THE ROLE OF EXPERT PLANNING WITNESSES

1. INTRODUCTION

1.1 The recent Environment Court decisions in *Tram Lease Limited v Auckland Council*[1] and *Tram Lease Limited v Auckland Transport*[2] have directly raised issues in relation to the role of planning witnesses.

1.2 In *Tram Lease v Auckland Council*, Judge Smith said:[3]

> *"This Court, as the fact finder, must reach conclusions based on multi-faceted interplay of fact (existing and predictive), analysis and projections, law, and often elements of integration and judgement. It is a complex task integrating a series of disciplines. We cannot see how an expert in a single discipline can reach a conclusion on the ultimate issue where the outcome requires such integration.*
>
> *This Court has, on a number of occasions, expressed concern at planning witnesses giving conclusions as to the ultimate outcome, particularly when multiple expert witnesses are called."*
>
> (Emphasis ours.)

1.3 In *Tram Lease v Auckland Transport*, Judge Newhook similarly raised concerns with planning evidence which His Honour considered offered conclusions:

> *"…that somewhat resembled an assessment that should be left to the decision maker, in this case the Court."*[4]

1.4 It is acknowledged that the context in which the above observations from these decisions were made was one in which the Court considered that a planning witness had presented evidence in a manner that was:[5]

> *"…contrary to the expectations of the Court in its December 2014 Practice Note guiding the work of expert witnesses".*

1.5 Nevertheless, the observations in these cases directly raise issues as to:

(a) Whether planning witnesses should present their professional opinion in relation to the "overall broad judgment" that the consent authority or Court needs to make in the context of Part 2 of the Resource Management Act 1991 ("RMA"), which must be seen as the "ultimate issue" in RMA proceedings; and

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[1] [2015] NZEnvC 133.
[2] [2015] NZEnvC 137.
[3] Supra Note 1, at paras 112-113.
[4] Supra Note 2, at para 101.
[5] Ibid, at para 97.

(b) If so, the extent to which this is appropriate and how presenting such evidence should be approached.

1.6 These decisions have caused some consternation amongst planning professionals (and the legal counsel who brief them) given that if planning witnesses are to provide the consent authority / Court with the assistance they might wish, it would appear to require the planning witness to opine on the "ultimate issue".

Purpose and scope of paper

1.7 Given the importance of this and the need to provide clarification as soon as possible, the Resource Management Law Association ("RMLA") and New Zealand Planning Institute ("NZPI") have collaborated in preparing this paper, and obtained input from the Environment Court, in order to:

(a) Clarify the scope of the planning witnesses' role, in particular whether it is appropriate for a planning witness to synthesise the evidence of other experts to offer their professional planning view on the "ultimate issue" by reference to the overall broad judgement required under Part 2.

(b) Should such evidence be appropriate, outline some "good practice" tips as regards the approach and language that planning witnesses should adopt when drafting and presenting expert planning evidence before the Court, to ensure:

(i) The evidence is admissible and of assistance to the Court; and

(ii) The planning expert complies with all the relevant obligations they have to the Court (particularly under the Environment Court's Practice Note 2014).

1.8 In addressing these issues, it is proposed to address:

(a) The basis of the ultimate issue rule (Section 2);

(b) The role of the expert planner / planning witness and good practice guidelines (Section 3); and

(c) Our conclusions (Section 4).

2. BASIS OF THE "ULTIMATE ISSUE" RULE

2.1 The extent to which a witness can present evidence on the ultimate issue before the Court is specifically addressed in section 25 of the Evidence Act 2006, which states:

> *"25. Admissibility of expert opinion evidence*
>
> *(1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.*
>
> *(2) An opinion by an expert is not inadmissible simply because it is about—*
>
> *(a) an ultimate issue to be determined in a proceeding; or…"*

(Emphasis ours.)

2.2 In addressing this matter, both *Tram Lease* decisions referred to the decision in *Pora v R*[6] in which the Privy Council held that an expert witness should only express an opinion on the "ultimate issue" in a proceeding where this was necessary in order for their evidence to provide "substantial help" to the decision maker.

2.3 It is noted however that both divisions of the Court stopped short of declaring the planning evidence of concern to them inadmissible, holding instead that the problems with it went to weight to be accorded (very low).

2.4 One can understand the reference to *Pora* in the context of criminal proceedings such as in that case in which the ultimate issue must be left to the judge or jury. These statements therefore need to be seen in the context of RMA proceedings, given the Act requires a range of disciplines to be synthesised in coming to a broad overall judgement under Part 2.

2.5 In this context, it seems axiomatic that expert evidence from a suitably qualified planning witness in relation to the overall broad judgment that the consent authority / Court is required to make under Part 2 (being the "ultimate issue" in RMA proceedings) must provide "substantial help" to the consent authority / Court, provided the evidence is based on critical analysis and sound evaluation. Indeed a planning witness' evidence could be seen as of little value unless they do so. This is the clear distinction between the unique role of the professional planner, and other technical specialists who regularly appear before the Environment Court such as landscape, traffic, air quality experts, etc.

2.6 It is also relevant that under section 276(2) of the RMA "the Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings", thus providing scope to receive evidence on the ultimate issue if the Court considers that will provide "substantial help" to it.

3. THE ROLE OF THE PROFESSIONAL PLANNER AND GOOD PRACTICE

3.1 The professional planner is expected to have skills that include objective, critical analysis; integration of multi-disciplinary inputs; and the ability to evaluate and form an overall opinion on a proposal in the context of the relevant planning regime. The New Zealand Planning Institute Education Policy and Accreditation procedures provide the following clarity and assistance in understanding the role of the professional planner at Section 1.2:

> "*A planner brings professional expertise and knowledge to the management of the environment within the context of the four well beings: environmental, social, cultural and economic and is concerned with making informed choices about the consequences of human actions and with bridging the gap between the present and the future. Planners consider strategic, policy, technical, legislative, administrative and community factors and often operate in multi or trans-disciplinary environments.*
>
> *a) Planners use their knowledge and experience in institutional and community contexts to solve problems, evaluate outcomes and manage change, including the use of complementary social, scientific and technical knowledge and tools. In applying this knowledge, planners must be aware of cultural, social, economic, environmental, ethical and political values, including New Zealand's bicultural mandate for planning.*
>
> *b) A professional planner is someone who has gained an accredited qualification, continues to learn post-qualification, undertakes continuing professional development, and is committed to upholding the principles and ethical practice of the planning profession. A key attribute of a planner is the ability to work across disciplinary and institutional boundaries and to*

[6] [2015] UKPC 9.

integrate knowledge from a range of disciplines within the framework of the discipline of planning".

3.2 It is these skills which a planner is expected to utilise and demonstrate in providing their opinion as to whether a proposal can or cannot be supported. This was perhaps aptly described by Brian Putt in his presentation to the 2006 New Zealand Planning Institute Conference as the 'Good Idea', which he summarised at paragraph 3.9 of his paper as:

> *"Against the social, economic and cultural backdrop to planning and resource management decision-making, there is the chance for the expert planning witness to provide some analysis about why the proposal is a good idea or a bad idea. This part of your evidence can be of particular assistance to the Court when it comes to weighing up issues when there is a fine balance in the evidence from both sides."*
>
> (Emphasis ours.)

3.3 These are also the skills which planners should use in the 'day to day' planning process where they act as reporting officers, providing reasoned recommendations to decision makers.

3.4 The weight given by the decision maker to planning (and any other) evidence will depend on the credibility of the witness and quality of the evidence. The planners reasoning and opinion should be conveyed to the decision maker in language that acknowledges that it is the decision maker who must weigh up any competing opinions to make the ultimate decision.

Observance of the rule/good practice

3.5 However, the planning expert's ability to opine on the ultimate issue must also be carefully balanced with their overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise, in accordance with the Environment Court's Practice Note 2014.[7]

3.6 To do so, planners must be particularly cognisant of the critically different roles of planning witnesses and the consent authority / Court in proceedings under the RMA. To be clear:

(a) The Court's role is to synthesise all relevant submissions, evidence and other factors and then exercise its discretion in coming to an ultimate judgment in accordance with the Act's provisions.

(b) As outlined above, the planner's role is to assist the Court by providing an objective and professional planning assessment of whether the particular matter before the Court is appropriate or can be supported, having regard to the full range of potentially relevant factors (such as the existing physical environment, planning regime (including planning instruments), other specialist technical evidence, potential environmental effects and the relevant statutory context.

3.7 In undertaking their analysis, and opining on the overall merits of the matter at hand, planners must therefore be careful not to cross this line and usurp the Court's judicial function.

3.8 To achieve this and properly meet their obligations to the Court as an expert witness, the authors consider planning evidence should:

[7] Environment Court of New Zealand, Practice Note 2014, Clause 7.2.

(a) Not stray into areas beyond the planner's expertise, although it should be clear where planning assessments rely on reports/technical expertise of others.

(b) Be carefully directed (and confined) to relevant matters before the Court, having regard to the applicable factual, statutory and planning framework, which should be carefully identified.

(c) Make an objective and professional evaluation/synthesis of those relevant matters, having regard to the other expert evidence that is available, and clearly articulate the matters on which their opinion is based (this allows the Court to evaluate the planner's opinion as against opposing planning evidence in the same proceeding).

(d) Clearly identify any assumptions that are necessary for completing the planning analysis, and why the planner has made the assumptions they have (noting any reliance on other expert evidence).

(e) Reach conclusions as to the matters in dispute (as relevant to the planner's expertise) through a coherent and reasoned process – that is, the planner's conclusions should have a clear, logical and sound evidential basis having regard to the matters outlined in (c) – (d) above.

(f) At all times maintain a professional demeanour and remain respectful of other experts and counsel.

(g) Be clearly presented as an objective, non-partisan expert opinion without straying into advocacy.

(h) Use appropriate language to reflect the role of the planner as an evaluative witness, such as:

(i) "If the Court substantially accepts the evidence of the expert witnesses upon whom I rely, and accepts my analysis, then it may see fit to grant consent subject to conditions / refuse consent…"

(ii) "In my opinion…"

(iii) "From a planning perspective…"

3.9 By contrast, some behaviours would be inappropriate and would "cross the line" from the planner's role into that of the Court as ultimate decision-maker. For example:

(a) Asserting expert opinion and conclusions based solely upon previous experience and credentials, without critical analysis and regard to relevant material.

(b) Offering evaluative opinion on the relative merits of technical evidence of others that is beyond their own expertise.

(c) Addressing the ultimate issue of the proceeding without sound evidential basis or justification.

(d) Utilising the type of terminology and language reserved for the Court or advocates. For example:

(i) "I submit…"

(ii) "I find…"

(iii) "In my judgement…" and

(iv) "On balance, I prefer the evidence of…" etc.

(e) Asserting the Court should make a particular decision rather than presenting a "planning opinion" for the Court to consider/weigh up in exercising its judicial discretion.

3.10 Finally, as Mr Putt notes (at paragraph 3.10 of his paper[8]), preparing reports under section 42A of the Act, an analysis under section 32 of the Act or an assessment of environmental effects are all "stepping stones" to the preparation of evidence before the consent authority / Court. These documents generally contain the planner's concluding opinion as to whether he or she supports the particular proposal and possible conditions which would address potential adverse effects. It is important to reflect on how that opinion is expressed, given that language used for a recommendation to a Council committee may not be appropriate in Court evidence. Planners should keep this firmly in mind when preparing such documents and be aware that such commentary may form the basis of future evidence. It should reflect robust critical analysis and sound evaluation and should be crafted to a level that would meet the Court expectations in any expert's statement of evidence.

4. CONCLUSION AND GOOD PRACTICE RECOMMENDATIONS

4.1 The key conclusion we have reached (as endorsed by Principal Environment Judge Newhook following His Honour's discussion with members of his Bench and further discussion with us[9]) is that it is appropriate for the planning witness to opine on the "ultimate issue" in terms of the "overall broad judgement" to be made in terms of Part 2 of the RMA provided that the planner's expert opinion is:

(a) Presented in a manner that provides "substantial help" to the Court / consent authority; and

(b) Well-reasoned and developed by reference to all of the other expert evidence presented and relevant planning instruments and in a manner that meets the planning witness' professional obligations; and

(c) Expressed in a manner and in language that is neither seen nor intended to supplant the role of the Court / consent authority; and

(d) Expressed conditionally upon the Court's acceptance of **both** the evidence of the expert witness(es) on whom the planner relies **and** the planner's identification, analysis and weighing of all the relevant considerations.

4.2 In summary:

(a) In RMA proceedings, planners must, where appropriate, provide a professional, objective assessment which synthesises the evidence of other experts, and opines on the "ultimate issue" in the context of Part 2 of the RMA and the overall broad judgement this requires. Planning evidence cannot be of "substantial assistance" to the Court unless it does so.

[8] As referred to in paragraph 3.2 hereof.
[9] The Court has made it clear that its careful consideration and significant endorsement of this paper can in no way pre-empt independent judicial thought and findings in particular circumstances that might come before it in cases.

(b) The ability to undertake such synthesis/evaluation is part of the skill set that planners are expected to have and which distinguishes them from other technical experts.

(c) In doing so, planners should be careful to always comply with their obligations to the Court and not to cross the line into the Court's judicial function.

(d) In practice, this means a planning assessment must be directed (and confined) to relevant matters, use appropriate language and reach conclusions based on a rational, coherent and reasoned analysis. The more accurate, professional and objective the evidence, the more weight it is likely to carry with the Court.

4.3 The authors wish to express their gratitude to Principal Environment Judge Newhook and the members of the Court with whom His Honour consulted for their involvement in this initiative, and their contribution to and endorsement of this paper.

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