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MEDIATION IN THE ENVIRONMENT COURT

A COMMENTARY BASED ON *WORKING MORE EFFECTIVELY IN A LEGAL ENVIRONMENT UNDER THE RESOURCE MANAGEMENT ACT* BY P R SKELTON AND C KERR

INTRODUCTION

Over the last five years mediation has become a significant means whereby the Court is able to dispose of appeals by way of an agreement between the parties in dispute.

Currently about 10% of cases before the Court are settled through mediation undertaken by Environment Court Commissioners.

Mediation is a form of dispute resolution in which *"the process by the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs".*[1]

THE PROCEDURE FOR ESTABLISHING A MEDIATION

An essential ingredient of a successful mediation is that the process is voluntary. All the parties involved in the case need first to agree that mediation is a feasible option for resolving the matters in dispute and that they are willing to embark on the process.

Court-assisted mediation can arise in a number of ways.

Firstly the Environment Court, "with the consent of the parties... may ask one of its members (a Commissioner) or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during a hearing".[2]

Secondly any or all of the parties may make a request to the Court for mediation.[3] This may arise from prompting by the Registrar when the parties are advised of the appeal or through a request made to the presiding Judge at the time of a "callover" before a hearing.

Whatever prompts mediation, and provided everyone involved agrees, the usual procedure is for the Registrar to arrange with the parties and the Commissioner a suitable venue (near the locality of the subject matter) and a date and time. A formal Notice of Mediation is then sent to the participants and the file is sent to the Commissioner who will undertake the mediation.

SETTING UP THE MEDIATION

It is often the practice of a Commissioner to write to all the parties confirming the arrangements made by the Registrar and outlining what is involved. This includes an outline of the process, the need for people to have power to act and be able to negotiate on all issues, the need for confidentiality, and the facilitating (rather than directing) role of the mediator.

At the appointed time and place when everyone is assembled the Commissioner invariably welcomes participants and ensures everyone is introduced. Assuming the role of mediator he or she then reiterates what is to follow and ensures that the each participant is in a position to negotiate on all issues and is empowered to act.

At this time the mediator usually finds it necessary to remind everyone present that mediation is a private process and confidential to the parties involved and that it would be quite improper for anyone to make public anything said or done during mediation.

As mediators the Commissioners also explain that their role is simply to facilitate the development of a common understanding of the position of each of the parties and the resolution of the issues in dispute. They are not there to "decide" anything.

Everyone is advised that in the event of the matters in dispute not being resolved and a Court hearing being required the Commissioner undertaking the mediation will not be a member of the Court that hears the case.

THE MEDIATION PROCESS

At the beginning of the mediation process each party needs to tell everyone present what the issues are from the perspective of that party. This step is important in identification of the "problem".

At this early stage Commissioners usually encourage participants to offer suggestions or options on how the differences between the parties could be resolved.

Through a series of interchanges with everyone present the issues generally become clarified and common ground can be identified.

The role of an Environment Court Commissioner when acting as a mediator is predominantly to enable this free exchange of opinions to take place within an atmosphere of trust and civility.

When it is appropriate and agreeable to the parties the mediator normally meets privately with each of them to facilitate the exploration of options, the revelation of hidden fears and agendas and to allow time for deliberation. In the private sessions the mediating Commissioner is sometimes required to be a broker between the parties and at the same time act with scrupulous fairness so the confidence of everyone is maintained.

After a further joint session or two the proceedings generally move from a "problem defining" phase to a "problem solving" phase.

In subsequent joint sessions ideas are explored further and gradually the issues in dispute are resolved through compromise, the development of new solutions to the "problem" or by the acceptance of a particular position.

It may take several private and joint sessions, sometimes involving reconvened adjourned meetings for matters to be finally resolved.

OUTCOMES OF MEDIATION

It may be that all or some of the issues cannot be resolved. It is possible that resolution will be achieved on only some of the issues but at least the issues in dispute may be narrowed.

In either case the matter has to proceed to a hearing at which the Court hears evidence and submissions and decides the case. It must be remembered that anything said at mediation cannot be referred to at the hearing. This is because to do so would breach the confidentiality requirements of mediation and consequently is not normally admissible.

By far the most important outcome from most mediation sessions is the recognition and development of an improved understanding of and respect for the position of each of the parties. It is this result which leads to enduring formal agreements.

Not all matters in dispute are necessarily within the ambit of the proceedings before the Environment Court. It is always necessary for these issues to be resolved at the same time. As a result the outcome of the mediation may include a memorandum to the Court which includes a draft Consent Order and a side agreement which settles other issues in dispute or provides for things to happen to enable the interests of all parties to be accommodated.

In general, the mediation process: (a) "empowers" those people who come to mediation with some trepidation and, (b) enables a settlement to be reached that is fair and reasonable to all parties. As a result confidence in the process is growing.

THE ROLE OF PARTICIPANTS

By far the most important people at any mediation are the people who are the "persons" in the case. That is the appellant, respondent, applicant, or other interested party. These are the people for whom a mediated settlement has the most meaning and effect.

It follows that all these people need to be present in person or at the very least be represented by people with delegated power to negotiate and complete the formalities of an agreement. It is hardly fair on the other people who have agreed to mediation for one or other of the parties to need to refer back to their principals before committing themselves to any element of an agreement.

Clearly there is a need for some flexibility in this matter, particularly when a settlement can be reached well outside expected bounds or in a form not previously contemplated. Nevertheless when agreeing to mediation participants need to understand that they enter into mediation for a purpose - that is to try to reach a consensual agreement.

It is perfectly reasonable for anyone coming to mediation on a subject that is highly contested to have very strong opinions about the issues and to express those opinions with emotion. The mediation process provides an opportunity for opinions and feelings to be expressed within a confidential forum. It is the role of the mediator to "manage" the often vigorous exchanges between participants usually by soliciting courteous behaviour.

THE ROLE OF LAWYERS AND OTHER EXPERT ADVISERS

Lawyers involved in mediation are usually well-versed in court procedures and in most cases are crucial to a successful outcome. This is because, with their understanding of the law, they can quickly advise their clients on the legal implications of a possible solution. Their skills are also very much in demand when "heads of agreements" and "draft consent orders" are being prepared.

Presumably because of the adversarial nature of their profession some lawyers find it difficult to accept the possibility of a mutually agreed position when from their experience of the law a case could, in their opinion, be "won" for their client in the Court. However, most lawyers appear to be wholeheartedly supporting mediation as a means of achieving a negotiated settlement for their client.

When called in to assist in the mediation process some other experts find it difficult to separate their perceived duty to their client from their duty to the Court to act independently. An expert can be a vital part of the mediation process especially when his or her particular expertise is needed to establish the facts relating to, or devise means of resolving, a problem.

In summary the principal role of the experts is to tell everyone present what the issues are (within their particular expertise), outline the options for management, present an analysis of the options, and finally give reasoned conclusions.

Planners and related resource management specialists usually have a key role in mediation as experts. This is particularly so when the issues in dispute arise from an application for a resource consent or involve district or regional plans. Here again it is important they act as experts and not as advocates. When an expert acts under delegated authority from the client to negotiate he or she ceases to be an expert in resource management but is simply an advocate acting on behalf of a client.

ADDITIONAL PARTICIPANTS

Occasionally people who claim to have an interest in the case "come out of the woodwork" and wish to participate in the mediation even though they have not registered their wish to be a party to the proceeding before the Court. Provided these people can demonstrate their interest, usually by being a submitter at the earlier local authority hearing (from which the appeal arises), it is normal for the Court to allow their participation in a hearing or mediation. Difficulties arise however if such people want to be involved after an agreement has been reached between the parties to the mediation and before the presiding Judge finally determines the matter. If they are entitled to be parties to the proceedings (see Chapter One) then a consent order cannot be made by the Court without their agreement of these "late comers".

FOOTNOTES

1. Folberg J and Taylor A (1986) Commercial Mediation Jossey Bass

2. See s.268 of the Resource Management Act 1991

3. Again see s.268 of the Resource Management Act 1991

Reference

Kerr, Chris (2001) Mediation in the Environment Court. In P. R. Skelton and Chris Kerr, Working more effectively in a legal environment under the Resource Management Act 1991. Lincoln, N.Z.: Lincoln University.