PREPARING FOR AN ENVIRONMENT COURT HEARING

Paper presented by Principal Environment Judge Laurie Newhook
to
4th Annual Environmental Law and Regulation Conference
Wellington, 30 April 2014

The role and work of expert witnesses

[1] Members of the Court consider that there is an ongoing need for improvement in the work of expert witnesses. To that end we regularly conduct seminars and workshops in concert with professional associations such as the Resource Management Law Association and the Law Societies, and we speak at gatherings of other groups. In 2012 members of the Court and senior practitioners led a "road-show" around New Zealand specifically on this topic. The road-show took the form of a workshop conducted in 8 regional centres around the country. At its conclusion I prepared a paper describing the topics covered and the many matters discussed and learned by all participants including ourselves.

[2] I recommend that registrants to the current conference read that paper, rather than I should repeat its contents here. It is called Report of Steering Group from 2012 Workshops on Expert Conferencing in the Environment Court, and may be accessed at a page called **Speeches and Papers** on our website at http://www.justice.govt.nz/courts/environment-court/documents

[3] A study of the report will show that the steering group drew on the products of the workshops to produce recommendations about the timing of conferencing in relation to proceedings overall; the early preparation of an Agreed Statement of Facts; the thorny question of whether conferences should proceed on the basis of "will-say statements" or

instead on the basis of evidence-in-chief; the timetabling of conferencing; the role of counsel; the crucial need for good preparation; the detailed organisation of the conference meetings; the preparation of an agreed witness statement after conferencing; and the applicability of the process to the framing of conditions of consent should consent be contemplated.

[4] The "learnings" from the road-show have informed a significant upgrade of the relevant section of the Court's Practice Note. Hence while there is a comprehensive section in the Court's 2011 Practice Note about the work of expert witnesses, the new 2014 draft Practice Note offers considerably more guidance. It will be found at http://www.justice.govt.nz/xourts/environment-court/legislation-and-resources/practice-notes/practice-notes

[5] If you are interested, you will see that the Court is open to submissions on the draft until 27 June this year. An address at which submissions may be lodged can be found on the website.

[6] I will now touch briefly on some key issues relating to the work of expert witnesses.

[7] The underlying themes to all work they conduct in the Court are the need for true independence, objectivity, and avoidance of advocacy. An expert witness's main capital in his or her professional life is, after all, **reputation**, and this will only be built (or can rapidly be lost) by honouring these objectives at every turn, and they underpin the contents of the section of the Practice Note just referred to. The opening paragraph of all statements of expert evidence lodged in Environment Court cases is required to record that the witness is familiar with this and will abide by it. It is unfortunate that there are at times still occasions on which a witness, despite having set out the obligatory words, has no clue as to their content and meaning. My approach on those occasions is to ask the witness to tell me in summary (without first turning to the Practice Note) what its provisions require. It is very salutary when he or she cannot do so !

[8] In recent years there have been developments in the area of narrowing the scope of hearings in order to minimise cost and delay. This has been by directing **conferencing** of groups of expert witnesses. For this we almost invariably utilise the services of Environment Commissioners as facilitators.

[9] The road-show workshops (and now the new draft Practice Note) have assisted in refinement of this aspect of work by and with expert witnesses. Notably, counsel are now much better informed about their role in preparing the experts for conferencing, remembering that counsel cannot of course attend the sessions themselves. Counsel also have duties of managing the expectations of their clients, it being understandable that there will be some anxiety on their part about leaving their selected expert unattended to meet with his/her peers and reach professional agreements in a totally independent and objective fashion.

[10] It is important that the process of conferencing of experts should result in the saving of time and costs in the resolution of cases. That is, it should be **cost-effective**. Cost-effectiveness of this sort is difficult to measure empirically, but it can certainly be said that the converse would be a risk of the process simply becoming another expensive layer of process in the litigation.

Electronic enhancements in the work of the Environment Court

[11] We live in an electronic age. Nevertheless, some of the Ministry of Justice hardware and software supplied for use by the Judiciary is very old in ICT terms, with some packages heading past the termination of vendor support. Judges are hopeful of seeing some urgent improvements to help with serious issues of speed, mobility, and reliability (some have recently commenced). These, of course, are difficult issues in times of fiscal austerity.

[12] A particular issue for the Environment Court is that a high percentage of its work (both mediations/facilitated expert conferences

conducted by its Commissioners, and Court hearings) is undertaken away from courthouse buildings. The ICT infrastructure of the Ministry of Justice, a significant part of which is required to support the work of the Courts, has always been arranged essentially for the daily work of the Ministry and some Courts in courthouses and central administrative offices. The sheer mobility of the Environment Court can present real issues for it and for the infrastructure.

[13] There are major projects undertaken from time to time by which, at great cost, something new is planned. An upgrade to the Ministry's Case Management System in the mid-2000s, to serve the Environment Court, was an example. It was not designed for our Court, but with considerable effort we adapted to it. It struggles to support the big, multi-party, multi-issue cases that have been increasingly coming to us in recent years. Notably, it is a long way from being anything like a management tool.

[14] There is a brighter side. Ministers have, in recent years been calling for "cheap and cheerful ICT solutions" in the public service, and in Courts as an independent arm of Government. We have identified solutions that can assist the Environment Court to streamline and speed up processes for the obvious end good. With initial encouragement from Ministers, there has been a number of Judge-led innovations commenced in the last 3 years:

- The Environment Court has a website which, despite its clunky look and feel, has been adapted to enable parties in some large cases to exchange evidence. The practice is currently being extended to some very large direct referral cases under way in the Court. We hope to see more of this, but need to make progress in connection with the third bullet point below.

- Several divisions of the Court have utilised i-Pads to conduct major hearings, initially by way of a pilot, but increasingly now as "business as usual". Each of the three panel members in the cases divisions is issued with an i-Pad, as is the hearing manager. A current stumbling block which causes significant labour for Registry staff, is that cloud and other software systems are

eschewed by the Ministry on security grounds, making the uploading of large quantities of hearing materials (including materials developed and lodged during the hearing) time-consuming and inefficient. Evidence and other materials prepared for Environment Court hearings are much less sensitive in the security sense than in the other Courts, but we have yet to move to achieve efficiencies with uploading that are being enjoyed by some players, particularly some of the larger law firms, barristers and expert witnesses.

- Counsel in these cases are also using i-Pads (the Court will always signal early in the life of a case when it intends to do so itself), and are able to move with the Court at a much greater pace than traditional paper-based hearings. Further development of use of this technology will be, to a degree, dependant on the next bullet point.

- The Court would like to move urgently to pilot electronic filing. About 6 years ago it was selected by all benches and the Ministry, to run a pilot for civil courts. That project was cancelled (with justification) in the 2011 Budget, because it was an unaffordable, process-laden project likely to produce a home-grown system whose ultimate success could not necessarily be guaranteed. We have since discovered some cheap and cheerful examples of the "art" in Australia. One is operating in one of the lists in the Supreme Court of Victoria, processing cases rather similar to our own. For a cost in low-five figures, a part of one of our registries could pilot a similar, off-the-shelf system for NZ Civil Courts. We have been the subject of a work-flow and business study by an international ICT (Courts) expert, and have implemented that consultant's recommendations to ready ourselves to conduct a pilot (and achieve efficiencies and national consistency in any event). I am anxious that little has happened since I addressed this conference last year. (I is worth noting that the system implemented in the Supreme Court of Victoria was, 6 months after commencement of the trial, set up as "business as usual" across all cases in the List, for very little extra cost. A Court as small and agile as the Environment Court is the ideal test bed for these sorts

of innovations, and I hold the view that successful implementation of e-filing should contribute to further and necessary enhancements of the systems described in the previous two bullet points).

[15] Visitors to our Registries and Chambers are flabbergasted at the quantities of paper that confront them. This, however, wouldn't come as anything of a surprise to our regular "customers." It really is necessary to wage war on paper. Why shouldn't it be thought efficient to be able to save many days of hearing and at the same time to be able to avoid lugging around the countryside, twenty, thirty, or more lever-arch folders of material per panel member? (An identical experience is endured by parties). Yes, there are mild security issues around use of i-Pads, but care in the manner of use of them can limit the risks, and are frankly not hard to implement.

[16] I look forward to the day when all members of the Court and their hearing managers run cases (particularly the larger cases) through i-Pads, evidence is exchanged amongst parties via a web portal and lodged in the Court electronically, and material uploaded seamlessly to the tablets. I reiterate that a small and agile court like the Environment Court is the ideal place to pilot these systems for the benefit of courts across the spectrum.

Direct referrals

[17] There is an increasing flow of these large cases, where councils resolve to refer applications directly to the Environment Court for first instance hearing. Last year's Amendment to the Resource Management Act has the potential to extend the opportunity for applicants to tread this route once new Regulations are in place. The Ministry for the Environment advises me that public consultation about the content of such Regulations should occur next month.

[18] The Environment Court has worked hard to develop processes, and a section of the new Practice Note including an entire appendix on the subject, is designed to enhance and streamline them. I once again refer you to the relevant page on our website.

[19] There has been the occasional procedural hiccup in these cases, but by and large those who have participated in them have been complimentary of the speed within which hearings have been reached, and the overall approach undertaken by the Judges and Commissioners.

[20] The essence of the statutory provisions is that applicants for consents can apply to Councils for their case to be referred directly to the Environment Court for hearing. Where Councils grant these applications, they are then to prepare a report for the Court and the parties. S 274 RMA then applies to the proceedings, so persons or bodies, whether or not they previously made a submission to the Council, must follow the requirements of s 274 if they wish to be party to the proceedings. Persons who do not give notice under s 274 will receive no further communication from the Court, other than ultimately to receive a copy of the Decision(s) when issued.

[21] Appeal processes in part 11 RMA apply after the s 274 period. Nevertheless, because the process leads to a first-instance hearing, there will generally be many more parties than in most appeals. The case-managing Judge may therefore impose further directions to move the proceedings forward efficiently.

[22] Included amongst these can be the appointment by the Court of Process Advisors to Submitters, to whom parties and proposing parties can have access free of charge for advice about the processes. These advisors are not able to give advice about the substantive law applicable to the proceedings, or about areas of expertise that may be relevant to the issues in the case.

[23] The case-managing Judge may take other steps to enhance the efficiency of the process, particularly where there are many parties registered, including directing communication by electronic means wherever possible, use of the Court's website in an interactive way for such things as the exchange of evidence, and other means.

[24] In these cases where large numbers of parties are registered, the Court may take steps to encourage them to group together and act conjointly in the interests of efficiency and cost saving.

[25] A recent example of the running of a case using these sorts of approaches, is a direct referral from Auckland Council of applications for consent to establish a marina at Matiatia Bay on Waiheke Island in the Hauraki Gulf. There is an entire page devoted to the case on the Court's website, where anyone interested can read conference minutes, directions, and many communications passing between the Court and parties and amongst parties. Shortly, the page will be utilised for the exchange of evidence amongst parties and its lodgement in Court, which will bring about a very significant saving in costs of labour, paper, and distribution, compared to what would have been required to run a case in which there are 310 parties !

[26] The Court is very aware that not all parties have access to computers or are particularly computer literate. A reading of the materials on our webpage will reveal steps taken to assist such parties, including arranging for the local council office to make available a couple of computer terminals and staff to assist in the use of them.

30 April 2014