Environment Judge LJ Newhook
Principal Environment Judge

Paper for delivery to Environmental Legal Assistance Fund

Annual Workshop

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1. At the beginning of this year the Environment Court published its first ever Annual Review by Members of the Court (not to be confused with the Annual Report to Parliament by the Registrar). The Review covered the calendar year 2014, but being the first of its type, it laid some foundations by offering appendices about the work of the Court and its place in the system.

2. In keeping with the Court's desire significantly to reduce reliance on paper, the review was published only in electronic form. It is available at:

   www.justice.govt.nz/courts/environment-court/environment-court-decisions-and-publications/environment-court-annual-review

3. Today I wish to talk about a few highlights from that review, with particular emphasis on aspects of the work of the Court that benefit from the operation of your Fund, and ways in which we can assist each other.

4. The Court is achieving ever-higher clearance rates of its cases. It has now for some time been operating without any backlog of cases awaiting hearing other than the necessary time period during which mediation is undertaken followed by an evidence exchange timetable for cases that do not settle.

5. A particularly notable feature of the high resolution rate is the success of mediations conducted by environment commissioners. This aspect of the Court's operations is currently resolving approximately 75% of all of its business, and a recent trend is that it is not just the smaller or simpler cases that are settling at mediation, but some of the really big and complex ones as well.

6. Another milestone in 2014 was publication of the Court's latest Practice Note, which came into force on 1 December, replacing all earlier Practice Notes. Those familiar with it will know that it is not a set of inflexible rules, but is a guide to the practice of the Court to be followed unless there is good reason to do otherwise. The new Practice Note incorporates the increasing body of experience gained by members of the Court in case management, alternative dispute resolution, preparation of hearings and the hearings themselves.

7. The topics addressed in the Practice Note are, broadly:

- Communication with the Court and amongst parties;
- Lodging appeals and applications;
- Direct referrals
- Case management;
- Alternative dispute resolution;
- Procedures of hearings
- Expert witnesses
- Access to Court records
- Glossary of terms.

8. There are three appendices:

- Lodgement and use of electronic documents
- Protocol for court-assisted mediation
- Protocol for expert witness conferences.

9. The Practice note may be accessed on the Court's website at:

www.justice.govt.nz/courts/environment-court/legislation-and-resources/practice-notes/practice-notes

10. Another relatively recent area of operation is the processing and hearing of Direct Referral cases. The 2009 amendment to the Resource Management Act introduced sections 87C-87I, making provision for an applicant for resource consent to request from a council a decision to refer the matter directly to the Environment Court without first being decided by the Council or hearing commissioners.

11. Applicants commenced using this process from the beginning of 2010, and a relatively small but steady number of cases have been lodged with the court since then. The cases tend to comprise proposals for larger commercial or infrastructural activities, and accordingly have been treated by the Court as requiring a reasonably high degree of priority to process, hear and determine.

12. Some of these cases have been resolved by the Court's mediation service, one of them in particular, a proposal for a very large gravel quarry which was thought by members of the Court to be incapable of resolution by settlement, actually being fully resolved in mediation. An online industry newsletter reported the applicant as saying that the Court was very efficient in processing the application, and was very succinct and clear on a number of complex issues.

13. I want to be careful to avoid creating a wrong impression. Not every large case proceeds so expeditiously. Difficult issues can arise in such cases, whereby even if the Court commences a hearing at a reasonably early time, steps may become necessary that have the effect of prolonging the life of the case. A recent example is one in respect of which I understand your fund has contributed resource to a community group. The case involves an application for consents to establish and operate a boat marina on Waiheke Island near Auckland. This direct referral case was lodged at the end of 2013, and after some significant preparatory steps, commenced hearing in October 2014. Notably, the applicant applied to significantly alter the proposal right at the end of the three-week hearing (mediation had been declined at all stages by all parties). Further interlocutory steps occurred, including a contentious application concerning jurisdictional scope of the amended proposal (resolved in favour of the community group); the substantive hearing resumes the week after next.

14. This might be a convenient point for me to sing the praises of the work of your fund, because its involvement in the Waiheke case has had a number of considerable process benefits for the benefit of all parties and the Court.

15. The first significant benefit was that the potentially unmanageable number of parties (310) mostly coalesced under the umbrella of the community group that applied to you for funding. This of course assisted case management very considerably. Secondly, the community group felt able to hire experienced senior counsel and some top flight witnesses, so the case gained more focus and process rigour, and one imagines the volume of evidence became less than otherwise might have been the case. The applicant might not have appreciated the quality that was brought to the opposition case, but it has certainly benefitted from the focus and other time-saving spinoffs!

16. You may of course understand that your contribution to the funding of the community group is not its sole monetary resource. The group has been most enterprising in its fund raising in the community, holding major outdoor concerts and the like which has probably had the spinoff of raising the profile of its case in the minds of the public. I think it must be said, however, that the contribution by your fund was a major kick-start for the group.

17. Before I turn to the subject of hearings, a little more on the subject of alternative dispute resolution. Section 268 RMA contains a broad power for the Environment Court to initiate "*for the purpose of encouraging settlement*" mediation, conciliation, or other procedures designed to facilitate resolution before or at any time during the course of a hearing. The Court makes significant, and increasing, use of these powers.

18. The section has a "voluntary" flavour about it, recording that ADR may be carried out "*with the consent of the parties and of its motion or upon request…*"

19. However, litigation in the Environment Court is not just about resolving private disputes. Almost all cases are laced with significant public interest issues as well. Not only does this factor drive the Court to ensure early resolution of proceedings, but it colours its approach to the "voluntary" to "compulsory" mediation spectrum, somewhat in the direction of near compulsion.

20. At a recent joint conference of the Environment Court and Māori Land Court, the Chief Justice presented a paper which in part was mildly critical of this flavour (tendency in favour of compulsion to mediate). One of her concerns is that Courts should operate as they have traditionally, to hear and determine disputes, thereby creating case law to guide future disputes. I have no doubt that she and I will discuss this matter further, but I consider that there will be no getting away from the fact that numbers of cases will always require adjudication and will produce jurisprudence, particularly from amongst the larger and more complex cases. I presently hold to the view that the public interest element is important. While there is no absolute compulsion to mediate, parties are strongly encouraged to do so, and it is well known that the cost of resolving any litigation by ADR processes, is usually considerably less than proceeding to hearing.

21. Another skill gained in recent years by the Commissioners has been their successful involvement in facilitating conferences of expert witnesses. The emphasis in such work is not to foster compromise, but to have experts in their appropriate groups debate objectively and scientifically the differences amongst them, for the purpose of reaching agreements and/or clarifying issues on which they do not agree. These conferences are conducted away from the influence of the parties who call them. The Practice Note assigns counsel obligations of readying the witnesses for their conferences, explaining the procedures to them including their duties of independence and objectivity, and managing client expectations. Increasingly, these conferences are proving successful in resolving significant numbers of issues canvassed in expert evidence in cases, with resulting savings in hearing time, and of course therefore also the cost of litigation. As with any worthwhile endeavour, good preparation by those involved is crucial to good outcomes, and the Court stresses this in the course of case management. In this, we include the importance of good advance preparation on the part of the facilitators themselves.

22. A technique employed by the Judges from time to time is the judicial settlement conferences, usually in circumstances where parties have got stuck on an issue in mediation or expert conferencing. This can be particularly useful when other forms of ADR have produced a result that the unresolved issue is the last item standing in the way of final resolution of a case. Once again, good preparation by all involved is key, including by the judges.

23. I wish now to talk about the use of "process advisors to submitters". A number of years ago the EPA and Boards of Inquiry commenced to make use of a process called appointment of "friends of submitters." This proved highly successful in cases where there were large numbers of parties, mostly self-represented. One of the early examples was the Waterview Motorway Board of Inquiry that I chaired, where a high percentage of the 70 parties were self-represented.

24. It is almost trite that if such parties have access, free of charge, to a person knowledgeable in resource management appeals and first instance hearing and pre-trial processes, a number of benefits should accrue for everybody involved. These include that the self-represented parties can become more focussed and relevant in their engagement in the case, and save everybody time and money; hearing panels and support staff may be saved considerable work, often repetitive and time-consuming; and hearing and pre-trial processes can flow efficiently. It is our experience that pre-trial and trial procedures move more quickly, with obvious attendant savings of cost. Last, but certainly not least, parties can be persuaded to merge their interests under the umbrella on one incorporated body as I have mentioned with the example of the Waiheke Marina case.

25. In the Waiheke case the Court appointed two experienced practitioners, one lawyer and one planner, to act as what we call "process advisors to submitters" in the Waiheke case. Their involvement was another catalyst to getting the parties to coalesce under the umbrella of the community group to which you supplied some funding.

26. The reason that we call these people "process advisors to submitters" is to lessen the anxiety apparently felt by some applicants who were concerned that in meeting the cost of such activities, they might be funding people to substantively oppose their aspirations.

27. You can gain a further insight into this aspect of the work of the Court, with the Waiheke case an interesting example, by looking at the Waiheke Marina pages on the website of the Court.

28. I wish now to talk briefly about promptness of process. I am a believer in the old adage "time is money." It is trite that applicants for consents can face significant holding costs, and that the longer a process runs in a significant case, the more money is needed

to keep it moving. Three or four years ago I was concerned that in a couple of cases, individuals were lodging s274 notices, and then advising the Court that they were endeavouring to form themselves into groups and seek assistance from your Fund. At that time I understood that the fund was considering applications only approximately every two months. These parties were pleading for adjournments in court processes and there were impacts on the timing of the holding of the first pre-hearing conferences, commencement of mediation, and the whole pre-hearing timetable. Naturally, applicants were unhappy at the delays.

29. My understanding is that your Fund's approach to considering applications may have changed, and in particular sped up. The concern has not re-emerged in my docket in recent times.

30. An impression that you may have gained from my presentation today is that I have the utmost respect for the work of your Fund, and the way in which your processes are administered. I consider that there have been significant advantages to parties in cases before the Environment Court, and not just the parties that have received your funding. I am very happy to work with you to endeavour to ensure that our respective processes are mutually respectful and efficient. The door and the phone line are always open, as your chairman knows.