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A paper by Principal Environment Judge Laurie Newhook, Environment Court of New Zealand

Advances in ADR Techniques in the New Zealand Environment Court

Introduction

[1] Environment Courts and Tribunals in most countries are regular targets by Parliaments and the Executive, for "reform". This year, Courts and Tribunals in New Zealand have seen a particularly wide-ranging restructuring exercise carried out by the Ministry of Justice which had the potential to significantly destabilise the Environment Court and cost it the benefit of the many efficiencies, largely Judge and Commissioner led, in recent years. So far as the Environment Court was concerned, the reforms were promulgated by officials possessed of little understanding of the workings of the Court, and in the absence of any consultation with the Judges and Commissioners at all.

[2] Meantime, members of the Court strive constantly to foster new efficiencies and improved access to justice. The work of the Judges and the Commissioners in the field of Alternative Dispute Resolution, offers a strong example.

Mediation

[3] As in many Environment Courts and Tribunals, mediation has become a mainstay of case resolution in recent years. In New Zealand it is authorised by s 268 of the Resource Management Act 1991, and is a free service conducted by the Court's Commissioners who are fully trained in the technique and very experienced.

[4] Mediation is conducted very early in the life of most cases, and results in resolution of approximately 75 percent of all cases filed in the Court.

[5] There are two extensive sections in our current Practice Note, which became operative at the end of 2014. The first is a section "Alternative Dispute Resolution", and the second is a protocol annexed to the Practice Note.

[6] Mediation is not compulsory, and the party can refuse to agree to go to mediation. However the technique is strongly encouraged by the Judges because, even if a case is not capable of full settlement, some aspects can get resolved, thus narrowing issues in dispute, reducing Court hearing time and reducing cost to all parties. The Court encourages parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Resolution of cases can sometimes be quite innovative. For instance, side agreements on other matters outside the jurisdiction of the dispute are sometimes entered into. Those side agreements are not seen by the case-managing Judge.

[7] Matters discussed during mediation are confidential to the parties. Only the written signed outcome from mediation can be reported to the Judge. As is well-known, this confidentiality is important for the process. It means that the parties can make offers or suggestions aimed at resolving the matters without fear of later adverse consequences.

[8] When agreement is reached on all or some matters in dispute, a draft Consent Memorandum is drawn up either at the mediation or afterwards by the lawyers or parties present. Once the wording is agreed to by all parties and signed, it is placed before the Judge with a request that a Consent Order be made. In considering a draft Consent Order the Court will ensure that the result conforms to the requirements of the Resource Management Act. On some rare occasions, the request can be rejected by a Judge, whereupon matters either become the subject of further mediation or negotiation, or go to hearing.

[9] As is also well-known, mediation is invariably much less expensive than a court hearing with its attendant witness expenses, legal costs and risk of an award of costs by the Court.

[10] Mediation is used to resolve all three main types of the civil jurisdiction of the Court, appeals about plan making, appeals about consenting, and enforcement. In New Zealand the Environment Court does not hear prosecutions for breaches of the Resource Management Act and plans. Those are heard in the District Court, by Judges holding dual District Court and Environment Court warrants. The mediation service is not of course engaged in such cases.

Expert Conferencing

[11] The Commissioners of the Court have developed a high level of expertise in recent years, in facilitating conferences of groups of expert witnesses prior to hearings occurring on major technical issues. In most such cases, the case-managing Judges will direct that experts confer in relevant groups between the evidence-in-chief and rebuttal evidence stages. In some cases, such conferral is directed prior to the preparation of evidence-in-chief.

[12] Once again, the Practice Note offers two sections on the technique, a main section and an appended protocol.

[13] In contrast to mediation (which is often about compromise), expert conferencing is a process in which groups of expert witnesses are required to attempt to reach technically accurate agreement on facts, issues, and matters of expert opinion. Directions require them to record agreements that they are able to reach, and then proceed to identify the issues on which they cannot agree, and the reasons for those disagreements.

[14] A similarity with mediation is that even if full agreement cannot be reached, matters in dispute can at least often be narrowed by agreements being reached on some issues.

[15] In this work, all experts have a duty to ensure that there is genuine dialogue amongst them, conducted objectively, and entirely free of the influence of clients and lawyers.

[16] The Practice Note expressly assigns lawyers the task of preparing the witnesses, in particular explaining their duties of objectivity and impartiality, and managing client expectations.

Judicial Settlement Conferences

[17] The Judges conduct a limited number of settlement conferences, to which parties, lawyers, and expert witnesses, are invited. Such sessions are sometimes held where mediation, negotiation, and expert conferencing, have successfully resolved a high percentage of the issues in a case, but the parties are left struggling to resolve a small number of complex issues, particularly (but not exclusively) legal ones.

[18] These sessions are conducted in a relatively robust style, and as is the case with other dispute resolution techniques, a high level of preparedness is required not only by the parties and their representatives, but also by the Judge.

[19] It is my experience that as such sessions progress, the Judge can find himself or herself inclined in the direction of a fairly evaluative style. It is for this reason that the Judge conducting the settlement conference will rarely, if ever, sit to hear a case that subsequently requires hearing time.

Joint Settlement Conference

[20] We have recently developed technique that is so new we have not as yet agreed a suitable name for it. For the moment I have called it a Joint Settlement Conference. It involves a Judge and a Commissioner acting together, and is designed to springboard from expert conferencing, take the proceedings to judicial conference level, but harness the skills of a Commissioner (for instance an engineer) alongside the Judge.

[21] One of our engineer Commissioners and I recently offered a session of this type in a complex and bitterly fought proceeding involving traffic engineering and hydrology as the key issues in dispute.

[22] We commenced with a three-hour session scoping the issues to be covered, and discussing and then directing, processes to be followed. Initially the parties wanted to proceed on the basis of "will-say" statements, but we resisted that, offering the comment that the matters in dispute were so complex, that for subsequence settlement conference sessions to have any benefit, all persons involved would need to drill into the sort of detail that would be found in statements of evidence-in-chief. I declared that if will-say statements were going to be developed in that level of detail, drafts of evidence might as well be exchanged. This the parties proceeded to do so, initially reluctantly, but having become involved in that exercise, then agreed also to exchange statements of rebuttal evidence. Some further expert conferencing sessions were held in between, facilitated by the Commissioner who was working with me.

[23] A one-and-a-half-day joint settlement conference session was then conducted in a robust but quite principled fashion, with myself and the Commissioner expressly adopting an increasingly evaluative role as time went by. This reached the point at the end of the session where we effectively delivered a short oral statement advising the parties what we

believed a Court would decide after a full hearing. The parties held brief further negotiations, and the case then largely settled, subject only to the need to undertake a short public process concerning an aspect that was outside the jurisdiction of the appeal. That process will be undertaken in the next few weeks, and I am confident that the case will be fully settled before the end of the year.

[24] While the expert conferencing and judicial settlement processes have been moderately time-consuming of themselves in this case, I believe that a traditional hearing of this bitterly disputed case would have taken considerably longer.

Conclusion

[25] My message to senior officials is to support the Court in a straightforward way, maintaining the skilled Registry staff who have served us so well for over a decade, and the relatively inexpensive electronic resources that we have identified or devised for ourselves over a similar period of time. And then to watch the Court flourish in terms of its efficiency and the provision of access to justice. Such an approach will almost invariably succeed in improving the operation of the Court, in contrast to efforts to place the Court into the mainstream of generalist Courts without specialist staff, the nature of whose cases is significantly different; our emphasis on harnessing expert opinion about future states and risks being one very significant point of difference.