SELF-REPRESENTED PERSONS AND COMMUNITY GROUPS IN THE ENVIRONMENT COURT

Notes to inform and assist them, and assist counsel in dealing with them, in Environment Court cases

A Webinar Presented for ADSLI on Tuesday 7 March 2017

Introduction

1. Publicity for this webinar announced the following, and I use it to introduce my presentation.

> *With increasing numbers of self-represented persons and community groups appearing in the Environment Court, having diverse (and potentially conflicting) interests and limited budgets, accommodating and managing them is becoming increasingly important. This webinar will provide judicial and counsel perspectives and insights, with a view to assisting counsel and others appearing before the Court.*

2. A high percentage of parties in cases before the Environment Court in recent years have seen self-represented persons and community groups involved. Some community groups are long established NGOs with much experience in conducting cases before the Environment Court.[1] Others are formed to meet the circumstances of individual issues as they arise in the community. Personnel associated with the latter are often not familiar with our processes. Similar to the latter category, many self-represented parties often find themselves engaging in an Environment Court case for the first time in their lives due to concerns about proposals in their immediate neighbourhood.

3. Some people and organisations not used to our processes get involved in a case carrying expectations, to one extent or another, that the Court will guide them through the processes, tell them the law, and generally assist them, in order to "balance the scales" against better-resourced parties represented by lawyers and calling numerous expert witnesses. Life, of course, is not so simple. The Environment Court is constituted under Part 11 of the Resource Management Act 1991 (RMA), and has the constitution, powers, discretions, and obligations, set out between sections 247 and 308. Nowhere is the Court mandated to offer legal aid, legal services, or to rectify

[1] An example is the Environmental Defence Society Inc., which itself provides advice to others on occasion.

power imbalances. The closest one gets is however in s 269, which is worth setting out in full:

> **269 Environment Court procedure**
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> (1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.
>
> (1A) However, the Environment Court must regulate its proceedings in a manner that best promotes their timely and cost-effective resolution.
>
> (2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.
>
> (3) The Environment Court shall recognise tikanga Maori where appropriate.
>
> …

4. It is also worth mentioning s 276 RMA, authorising the Court to receive anything in evidence that it considers appropriate to receive and to call for anything to be provided in evidence which it considers will assist it to make a decision or recommendation; and that it is not bound by the rules of law about evidence which apply to judicial proceedings.

5. The Court must be aware that offering assistance to self-represented persons and community groups can create unfairness for parties who have engaged the often considerable cost of hiring lawyers and experts. At the same time, we acknowledge that if we offer some level of process guidance to such persons and groups, proceedings can flow more smoothly and possibly reach resolution sooner, for the benefit of all parties. All of this is a balancing act, and it is a major feature of the work of this specialist court to which significant numbers of self-represented persons and entities come.

Processes and Resources

6. In the current age the first port of call for any party, particularly a self-represented one, should be the website of the Environment Court https://environmentcourt.govt.nz/. A considerable amount of information is available there. Prominent on the home page is access to a number of further pages and links, including "*About the Environment Court*", "*Overview of the Environment Court's Processes*", "*Forms & Fees*", "*Use of Te Reo Māori and Sign Language*", and contact particulars. The Overview page can be

particularly useful, setting out a simply-worded summary of the main steps that occur in resource consent appeals and plan appeals, and offering advice about lodging appeals or applications, or getting involved in proceedings. It also offers advice about particular things to note before a hearing, as well as at a hearing and after; and importantly about mediation.

7. A very important page, offering several links, is one called "*Representing yourself in the Environment Court*". It is divided into three parts, concerning legal assistance, resources, and a glossary of terms. Here again, in simple language, is a wealth of information for those new to these processes.

8. The page offers advice about finding a lawyer with the requisite specialist knowledge, including by inquiring of law societies, the Resource Management Law Association (RMLA), and local community law centres.

9. Of considerable importance is advice that the Environmental Legal Assistance Fund (ELAF or Fund) exists to receive applications for assistance to help pay for legal and other professional advice in resource management litigation, being available to environmental, community, iwi and hapu groups (but not individuals). A link is provided to relevant pages of the website of the Ministry for the Environment (MfE) concerning the ELAF.

10. As many specialist RM lawyers will know, those pages on the MfE website provide considerable information about the Fund, in particular how to apply for grants. They will also know that making an application is no simple task, and that a great deal of information must be provided to the Fund, including:

    - The group's ability to manage the case including any previous experience in legal cases.
    - The prospects of success for the case.
    - Whether the case is unreasonable or undesirable.
    - Whether the case will set a legal precedent.
    - Whether the group and/or its members have a private interest in the outcome.
    - Any overlap with other parties' cases.

- Whether the group is open to mediation.
- Whether the case relates to policy and planning instruments.
- Whether the case relates to a Board of Inquiry or a Direct Referral to the Environment Court.
- Any other matters arising out of the application.

11. Information is also offered on the maximum size of grants, eligibility criteria, aspects of parties' cases that the Fund will cover, and aspects that it will not cover. Considerable advice is offered about timeframes for applications, completion of application documentation, the decision-making framework and other matters.

12. Of particular note is that there is a degree of screening by the Fund administrators, given that "*reasonable prospect of success*" features amongst the criteria for grants.

13. Groups that have been granted assistance have, on occasion, achieved significant successes in cases before the Environment Court. The most notable in my experience was the participation of a funded group called Direction Matiatia Inc. (DMI), in a case before my division of the Court, which enjoyed a resounding victory in persuading us to refuse consent for a moderately large boat marina at Matiatia Bay on Waiheke Island. As I happened to learn from subsequently considering costs applications in that case, the cost to DMI of fighting the case was very considerably higher than the aid granted it by ELAF; the group engaged in extensive community fundraising including the holding of concerts and many other activities.

The use by the Environment Court of Process Advisors to Submitters

14. 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. An early example was the Waterview Motorway Board of Inquiry which I chaired, where a high percentage of the 70-odd parties was self-represented. The applicant in each case meets the cost of such appointments.

15. 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 will 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 everyone time and money; and the staff of the Environmental Protection Agency (EPA) and the Boards themselves may be saved considerable work, often repetitive and time-consuming, in ensuring that hearing and pre-trial processes flow efficiently. Time-wasting can be avoided, and the case proceed the quicker for taking this step. Last but certainly not least, parties can sometimes be persuaded to merge their interests under the umbrella of an incorporated body in order to attract funding support and participate in cases in a more professional way. This happened in the Waiheke Marina case before the Environment Court.

16. It is a fact that the hearing work of the Environment Court currently tends to comprise mainly the larger and more complex cases, including the Direct Referrals. (The smaller cases usually settle in mediation.) Of relevance is the fact that these larger cases are the ones that tend to attract considerably greater numbers of self-represented litigants than customarily have appeared in our Court.

17. The Environment Court has accordingly found it extremely beneficial to make use of what we have come to call "process advisors to submitters". We have done this re-badging in the face of anxiety expressed by some applicants who were concerned (even though wrongly) that they might be funding parties to substantively oppose their aspirations. We have continued to refine the process in the last couple of years.

18. I will now offer a little more insight into the Waiheke Marina case, which I case-managed in the lead up to a hearing before my division of the Court in 2014. 310 parties registered under s274. Much of the pre-trial activity was managed electronically, which is something to which I shall return. Reference to the Court's website will reveal a page that was dedicated to the running of this case. On that page you can see a bold note as follows:

    The Court's Process Advisors, …. and …. are available to provide procedural advice. Parties may ring B… on 021 …. T… on 027 …..

19. The First Case Management Minute, accessible via the website page, showed that the appointment of the Process Advisors was in fact one of the earliest directions made in the proceedings. That is as it should be.

20. I identify a few pointers to making best use of this office. First and foremost, I think it is critical that the Court appoints very experienced resource management practitioners who are also known to have good skills in dealing with people who are often anxious

and lacking in knowledge about our processes. These officers need to make themselves readily available via cell phone and email as necessary, and to conduct meetings in appropriate localities. It can also be useful to have them available pretty much during the whole pre-trial and hearing process. Advisors who are really skilled will know how much time and effort to spend to genuinely help parties and the process.

21. The employment of the process advisors in the Waiheke case produced the major benefit that the great majority of the 310 submitters (I think about 290 of them) agreed to DMI being their address for service and representing them. The society was represented by counsel and engaged independent expert witnesses, and brought significant professionalism and focus to the case. Overall time savings and other efficiencies most certainly accrued.

Alternative Dispute Resolution – Primarily Mediation

22. In almost all cases filed in the Environment Court, once all parties have been identified through the mechanism of s 274 RMA, the Court will direct the case to mediation. Parties can also seek mediation at any stage of the progress of a case.

23. Section 268 RMA authorises the Court to conduct many kinds of alternative dispute resolution, but mediation is the one most commonly used.

24. The purpose of mediation is to resolve cases through mutual agreement of all parties, or at the very least to resolve some issues within cases. It is a voluntary process but strongly encouraged by the Judges. The mediation service in the Environment Court is, as is well known, free.

25. Mediation sessions are facilitated by the Commissioners of the Court, who are specifically trained in the process.

26. Benefits of successful mediation include:

- Avoiding the need of going to a formal Court hearing, and avoidance of the significant costs associated with that.

- Agreeing upon mutually acceptable solutions to disputes or aspects of them.

- Exploring a range of options for solutions in cases, some of which can be quite innovative and even involve “side agreements” beyond the jurisdiction of an individual case.

- Endeavouring to resurrect or build constructive ongoing relationships amongst parties.

27. All parties in a case should attend the mediation for it to succeed. Parties can be represented by lawyers or others, but all individual parties are encouraged to attend in person to articulate their concerns. Any parties not attending in person are required by the Court's Practice Note to be represented by someone with full authority to reach agreements and settle the case.

28. These processes really work. Approximately 75% of cases in the Environment Court are resolved through mediation. The saving in cost to all parties is usually considerable.

29. Self-represented parties will usually feel somewhat more comfortable attending mediation than participating in a formal court hearing. It is also the case that the Commissioner/mediators have somewhat more opportunity to remedy imbalances in power amongst parties than can be achieved in a formal court hearing.

30. Mediations can vary in style and content depending on the individual case, however sessions will generally proceed as follows:

    - a welcome and introduction to the process by the mediator;
    - each party then provides an overview of how they see the issues in dispute;
    - the mediator will then summarise the issues of concern and identify areas of agreement and disagreement;
    - the mediator will facilitate discussion about the unresolved issues to endeavour to have every party understand the views of the others;
    - parties will be asked to identify ways in which an issue could be resolved, thinking as laterally as might be necessary;
    - parties will be encouraged to assess whether suggested solutions could form a binding agreement and work in practice; and
    - the mediator will assist the parties to reach agreements and document the same.

31. Parts of the mediation session will be conducted in plenary form, that is with all parties present. Other parts may involve parties or groups of parties entering break-out rooms

for discussion amongst themselves, often facilitated by the mediator. It is particularly by means of this process that mediators can identify power imbalances amongst parties, and take steps (whether in break-out mode or a plenary session) to try to rebalance matters somewhat.

32. If agreement is reached at the mediation, a formal draft consent order will be prepared and signed by all parties, and presented to a Judge for subsequent approval. Any side agreements reached in order to facilitate overall agreement will not be shown to the Judge. Draft consent orders will usually be accepted and formalised by the Judge, but on some occasions this may not occur, for instance where subject matter is beyond the jurisdiction of the case. In such instances the Judge will direct the parties to revisit matters, sometimes in further mediation. In rare instances the Judge might set the case down for a hearing at least on the points that are of concern to him or her.

Conclusion

33. Given the broad discretions and flexibility of process mandated by s 269 RMA, and the operation of the Court's free mediation service, the Environment Court feels justified in considering itself to be relatively accessible, agile, and user-friendly. The Court receives high numbers of self-represented litigants, and is attuned to accommodating them in its processes in a manner that we hope is fair to all parties, self-represented or not.