

**Public Participation in Environmental Adjudication:
Some Further Reflections**

**Opening Address
at the
Environment Adjudication Symposium
Auckland**

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**The Hon Justice Stephen Kós
President
Court of Appeal of New Zealand**

[1] E nga iwi I hui hui pei, nau mai haere mai, ki tenei hui, tēnā koutou, tēnā koutou, tēnā tatou katoa. To all peoples here today welcome, welcome to this gathering; greetings to you all.

[2] This is a nation of many peoples but we all depend upon and must respect the land. That verity is summed up in a whakatauki (or proverb): whatu ngarongaro te tangata, toitū te whenua. People will perish, but the land is permanent.

[3] The Chief Justice regrets that she cannot attend this symposium but she has a meeting in Australia today. So the pleasant task of welcoming distinguished speakers and delegates falls instead to me.

[4] The organisers of this symposium have gathered a group of environment jurists and other experts of the highest standing. We have much to learn from them over the course of the programme.

[5] It was said last night that our environmental legislation — some quarter of a century old now — was cutting edge in its heyday. The underpinning philosophy is more obscure now as competing administrations have remodelled it. Initially a crisp Le Corbusier dwelling, it now has some curious gothic additions. The front door tends to stick. The lift leading upstairs does not work as well as it used to.

[6] Topics to be addressed over the next two days include ensuring equal access to justice, interdisciplinary analysis, the maintenance of impartial justice and the rule of law, and

environmental statutory interpretation and legislative reform. Others more versed in daily practice in this field — and perhaps less constrained than I must be — will talk more about the Resource Management Act. My contribution today is modest in scope and purpose.

[7] In their key note address at the 2016 Colloquium in Oslo, Rock and Kitty Pring identified 10 major challenges for Environment Judges in the next decade. Number four on their list was access to environmental justice. They referred to the “three pillars” of the environmental rule of law, all being access rights: peoples’ rights of access to information, access to public participation and access to justice in environmental matters.

[8] The focus of their immediate comments was restrictions on standing. Happily, that has been less of an issue in New Zealand than other jurisdictions perhaps. At least technically if not practically — which is another issue. Vigilance is essential, and recent reforms have begun to create quasi-standing barriers. Their remarks resonate with an address I gave last year, when I was asked to give the Tony Hearn QC Memorial Lecture for the Resource Management Law Association.

[9] My address was called *Dauids and Goliaths: Public Participation in the Planning Process*.¹ Tony Hearn QC was the first barrister at the New Zealand Planning Bar to take silk, in 1981. The Resource Management Law Association sponsors an annual lecture in his memory. The lecturer is usually a notable expert in the field of planning law. In 2016, by some mishap, they invited me instead. I never pretended to specialise in environmental law. I was a commercial silk who had a bit of luck in environmental cases.

[10] The theme of my lecture — *Dauids and Goliaths* — was that good environmental decision-making required robust evaluative processes. That normally depended on effective public participation. And effective public participation depended on a reasonable equality of arms. So the focus of my lecture was on properly *resourcing* public participation in environment cases.

[11] It is a reality — one I saw myself many times when acting for major infrastructure providers applying for consents for projects with a significant environmental impact — that members of the public with the most immediate connection to the environment are often outgunned in the consent hearing process. I said I had luck as counsel. But as they say, you make your own luck. The well-resourced achieve more luck than their opponents.

[12] The overall point I made in 2016 was that a fundamental inequality of arms simply made for bad decision-making and lingering resentment. I demonstrated that by reference to a case I did in which I had successfully defended fast inter-island ferries from enforcement action after their wake caused coastal erosion in the Marlborough Sounds, at the top of the South Island. The

¹ Stephen Kós, Judge of the Court of Appeal “*Dauids & Goliaths: Public Participation in the Planning Process*” (Tony Hearn QC Memorial Lecture, Christchurch, 3 March 2016) <<https://www.courtsofnz.govt.nz/speechpapers/HJK.pdf>>.

result in that case was, events showed, wrong. In part we achieved that because of inadequate opposing evidence. The community simmered with resentment hereafter until somewhat spurious safety-based speed restrictions killed fast ferries off.

[13] What public resources can community groups look to in this country?

[14] I looked first at the Environmental Legal Assistance Fund. It has a total annual budget of \$600,000 (excluding GST). About 14c per head of population.² The maximum amount per group per application for any one case is \$50,000.

[15] This contrasts with Australia and two Canadian provinces that have Environmental Defenders' Offices. Funding levels are typically greater than in this country.³

[16] There is much to be said for the New Zealand Legal Assistance Fund, and the Principal Environment Court Judge has said so in a perceptive lecture.⁴ As I said last year, it is not for a sitting Judge to comment on the adequacy of such executive provision. But the obvious may be recorded: sums of less than \$50,000 will have limited effect in achieving any sort of equality of arms in a major infrastructure project where applicant legal and expert witness hearing costs can easily reach \$2–3 million.

[17] What other assistance might the public glean in a major hearing?

[18] I discussed the role played by counsel assisting in major infrastructure project enquiries, conducted by the Environment Court or more commonly now by Boards of Inquiry. I said that the appointment of such counsel should be encouraged and both the Environment Court and Boards of Inquiry had that appointment power in their powers to regulate their own processes. But the appointment of counsel assisting was erratic.

[19] Other techniques used by hearings panels, the Environment Court and Boards of Inquiry — such as “friends of submitters” (a planner to help guide submitters), process advisers and *amicæ curiae* (usually confined to declaratory proceedings) — were worthy but ultimately unsatisfactory.

[20] Counsel assisting, on the other hand, would ensure greater equality of arms. They could ask questions that needed to be asked and that members of the public could not effectively ask. They would ensure that the applicant's proposal was properly and robustly tested, while allowing the Board not to be dragged into the fray — a real risk when a forensic vacuum emerges. I also took the view that equality of arms was not just about legal representation and not just about cross-examination or close questioning by the Board itself. It also required some equality of

² At [42].

³ Ranging between NZD 0.13 and 0.64 per head of population: Kós, above n 1, at [47].

⁴ Environment Judge Newhook *Paper for delivery to Environmental Legal Assistance Fund Annual Workshop* (July 2015).

exchange in the evidence called. So, tentatively, I called for counsel assisting to be able to call evidence of their own.

[21] In reflecting on what I might say today, it occurred to me that my earlier focus had been very much on *resourcing*. But there is another issue worth debating at least briefly today, and that is *risk*. In particular, the risk of exposure to *costs* and the like. And there I want to suggest a small innovation — one that lies in the hands of the environment Judges themselves.

Economic risk for participants in environmental adjudication

[22] There is an increasing trend for community groups (sometimes issue-specific groups, general environmental groups and Māori) to take an enlarged role in environmental protection litigation — and for local government to take a reduced role. Theoretically, the Attorney-General is at liberty to intervene in the public interest, but that is an exceptionally rare event.

[23] This means that public interest groups are exposed to adverse costs orders as the applicants for enforcement or abatement orders (including interim orders) and as appellants before the Environment Court and High Court. There is good reason to believe that risk is a disincentive to public participation.

Undertakings as to damages

[24] It is unusual for the Environment Court to require undertakings as to damages from public interest groups, although not unknown. The leading case is one I appeared in where the Forest and Bird Protection Society was made to stump up \$80,000 to obtain interim orders to halt earthworks on a coastal subdivision.⁵ More typically the Environment Court in *Save Happy Valley Coalition Inc v Solid Energy New Zealand* accepted that such undertakings may not be required when an applicant seeks to preserve a public interest via interim enforcement orders. In that case the Court accepted the applicant was seeking to preserve the habitat of an indigenous animal (a giant native snail) in a context where its only known habitat was largely destroyed.

Security for costs

[25] The second aspect of economic risk is security for costs, ordered against an applicant where there is reason to believe it would be unable to pay costs if unsuccessful.

[26] The Environment Court's ability to make such an award has varied since the Court's inception. In 1996 the Environment Court was afforded the same powers as a District Court including, under what is now 5.48 of the District Court Rules 2014, the power to order security for costs. That power was removed in 2003 but reinstated in 2009 in the Resource Management

⁵ See for example *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* HC Wellington CIV-2007-485-635, 30 July 2007.

(Simplifying and Streamlining) Amendment Act 2009. The relevant Select Committee said this would avoid frivolous, vexatious and anti-competitive submitters and litigants, but that the Environment Court would continue requiring security for costs in few instances only.⁶

[27] Prevailing practice is opposed to such orders being made against public interest groups — especially where there is a record of responsible previous participation. The degree to which the public interest would be served by the proceedings is certainly relevant, as is the extent to which the applicant has an established history of responsible involvement in planning issues.⁷ In *Mahanga E Tu Inc v Hawkes Bay Regional Council* an impecunious appellant community group was not ordered to pay security for costs, the Environment Court noting resource management litigation inherently carried a high degree of public interest (unlike civil litigation which tended to engage private interests).⁸ The Court said it would need material “which clearly demonstrated that proceedings had little or no realistic prospect of success, and were being pursued for private benefit, with little or no element of public interest in promoting the purposes of the Resource Management Act” before making an order for security for costs.

Costs after the event

[28] The third aspect of economic risk is costs ordered after the event.

[29] Both the Environment Court and the High Court have power to award costs on a very broad discretionary basis.⁹ Plainly the threat of an adverse costs order can act as a disincentive to an appeal, enforcement action or judicial review proceedings. Yet in New Zealand at least costs awards against community groups have usually — but not always — been fairly modest.

[30] Three examples will suffice.

[31] In *Peninsula Watchdog Group v Waikato Regional Council*, the consent applicant claimed to have incurred costs in an appeal to the Planning Tribunal of over \$400,000.¹⁰ It sought an award of \$85,836.37 from the appellant community group. The Tribunal noted the appeal was brought to pursue what was thought to be the public interest. A fair and reasonable amount for the group to pay to the applicant was \$20,000. The group appealed the order. Ultimately, the group failed in their appeal. Salmon J made no order for costs in the High Court.¹¹ He noted the issues were of importance to all litigants involved in resource management matters.

⁶ Resource Management (Simplifying and Streamlining) Amendment Bill (18-2) (commentary) at 3 and 7–8.

⁷ See for example *Stanimiroff v Auckland City Council* EnvC Auckland A131/98, 16 November 1998.

⁸ See *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2014] NZEnvC 83, (2014) 18 ELRNZ 419.

⁹ Resource Management Act, s 285; and the High Court Rules 2016, Part 14.

¹⁰ *Peninsula Watchdog Group v Waikato Regional Council* [1996] NZRMA 218 (Planning Tribunal).

¹¹ *Peninsula Watchdog Group v Coeur Gold NZ Ltd* [1997] NZRMA 501 (HC).

[32] In *Protect Piha Heritage Society v Auckland Regional Council*, the successful applicant and Council both sought costs against an unsuccessful community group.¹² The applicant had incurred costs of \$87,630 and sought a contribution of “at least” half to two-thirds.¹³ It received only \$10,000. The Council claimed to have incurred costs of \$85,179.77 and sought an order in the range of a third to a half. It received only \$5,000, on the basis the group did have an arguable case with respect to the substantive issues.

[33] On the other hand in 2009 in *Pope v Auckland City Council* a successful developer sought costs against the Gulf District Plan Association Inc.¹⁴ The Judge found the Association failed to act responsibly on appeal, and failed to participate in meaningful negotiations. The appellant claimed to have incurred costs totalling \$40,450. The association was ordered to pay 50% of that: a \$20,000 award. It is one of the largest awards as a percentage of costs actually incurred by the successful party.

[34] The perspective of at least one public interest group with whom I have communicated on the topic is that risks of adverse costs awards are significant in appealing a resource consent decisions; and greater again in taking enforcement action.¹⁵ The latter course is particularly risky for public interest groups.

[35] And of course the fundamental problem is that costs are fixed, on a largely discretionary basis, only *after* the event. A generous attitude to standing avails public participation little if the invitation turns out to have hidden and unpredictable cost consequences.¹⁶ It is like exercising your democratic right to take your car to the garage. The repair bill can prove a nasty shock.

A modest innovation?

[36] It seems to me that there is a modest innovation here worthy of consideration.

[37] In *trusts* litigation a party may seek a pre-emptive¹⁷ protective costs order either to ensure that their own costs are paid by the trust fund or to ensure they are not liable to pay costs to any other party. I discussed the principles in a case called *Woodward v Smith*.¹⁸ Protective costs orders are more commonly made where a question of construction of a trust deed or some aspect of the trust’s administration is in issue, as opposed to a hostile claim by a beneficiary against trustees or other beneficiaries. In the latter case, costs typically follow the event.

¹² *Protect Piha Heritage Society v Auckland Regional Council* NZEnvC Auckland A072/09, 26 August 2009.

¹³ At [9].

¹⁴ *Pope v Auckland City Council* NZEnvC Auckland A031/09, 20 April 2009.

¹⁵ Personal communication Sally Gepp. in-house counsel, New Zealand Forest & Bird Protection Society (30 March 2017).

¹⁶ *R (Cornerhouse Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 at [31].

¹⁷ “Pre-emptive costs orders” are also variously referred to as “protective” or “prospective” costs orders, all conveniently falling under the same acronym, “PCO”.

¹⁸ *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525.

[38] Protective costs orders in *public law* cases are not uncommon in the United Kingdom, but they are most unusual in New Zealand. I have been able to find only one example in New Zealand, and it involved an amalgamation of public law and trust issues (the sale of a community trust electricity enterprise).¹⁹ In New Zealand they have not been used in environmental litigation.²⁰ In Australia they have been, and there are several cases concerning the concept in that context.²¹

[39] In *R (Cornerhouse Research) v Secretary of State for Trade and Industry* Lord Phillips MR declared that a protective costs order could be made at any stage if the Court was satisfied that:²²

- (a) the issues raised were of general public importance;
- (b) the public interest requires that those issues should be resolved;
- (c) the applicant has no private interest in the outcome of the case;²³
- (d) having regard to the financial resources of the applicant and the respondent, and the amount of costs likely to be involved, it is fair and just to make the order; and
- (e) if the order is not made the applicant will probably discontinue proceedings and would be acting reasonably in doing so.

The fact that the applicant's legal advisers were acting pro bono would be an enhancing consideration also.

[40] Similar considerations could be applied in an environment case where a public interest group (or indeed individual) was raising on appeal or on an enforcement application, or in a judicial review, a point of genuine public rather than private interest and could substantiate the need to be protected from an adverse costs order. I would suggest two further considerations to those laid down by Lord Phillips that:

- (a) the applicant's case is a seriously arguable one; and
- (b) the applicant complies with court directions during the course of the proceeding.

¹⁹ *Rodley v Cuddon* HC Blenheim CP3/99, 29 March 1999.

²⁰ See, however, *EDS v King Salmon* [2014] NZSC 167 at [19]–[22] which appears to anticipate that this might occur.

²¹ See for example *Oshlack v Richmond River Council* [1998] HCA 11, (1998) 195 CLR 72 (HCA).

²² *R (Cornerhouse Research) v Secretary of State for Trade and Industry*, above n 16, at [74].

²³ This element has attracted criticism, and some revision in later cases: *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436 at [23].

[41] Subject to those further considerations, however, it seems to me that there is much to be said for allowing a public interest litigant to seek to address the issue of costs pre-emptively. Indeed it appears the Environment Court has such jurisdiction. The Court has a broad and unfettered power to make costs orders.²⁴ The costs regime under which the United Kingdom courts make protective costs orders does not expressly empower them to make such awards.²⁵ Likewise here in New Zealand.²⁶ The making of a protective costs order is inherent in, and incidental to, the statutory discretion afforded.²⁷ Consequently given the presence of a broad and unfettered discretion to award costs under our resource management regime, I see nothing that would inhibit the Environment Court from making a protective costs order.

[42] I hope that counsel, and the Environment Court in New Zealand, give this innovation — which is hardly an innovation in cognate jurisdictions — due consideration.

Conclusion

[43] With that modest proposition stated for consideration, I welcome you warmly to this splendidly timely symposium on comparative environment adjudication.

[44] I congratulate the organisers, in particular Judge Laurie Newhook and Associate Professor Ceri Warnock. And I congratulate you for your perspicacity in attending.

[45] Nga mihi, mō tō manaakitanga mai. Thank you for your kind attention to my remarks. I hope the symposium brings both pleasure and wisdom.

²⁴ Resource Management Act 1991, s 285; as discussed in *Goldfinch v Auckland City Council* [1998] NZRMA 97 (HC).

²⁵ See the Senior Courts Act 1981 (UK), s 51; and the Civil Procedure Rules 1998 (UK), r 44.2.

²⁶ See the District Court Rules 2014, r 14.1; and its identical counterpart in the High Court Rules 2016, r 14.1.

²⁷ Notably there is no presumption (rebuttable or otherwise) that costs are to follow the event in the Environment Court: *Mahanga E Tu Inc v Hawkes Bay Regional Council* [2011] NZEnvC 21, [2011] NZRMA 414 at [14].