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Feature session: improving access to justice through alternative dispute resolution procedures

Judge Laurie Newhook, Principal Environment Judge

Although legal rights exist, the cost of effective participation often places limits on a party's ability to participate. What can be done to increase access to justice, maximise efficiency and minimise cost? Traditional forms of ADR as well as alternative hearing processes introduced by legislation and by the Court itself attempt to address these issues. This session will provide a summary of the varied forms of dispute resolution and guidance on the benefits and drawbacks of each.

Introduction

[1] Prior to the last election, the NZ Labour Party published detailed policy planks about the environment in its 2017 Manifesto. Under the heading "improving processes", in addition to statements about promoting community participation in RM decision making, the party promised that it would "*work with the Environment Court to encourage shorter hearings and limit expensive and complex expert evidence*".

[2] I understand that the Minister for the Environment will shortly announce steps proposed on a broad front to improve access to environmental justice, including access to the Environment Court. We are happy to work with him and officials on good ideas for access to environmental justice and efficiency of process. But we also claim to have been doing that on a constant basis for many years. That said, we acknowledge that full hearings in our Court can be mighty expensive! We see the detail in many applications for awards of costs after substantive decisions have issued. In managing cases we are very conscious of the huge potential cost of hearings. Many of the steps Judges direct in cases are designed to keep the lid on disputes and encourage parties actively to narrow them, or better still, settle whole cases for as little cost as possible.

[3] As Principal Environment Judge, I welcome any initiative by the Executive and the Judiciary to improve access to environmental justice and at the same time improve efficiencies. It is heartening that collaboration about this has commenced under the new Administration.

[4] I have made a point of saying to the new Ministers, and am happy to say here today, that these concepts are not new. Long gone are the years in which the Court suffered under a big backlog of work brought on mainly by the promulgation of first generation plans under

the Resource Management Act and because of inadequate administrative support for the Court at the time. The Court has in recent years been better resourced, but even more importantly has worked actively to improve its efficiency through many techniques of case and hearing management. Details of these endeavours have been published in the Annual Reviews by Members of the Court in the last 3 years which can be found on the Court's website.

[5] I can say that there is certainly no intention to rest on our laurels, and the search for efficiencies coupled with better access to environmental justice does not cease. 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 ('ADR'), offers a strong example.

Authority for ADR in the Environment Court

[6] It has been a key plank of process in the Environment Court under the Resource Management Act since inception, that the Court provide ADR, particularly mediation.

[7] The Court has embraced the concept strongly, and it is a matter of record that a consequence is that approximately 75% of cases lodged in the Environment Court are resolved through ADR processes principally conducted by the Court's Commissioners who receive formal training in the technique and are very experienced.

[8] Until last year, ADR in the Environment Court was voluntary. No party was compelled to participate, but mediation was strongly recommended by case-managing judges with very few exceptions. The voluntary quality followed universal best practice in mediation worldwide. That has now changed in consequence of provisions of the Resource Legislation Amendment Act 2017, two key provisions of which I record:

> **268 Alternative dispute resolution**
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> (1) At any time after proceedings are lodged, the Environment Court may, for the purpose of facilitating the resolution of any matter, ask a member of the Environment Court or another person to conduct an ADR process before or at any time during the course of a hearing.
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> (2) The Environment Court may act under this section on its own motion or on request.
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> (3) A member of the Environment Court who conducts an ADR process is not disqualified from resuming his or her role to decide a matter if –

(a) the parties agree that the member should resume his or her role and decide the matter; and

(b) the member concerned and the court are satisfied that it is appropriate for him or her to do so.

(4) In this section and section 268A, **ADR process** means an alternative dispute resolution process (for example, mediation) designed to facilitate the resolution of a matter.

268A Mandatory participation in alternative dispute resolution processes

(1) This section applies to an ADR process conducted under section 268.

(2) Each party to the proceedings must participate in the ADR process in person or by a representative, unless leave is granted under this section.

(3) Each person required to participate in an ADR process must –

(a) be present in person; or

(b) have at least 1 representative present who has the authority to make decisions on behalf of the person represented on any matters that may reasonably be expected to arise in the ADR process.

(4) A party to the proceedings may apply to the Environment Court for leave not to participate in the ADR process.

(5) The Environment Court may grant leave if it considers that it is not appropriate for the party to participate in the ADR process.

[9] I believe that some people submitted during the Select Committee process, that the proposal to make ADR compulsory in the Environment Court was not necessary because it was so strongly encouraged by the Judges. If we had been asked, we probably would have offered the Select Committee the same advice.

[10] I do not want today to debate the issue of whether mediation should be compulsory. The legislation now ordains that. Some interesting questions nevertheless arise as to whether a Judge can direct (after hearing the parties) that there be no mediation or other ADR in any particular case. A very small percentage of cases are considered by my colleagues and myself to be inappropriate for mediation. One example was the 2013 case of a proposal for a boat marina at Matiatia Bay on Waiheke Island in Auckland's Hauraki Gulf, where all parties submitted, and I agreed, that the case should head directly to hearing.

[11] It might be an open question as to whether Parliament has removed our ability to follow that course. We seem expressly to be empowered to give leave to individual parties not to participate in the ADR process. I suppose it could be argued that if all parties in a case sought leave to be excused, that would effectively be the end of ADR. What however if a small number of parties opposed such leave but the Judge nevertheless considered that ADR would be futile? Would overall progress in the case be delayed while a handful of the parties participated in some sort of ADR process after the others had been excused? Or might a Judge need to direct that all parties were excused after hearing the arguments for and against? Might cases be unduly held up while these interlocutory arguments were resolved? Is that truly efficient? It would be wrong of me to try and give answers today, in case such questions arise for determination in a future case. Or perhaps the issue could be the subject of further reform.

[12] Was last year's change really necessary? Was it really appropriate judged against best ADR practice? The answers are ultimately in the hands of the Parliament. In the meantime, life goes on, and the record speaks for itself. Approximately 75% of cases in the Environment Court are resolved directly or indirectly by active mediation.

Forms of ADR

[13] The types of ADR offered by the Court are principally mediation, expert conferencing, judicial settlement conferences and a recent invention, joint settlement conferences. These will be discussed in turn. I will refrain from discussing case resolution practices in other fora such as Boards of Inquiry and one-off plan-making exercises like the work of the Independent Hearing Panels in Auckland and Christchurch. Those matters will be addressed in the next address, that of Environment Judge John Hassan.

Mediation

[14] As previously noted, this technique is the mainstay of case resolution in the Environment Court. There are two detailed sections in the Court's Practice Note, offering guidance. The first is a section headed "Alternative Dispute Resolution", and the second is a protocol annexed to the Practice Note. I will not take time today to describe them in detail. They are clear and self-explanatory, and everyone involved in the work needs to know them backwards. Even "old hands" will benefit from refreshing their knowledge of them by re-reading from time to time. The Practice Note can be found at: https://environmentcourt.govt.nz/about/practice-note/

[15] Except in the rare type of case already mentioned where parties are so polarised that the case should go direct to hearing, we find that even if a case is not capable of full settlement,

some aspects can get resolved in mediation, thus narrowing issues in dispute, reducing Court hearing time and reducing cost to parties. Rarely will attempts at mediation be entirely without benefit. 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.

[16] 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.

[17] 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.

[18] 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.

[19] 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 engaged in such cases.

[20] I want to suggest that “one size doesn’t necessarily fit all”. While the Practice Note describes mediation work in the Court in quite some detail, there can of course be nuances in what happens in the mediation room. For instance, it is trite that human beings (yes, mediators are human beings!) might bring differences of personal style despite all having received the same training. Furthermore, all cases are different; the issues in dispute are different; the parties are different; so the atmosphere and dynamics of mediations can differ. We have also developed an understanding over the years that different styles of mediation might be required in different circumstances. Mediation as originally practiced in the Environment Court was as

prescribed and taught by the LEADR organisation, a system which I hope would not be too unkindly thought of as “softly, softly, catchee monkey”. I believe that in some instances, matters should go beyond that. Mediators with long experience in resource management matters can in some cases be particularly well placed to assist with reality checking, so some processes might not always be so “gentle”. I have heard it said that ADR processes run by other agencies can be anything but gentle. It would not be appropriate for me to comment on that, but I would hope that the Environment Court mediation practices usually leave parties feeling as though they have been properly involved, and treated fairly.

[21] Bearing in mind the above descriptions and comments, there are almost invariably many benefits from mediating in Environment Court cases, and very few drawbacks.

Expert Conferencing

[22] 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.

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

[24] 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 reached, then identify issues on which they cannot agree and the reasons for those disagreements.

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

[26] 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.

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

Judicial Settlement Conferences

[28] The Judges sometimes conduct 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 many 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.

[29] These sessions are conducted in a relatively forthright 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.

[30] 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

[31] We have recently developed technique 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 working together, and is designed to springboard from expert conferencing undertaken by the Commissioner, to take the proceedings to judicial conference level, but also harness the skills of the Commissioner (for instance an engineer) alongside the Judge.

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

[33] 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 subsequent settlement conference sessions to have any benefit, all persons involved would need to immerse in the sort of detail necessary for 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.

[34] A one-and-a-half-day joint settlement conference session was then conducted in a robust but 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 settled.

[35] While the expert conferencing and judicial settlement processes were moderately time-consuming of themselves in that case, I believe that a traditional hearing of the bitterly disputed case would have taken considerably longer and cost everyone a great deal more.

Conclusion

[36] A common theme amongst all these kinds of ADR, is that there are few drawbacks, and a great many benefits to be derived. Only in rare instances will they fail to achieve any kind of positive outcome and result in the time and cost of ADR processes being added on top of the time and cost of subsequent hearings. In many cases either full settlement will be achieved for a great deal less time and cost than would have been incurred in a full hearing, or sufficient numbers of contentious issues solved will result in significant savings of hearing time, for the overall benefit of outcomes and of parties' bank accounts.

[37] Another common theme can hopefully be seen in this paper. The old adage "preparation is everything" is extremely apt. The more a party prepares and puts into an ADR process, generally the more will come out of it at the end. My description of the joint settlement conference process above is a good illustration of this, but the same must apply to all processes.

[38] Judicial support for ADR processes appears to be growing worldwide. They certainly have the full support of members of the New Zealand Environment Court. In a recent study for the Australasian Institute of Judicial Administration, results of a comprehensive survey of the judges of several Australian Benches were reported. Criminal processes being something of an exception, the authors of the report recorded wide judicial satisfaction from the fact that ADR assisted courts to manage their workloads efficiently and provide them with a platform for delivering outcomes that might not be always achievable in court. Further, there was wide-

spread belief that ADR can improve the efficiency, accessibility and outcomes for the courts and for parties.[1]

[39] Members of my Court strongly believe that ADR processes will remain a core part of the work of the Court in civil and enforcement cases concerning many types of subject matter. The fact that in large part the work of the Court concerns predictions of future states and risks rather more than analysis of historical fact, does not seem to present any difficulty. If anything, such work seems ideally suited to ADR processes.

[1] Australasian Institute of Judicial Administration Incorporated, "An overview of the results of a study: Court-referred alternative dispute resolution: Perceptions of members of the judiciary", McWilliam and Grey, October 2017.