EFFECTIVE MEDIATION

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(Delivered in his absence by Judge Laurie Newhook)

An address for a one day workshop arranged by the Environmental Defence Society on 13 April 2013 at Gisborne.

Thank you for inviting me to talk to you about mediation. [Russell self-effacingly writes :] I cannot claim to be the world's best mediator and there are many other Environment Commissioners who have more experience than me. Nevertheless I have had the benefit of training, discussions on the topic with my colleagues and the conduct of many mediations. So I will try to bring the results of this experience to bear in what I have to say.

I am also pleased to be able to contribute to this worthwhile workshop organised by the Environmental Defence Society. I first encountered EDS in 1972 in Hamilton. It challenged a water right issued for the proposed Huntly Power Station. I was the author of the resource consent application as it is known these days and we locked horns before the Planning Tribunal presided over by Judge Arnold Turner. David Williams (later QC) and Mike Holm led the charge for EDS supported by a bunch of planners and university types from Auckland. It was a memorable experience and I remember it didn't seem to worry them that the electricity to be generated was needed mostly for Auckland.

The Environment Court offers a significant mediation service to parties in cases before it, presently at no cost over and above the filing fee on the appeal paid by the original appellant. The service succeeds in resolving something between 60% and 70% of case topics lodged in the Court, year by year. It is regarded by the Court and many parties as an extremely effective and cost-efficient means of resolving cases.

Mediation is a voluntary process for parties in dispute to sort out a solution in the presence of a facilitator.

Before talking about mediation as conducted in the Environment Court, let's consider some thoughts on conflict:

One can't go straight from intense conflict to resolution. A pathway is needed.
Conflict means a party is not ready to give something up. Willingness is needed.
To begin anew one needs to know the present position.
If one is listened to one can experience some empowerment.
People in conflict go into stereotypes, take thin positions, show no vulnerability and defend their identity.
The aim is to improve relationships in order to resolve the dispute.

These basics are taught in a course on conflict resolution by the LEADR organisation.

Mediation in Environment Court proceedings is authorised by section 268 of the Resource Management Act.

It is a section that is short and to the point, unlike some other provisions in the Act.

The Court with the consent of the parties can get one of its members to conduct a mediation to facilitate a resolution.

Other similar processes such as expert caucusing may also be undertaken. Collectively they are referred to as alternative dispute resolution processes.

It is a practice of Environment Court Judges to include a mediation stage early in the case management of most appeals made to the Court. However, it is not compulsory, and a party can refuse to agree to a mediation meeting.

That will not count against the party in a subsequent hearing before the Court or in any assessment of costs. But mediation is nevertheless strongly encouraged by the Judges because even if a case is not capable of full settlement, some aspects could get resolved thus narrowing issues in dispute and lessening Court hearing time and cost to all parties. Furthermore, we encourage parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Many are the cases where problem solving has moved outside the square containing the issues in the case ! For instance, side agreements (that do not get shown to the Judge) are sometimes entered into.

Early in the life of a case the Court invites the parties to take part in a mediation. If they agree the Court will issue a Notice of Mediation that states the place and time allocated. The Court will also appoint one of its Environment Commissioners to conduct the mediation.

Environment Commissioners are specifically trained to conduct mediations. Their role is not to settle arguments but to facilitate the parties to settle or at least identify the particular issues that are agreed and those that keep them apart.

The process that usually occurs is that there is a fair head of steam present at the beginning and initial discussion is wide ranging. That is to be encouraged but without over-talking one another or being rude. The issues emerge and the discussion widens. Each party in turn is given a chance to state their concerns and that opportunity is repeated until all the issues are identified.

Then each of the issues is considered to see if some solution is possible. It might mean some design modification, a compensatory action or an acceptance, after explanation, that the concern is satisfied. Or it might remain in dispute.

The areas of dispute and discussion narrow down during this process. A focus emerges on the fundamental outstanding issues.

At this stage a party might want to meet privately to review the matters outstanding and adjust their position. That is encouraged and the Environment Commissioner will

offer to contribute to that private discussion. Any outcome reached can be brought back to the mediation by the party – the Environment Commissioner will not report any discussion back.

And so the process continues until either the issues are settled or some are settled and some remain for determination by the Court.

Matters discussed during a mediation are confidential to the parties. Only the written signed outcome from a mediation can be reported to the Court. It will not accept any comment, document prepared for the mediation or other information prepared specifically for the mediation other than the agreed outcome.

This confidentiality is important for the process. It means a party can make offers or suggestions aimed at resolving the matters without fear of being saddled with them later if they do not prove to be acceptable. A party cannot come along to the Environment Court later and say a party in mediation offered such and such a solution but now will not.

Confidentiality is enforceable in most situations but I make it a practice to ask the parties to agree that what is said in mediation stays in the room; that there is no media reporting and the only outcome is any that is finally agreed between the parties.

That outcome can be of two forms.

If agreement on all matters is reached then a Consent Memorandum is drawn up either at the mediation or afterwards by one of the counsel present. Once the wording of that is agreed by all the parties and signed off it is sent to the Environment Court requesting that a Consent Order be made. This is often also done when agreement is limited to just some (but usually key) aspects of a case that can be separated out in some way from the issues unresolved.

That then has the potential to modify the resource consent or plan instrument in accordance with the agreed Consent Memorandum. In considering a consent order the Court will ensure that the result conforms to the requirements of the Resource Management Act, and in a small percentage of instances might not be signed off by the Judge.

As already mentioned there can be a second outcome, an agreement between the parties that does not require action by the Environment Court. It becomes in effect a contract between the parties. It is a side agreement and can cover any matter that parties decide to address.

When some matters are settled and others are not, the parties may be required to prepare a statement of matters on which agreement is reached, and those not. The latter are to include succinct reasons for disagreement. At the subsequent hearing the Court will concentrate on the matters that are unresolved.

On some occasions there may be no outcome from a mediation.

In these later two cases the Environment Court will set the matter down for hearing and a Notice of Hearing will be issued to the parties.

A mediation may require more than one meeting. Some issues or options might require further investigation or design. In that case a timetable is agreed between the parties and milestones established including a future mediation date for which a new Notice of Mediation will often be issued.

Mediation is certainly much less expensive than preparing for a court argument, with witness expenses, legal costs and the risk of an award of costs by the Court. I have on one occasion, when a party got so frustrated that they prepared to walk out, reminded them that at the mediation they were in a canvas tent but the next step would be a gold tent! Funnily enough they returned to the table and a little while later reached agreement.

It is a process that also offers opportunity for a wider range of solutions than are possible in a Court decision. Remember the potential for side agreements ?

Parties to a mediation need to come well prepared to argue their point of view but with authority to yield to some matters even if insisting on others.

Parties can represent themselves and often do. They can bring supporters within reason, who can contribute, and they can bring an expert or two and their counsel.

Lawyers coming with their clients need to remember they are in a mediation. Their usual duty to their clients needs to be tempered by the objective of the parties in mediation, which is to seek solution often involving compromise. I have found lawyers with that attitude greatly assist the process.

The Environment Commissioner presiding will ensure a fair informal hearing without one party dominating.

If one party does not have authority to agree to suggested solutions then other parties can become reluctant to offer solutions and the process is impaired.

At the beginning of a mediation the Environment Commissioner will usually ask each of the parties if they have authority to settle and what the limits, if any, are to that authority. Sometimes officers from the Council need to check with a senior officer or politician, which should be possible by telephone at the appropriate time during a mediation. However, the Court is increasingly endeavouring to encourage all parties to be represented by people of sufficient experience, knowledge and authority, that the business of the mediation flows more easily, and resolution arrived at expeditiously.

When preparing for a mediation the registrar will ask the parties how many people are expected to come (including experts), and if particular technical matters are to be debated. If experts are required for particular issues it is important that all parties know that, and can bring an expert of their own if they wish. Sometimes if an expert attends alone the debate in the mediation can be stymied with little progress.

That brings me to mention another form of dispute resolution; a conference of experts.

This not a mediation but a meeting between the experts in a field that are to be called by the parties to give expert evidence in Court. Often the conference is chaired by an Environment Commissioner. These experts are not there to advocate for the party that is calling them. They must address the issues each as an independent expert, and objectively. The outcome is a statement from them that lists the issues they agree are relevant, those that they agree about, those that they disagree about and succinct reasons for the disagreements.

The outcome of an experts' conference can affect the way a mediation might proceed although more often expert conferencing occurs after sessions of mediation when full agreement has not been reached.

A mediation is successful when it achieves an agreed outcome that avoids the need for a Court hearing, especially at its first or second sitting. It is still successful when it settles some of the issues and narrows the outstanding matters that need to be decided by the Environment Court. Even when no agreement is reached a mediation often permits a frank discussion between the parties in a supervised and structured forum and helps make the evidence to a subsequent Court hearing more focussed.

I offer a "snap shot" statistic from the 2009/10 year. The Environment Court held 516 mediations, of which 60% reached agreement in full or in part. An unknown number of others produced agreement at some time subsequent to the mediation, usually after further negotiation amongst the parties.

The Court's investment in mediations in that year totalled close to $1M. That cost included venue, travel and staff costs. It is a service offered by the Court in the belief that the savings in Court time and the parties costs are well made. It is also a process that allows the parties a chance to sort out their differences themselves with a wide range of options rather than having a decision imposed on them by the Court within the constraints of the legal provisions.

Finally, we must ask the question, how can mediation best be made effective ?

Firstly of course the nature of the dispute itself should be examined. If the parties are irretrievably fixated and polarised the best course might be to proceed straight to a hearing and get the Court to rule.

Or the case might be primarily concerned with a legal argument in which case it might be more logical to go straight to a hearing.

So a mediation attempt in these cases is unlikely to be effective.

But there would be few other examples of Environment Court disputes that are inherently unsuitable for mediation.

There are probably five aspects in a mediation; the party promoting something, the party opposing it, the respondent council, the mediator, and the process.

Each can make or break a mediation.

A mediation is essentially voluntary so the intentions, manners and openness of the parties predominate. They control how effective a mediation might be. Solutions to a dispute usually require compromise. Seldom is one party completely right. The trick is to determine accurately the issues in dispute and then to seek a position on each issue that the parties could live with even though it might not be their preferred position.

Questions typically look like this :

- How much compromise by each party is it worth to avoid the next step?
- If I hold out am I likely to win the next time?
- Are there side agreements possible that won't be available in the next step?
- What altered design could I accept?
- What are my costs if I have to go to the next step?
- Are there conditions possible that relieve the impacts?
- Are there steps that could be offered that might soften the opposition?

These are some of the reality checks that need to be addressed by the parties during a mediation. Often the Environment Commissioner will use them to encourage some movement towards agreement.

An Environment Commissioner has been trained to assist with accurate definition of the issues, and to encourage objective consideration by the parties. A full and fair opportunity to express and discuss the issues and possible solutions is his or her aim.

The way this is undertaken obviously has an important effect on the effectiveness of the mediation. A light hand on the tiller, sails trimmed and running nicely before the breeze will give a smooth journey and when the odd gust comes through a firm hand to keep stability and course is needed.

Then there is the process; informal, orderly, fair, not threatening, constructive with timely reality checks. Sometimes the initial stages seem to get broader and broader with some despairing that a solution will ever emerge. That is the time when the issues and feelings, some underlying, are identified. After that is completed the process becomes rather more focussed being able to deal with the matters that have arisen. Reality checks on each of these can help to find solutions that can be accepted.

Two good reference works on mediation practice are a publication produced by MfE called "You, Mediation and the Environment Court (An Everyday Guide to the RMA)", and the Environment Court Practice Note "Mediation protocol: Court-assisted mediations", to be found on the Court's website.

Thank you for this opportunity to introduce a discussion on mediation.