment not only of solicitors but of counsel or even senior counsel. As we have said, liability to pay expenses depends mainly on success. The court has no power to exercise a sympathetic discretion to limit the amount you have to pay if you lose. Liability to pay expenses will be a debt like any other. The amount charged will not depend on your ability to pay.

You may think it particularly hard that the opponent is entitled to charge the cost of employing lawyers when you have managed without. The Land Court does have some limited scope for control of this. If your opponent has employed a solicitor the cost will usually be seen as a proper charge. But where counsel have been employed the losing side will only have to pay for counsel if the court gives specific authority certifying that their fees are a proper charge. Where senior counsel has been employed the court has to certify that the case is suitable for employment of senior counsel before their fees can be recovered. But many cases which seem straightforward to the parties can turn out to give rise to complicated legal questions. Often DIY pleadings do not make it at all clear what the legal contentions are. Put shortly, it is not uncommon for the court to feel obliged to certify a case as suitable for counsel or even senior counsel despite the fact that the other side is acting on a DIY basis. In that event, losing litigants can find themselves liable to pay the full lawyers expenses of the other side even when they have been very careful in minimising their own expenses.

The Court cannot reduce the liability just because one side has no money – unless that person has the benefit of Legal Aid. It may be worth noting that if you qualify financially for Legal Aid it will almost certainly be worth getting it and employing a lawyer, even if you think you could do the case just as well yourself. That is because, if you lose, you will be entitled, if you are on Legal Aid, to have your liability to the other side reduced. Otherwise the Court has no power to cut down a bill just because you cannot afford it.

The risk of liability in expenses is a major worry for both sides. It may worth trying to persuade your opponent, at the outset of the litigation, that each party will pay their own expenses – win or lose. That would allow each side to keep a good control of how much the case was going to cost them, win or lose. Such agreements are not uncommon where the dispute is between employer and employee and that

relationship is to continue, and they might make good sense, particularly in relation to certain types of dispute between landlord and tenant.

In some cases it may be possible to get some protection against expenses by making a formal offer in settlement at the outset. You might be prepared to offer more than you think the other side is really entitled to, just to avoid litigation. You can make your offer to the other side and send a copy to the Principal Clerk in a sealed envelope. The court will not know what your offer was until the stage of deciding who should pay expenses. So, you will not be prejudiced by making your opponent a generous offer and then fighting for less if they do not take it. If you have offered more than the court has awarded, it will be clear that the litigation has been caused by your opponent's failure to take the offer when it was made. So, you will have been successful as far as expense was concerned.

It is worth taking professional advice on such offers, whether you are the party making the offer or the recipient of an offer. In courts where the dispute is about money such offers are described as "tenders" and various formal rules apply to them. These can be a trap for the unwary. Although the Land Court does not have formal rules for tenders, the principles applied in other courts will be borne in mind. Where the dispute is not over something as simple as a claim for payment, offers in settlement may be a bit complicated. Legal advice will probably be worthwhile.

Getting Help

Professional advice generally

In many crofting cases, the issues are largely questions of fact and you may well be able to conduct the case successfully on your own. However, we think that, it will usually prove worthwhile to seek professional advice at some stage in most cases. A lawyer would be able to warn you of the risks as well as guiding you to any important issues. There are often practical issues, obvious to a professional, but not so clear to the DIY litigant, which can have a major bearing on the outcome in some cases. It is a well-known saying that a lawyer who acts for himself has a fool for a client. There is no doubt about the value of objective assessment. The risk of liability to pay the other side's expenses is likely to outweigh the cost of having a lawyer yourself, at least for part of the case.

You can save money by limiting the lawyer's work. You might simply ask for advice before you start. You might seek advice once the pleadings were complete and the other side's case was known. You could let your lawyer deal with pleadings and do the hearing yourself. You could ask a lawyer to prepare a submission for you to present to the Court. A lawyer can advise you about settlement negotiations; how you should react to proposals from the other side; how you might go about making your own offer; what the consequences might be for expenses if settlement fails; etc.
It is particularly important to consider taking advice at the appeal stage. Appeals are usually limited to points of law. A lawyer can advise you what precisely is meant by a point of law. It does have quite a wide meaning but it is not always easy to say which issues are questions of law and which are pure fact. This is an area where sound advice could help you avoid wasting a lot of money.

Mediation

This Guide is intended to deal with litigation. But it is important to stress that there are other ways of resolving disputes. Most people are familiar with the idea of arbitration without realising that an arbitration is a bit like litigating in court. The arbiter takes the place of a judge but has to hear parties in a judicial way. Another traditional way of dealing with disputes is simply to agree that you would abide by the decision of a suitable independent person. You could agree that such a person would make such enquiry as they thought fit and then decide.

"ADR" refers to "alternative dispute resolution". The best known method is probably mediation. This is quite a formal process where an independent third party helps contesting parties to reach agreement. That third party will not usually try to give advice. Their role is to help you fully to understand the other side's position and to help you make a sound appraisal of the strengths and weaknesses of your own position. They may ask you searching questions to explore these points. They will

help facilitate discussion. They will be looking for ways in which both sides can gain. To take an obvious example, a tenant might be prepared to pay higher rent if the landlord agreed to provide new equipment. Depending on the parties' respective finances that might produce a deal which would not have been reached if the whole argument had been about rent. Various professional firms offer a mediation service. It may seem expensive in itself but, if it is successful, it will be cheaper than litigation. It will be quicker and more private. It is a process which leaves you in control of the detail of any settlement proposals. You are not committed to accepting such a third party's decision. You are only bound if you actually reach an agreement which you are prepared to accept.

But in any event, with or without outside assistance, parties should always be on the look out for opportunities to discuss settlement. You should be aware that attitudes change during the litigation. Sometimes that is because of change of circumstances or the passage of time. Sometimes it is because the very process of litigation alerts the parties to the strengths and weaknesses of their own and their opponent's cases. People may be frightened to be the first to suggest settlement. It can seem like a sign of weakness. Having an independent mediator can help avoid that problem. But, in practice, a proposal to discuss matters is simple common sense rather than any sign of weakness. It is stupid to go from start to finish of a litigation without any attempt to discuss settlement. It would be a disaster for a case to go the whole way just because both parties were frightened to open the discussion.

At risk of stating the obvious, one main difficulty about litigation is that the court award is usually "all or nothing". The winner takes all – including expenses. Often a court can see that there may be quite a bit to be said on both sides. The court may think it possible to identify various possible compromises. But, it is not the task of the court to negotiate. It is obliged to reach a decision on the disputed issues. Even if a court has found it hard to reach a decision and, perhaps, has only reached it on a narrow margin, it cannot reflect that in the decision. If parties come to realise that the issue between them is not clear cut, they may be more than happy to settle for a share. They cannot do that without being prepared to talk.

Even if the whole case cannot be resolved by agreement or compromise, we stress again the need to agree as much as possible to limit the litigation to points of genuine importance. We conclude by repeating that even if agreement on points of substance proves impossible, the actual process of litigation should, ideally, be a collaboration between the two sides to try to identify, as clearly and narrowly as possible, the issues which they need to have determined by the court, and to find the most efficient way of allowing the court to deal with these issues. The Court and the Principal Clerk should be seen as partners in this enterprise.