Decision No. W 99/2000

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of a purported appeal under section 120 of the Act
BETWEEN	**THOMAS HARRIS and MICHELE BLAIN**
	(RMA 703/00)
	Appellants
AND	**TASMAN DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine sitting alone pursuant to section 279 of the Act

IN CHAMBERS at WELLINGTON

DECISION

1. This decision arises out of an application for a direction in respect of a purported appeal by Mr Thomas Harris and Ms Michele Blain **(the appellants)** filed on 29 August 2000 against a decision issued by the Tasman District Council **(the council)** on 3 August 2000. The decision granted a land use consent to the Mr Colin White **(the applicant)** to operate a mechanical repair workshop at property located at the junction of High Street South, Wildman Road and Batchelor Ford Road, Motueka.

2. The council's decision was posted and received by the applicant on 4 August 2000. The appellants lodged a notice of appeal on 29 August 2000 which stated the appellants had received the council's decision on 8 August 2000. The applicant filed a notice of motion with the Court requesting for

more information from the appellants as to their receipt of the council's decision, alleging that in the ordinary course of post. the appellants should have received the decision on 4 August and not 8 August, as stated in the notice of appeal. If the appellants had received the decision on the 4 August, their notice of appeal would have been lodged out of the statutory time requirement, being 15 working days from receipt.

3. Accompanying the notice of motion were three affidavits. It was the evidence of Mr Anthony Stallard, former counsel for the applicant, that he received the council's decision at his firm's Post Office box address in Nelson on 4 August. Ms Lorraine Walls, a submitter in support of the resource consent application stated in her affidavit that she also received the council's decision on 4 August. And Ms Kathryn Greer, Executive Assistant to Mr Dennis Bush-King of the council, testified that she posted the council's decision to the appellants, included in the list of submitters and whose address was given as a Post Office box address in Motueka, on 3 August. Her personal experience is that Post Office boxes in Motueka receive mail in the ordinary course of post on the following day.

4. The appellants replied by way of an affidavit of Mr Thomas Harris, one of the appellants. He stated that he did not receive the council's decision until 8 August because he did not clear his Post Office box until then. He explained that he does not clear his box every day as he travels in his work and is often out of town.

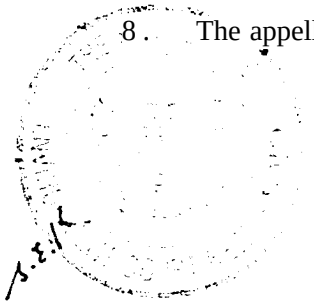
5. The applicant's notice of motion application sought a direction that there is no valid appeal, or in the alternative, an order pursuant to s.279(4) of the Act striking out the appeal in that to allow the case to be taken further would be an abuse of the process of the Court.

6. On 16 November 2000 the Court issued a minute to the parties requesting a formal application from the appellants for a waiver of the statutory time requirement in which the appeal should have been lodged, a response from the appellants to the application made by the applicant for an order to strike out the appeal and a response from the applicant to the appellants' application for waiver.

7. The Court is now in receipt of these documents.

The Waiver Application

8. The appellants apply for three waivers pursuant to s.281 of the Act:



- A waiver of the requirement under the Act that the appeal be lodged on or before 25 August 2000;
- A waiver of the requirement under the Act that the appeal be served on the council on or before 25 August 2000; and
- A waiver of the requirement under the Act that the appeal be served on the applicant and others who made submissions on the application by 1 September 2000.

9. The grounds raised in the application are that if the Court finds the appeal was lodged and served out of time, then the delay was only 2 working days. There is a reasonable explanation for the delay which was based on a mistake made by Mr Harris. Further, neither the council nor the applicant will be unduly prejudiced by the grant of waiver and direction.

10. The appellants refer the Court to the decision in Edwards v Kapiti Coast District Council[1], which is factually similar to the present case. Factors leading the Court to grant a waiver in that case were a short delay (of two working days), the delay was based on a mistake and there was no evidence of prejudice.

11. On the question of prejudice, the appellants note the comment of the Court in Edwards at paragraph 12. There is no evidence in the present case that capital has been expended or that the applicant has acted to his detriment in reliance on there being no appeal against the council's decision. It appears from a letter from the applicant's solicitors to the appellants' solicitors dated 6 September 2000 that extensions of time have been made available on the conditional purchase agreement until such time as the matter is dealt with by the Court. The appellants submit that prejudice flowing from an appeal in the usual course is not the measure for the purposes of s.281.

The Appellants ' Position in Relation to the Strike-Out Application

12. It is the appellants' case that notwithstanding that the council's decision may have been deposited in their post box on 4 August 2000, it was not "received" by the appellants until the box was cleared. It is submitted that this is sufficient evidence to rebut the presumption in s.325(5) of the Act. Accordingly, if this submission is accepted, the appeal was lodged within 15 working days of the date of receipt of the decision and there is a valid appeal.

13. If, however, the Court determines that there is no valid appeal, then the question is whether it should be struck out. The applicant relies on the decision of Moulton v Auckland Regional

[1] W371/99.

Council[2]. In that case a purported appeal was struck out because it was out of time and leave had not been sought for a waiver in relation to the late lodgement. Furthermore. no filing fee had been paid. The appellants submit that the present appeal may be distinguished from that case because the appellants have now applied for a waiver pursuant to s.281 of the Act and the filing fee was paid when the appeal was lodged.

14. It is the appellants' submission that it is an established principle that the jurisdiction to strike out must be exercised sparingly. This is not a case where the grounds of appeal disclose no reasonable case and there is no basis to strike out other than by reference to jurisdiction, which now stands to be dealt with in the context of an application by the appellants for waiver.

The Applicant's Response

15. The applicant's position is that there is no valid appeal because the purported appeal was lodged out of time. The affidavits of Kathryn Greer, Anthony Stallard and Lorraine Walls evidence the posting of the council's decision on Thursday 3 August 2000 and the receipt of the decision by Mr Stallard and Mrs Walls on the 4 August.

16. It is the applicant's submission that s.325(5) of the Act provides that where a Notice or other document is sent by post to the person or to a post office address it shall be deemed, in the absence of proof to the contrary, to be received by the person at the time at which the letter would have been received in the ordinary course of the post.

17. It is submitted that there is no evidence before the Court to substantiate any suggestion that the decision did not arrive at the appellants' post office box on 4 August 2000. The matter deposed by Mr Harris that he did not clear out his post office box until 9 August is not, in the counsel's submission, sufficient to override the provisions of s.325(5) of the Act. indeed, to follow the appellants' deposition to a logical conclusion would lead to an absurd situation - a person knowing the likelihood of a decision issuing from a consent authority could simply choose not to clear a post office box and would then expect the appeal period to run from the period on which he chose to clear the box. That would be an absurd result and it is this exact situation that s.352 seeks to sort out.

18. The applicant submits that the effect of s.352 is, in circumstances such as these, to reverse the onus of proof so that it is incumbent upon the appellants to dispel, on the balance of probabilities, that the decision was not received at their post box on 4 August. The appellants have not done this.

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[2] W16/93

19. Furthermore, the appellant is legally represented. In his affidavit Mr Harris admits that the Notice of Appeal was taken by him from his post office box on Tuesday 8 August and was delivered "later that week" to his solicitor. His solicitor would have noticed the date of the decision and would have been aware of the provisions of s.352. Counsel submits that in the circumstances of this case. whilst the appellants may say that the delay was "based on a mistake", they are well experienced with the Court proceedings, having been involved previously in respect of the site at issue in this appea1[3]. To allow what is clearly an out of time appeal in these circumstances would amount to an abuse of process.

20. The applicant opposes the waiver application. In Edwards the Court was required to rule on whether any party would be unduly prejudiced by a grant of waiver. The Court referred to the decisions in Noel Leeming Appliances v North Shore City Council[4], Reilly v Northland Regional Council[8], Shardy v Wellington City Council1[6], Baker v Wellington City Council[7] and Shirtcliff v Banks Peninsula District Council[8]. It granted the waiver and held that while an applicant has the right to assume the resource consent will commence on the day after the statutory period for appealing expires if no appeals are lodged. it may well be prudent business practice not to rush into commitments without making allowances for technical mistakes as to time, as occurred in that case. It is submitted that in terms of undue prejudice, the equivalent situation does not exist here.

21. The applicant further states that s.281(3) specifically restrains the Court from granting an application to waive a requirement as to time unless it is satisfied that the applicant or the council consent to that waiver or any of those persons who do not consent to the waiver will not be unduly prejudiced. The qualifier "unduly" indicates that the Court must be satisfied that prejudice to the parties would not be greater in extent than is reasonably to be expected and unavoidable from the grant of any waiver of with the relevant requirement (Noel Leeming Appliances, followed in Te Tii (Waitangi) A-Marae v Northland Regional Council[9]).

22. In Baker the Court concluded that "undue prejudice" means prejudice greater than that which would necessarily follow in every case from waiving compliance with the time for appealing. Delay in implementing a consent is inevitable when an appeal is lodged. Factors that have contributed towards findings of undue prejudice have included the amount of money involved or at risk, the level of expenditure already committed to a project and the fact that an applicant has

[3] Harris v Tasman District Council (RMA 625/96) and Harris v Tasman District Council (RMA 871/97).
[4] (1992) 2 NZRMA 113.
[5] (1993) 2 NZRMA 414.
[6] W83/92.
[7] A121/97.
[8] C17/99.

waited longer than the statutory period before taking steps to exercise the consent. The prejudice relevant in terms of s.281 must arise directly from the lateness of service (Orr v Tauranga District Council[10]). It is a question not of whether there is good reason for the extension but whether there is any undue prejudice.

23. The applicant argues that there will be undue prejudice by the grant of waiver. The affidavit of Belinda Clark, Legal Executive to Messrs Daniell-Smith Stallard and Hunter (who acted for the applicant in relation to his resource consent application), confirms that the applicant via his agent checked as to whether any appeals had been lodged with both the council and the Court on Friday 25 August and again on Monday 28 August out of caution. The applicant therefore acted prudently.

24. Moreover, Mr White has identified an undue prejudice which he, his family and the vendor of his property will suffer should a waiver be granted. He states that he entered the first of two agreements with Mr Walls on 12 May 2000 to purchase Mr Walls' property, which is a contractors yard used for the service of Mr Walls' business vehicles. The first agreement was subject to the applicant, inter alia, obtaining resource consent to enable him to use the yard for a mechanical repair workshop on suitable terms. The second was an agreement under which Mr Walls would buy back from the applicant in part exchange.

25. Previously, the applicant had been employed by Lloyd Heslop Motors Limited. When he was informed that the resource consent had been granted, the applicant notified his employer the following day that he would be proceeding to set up his own business. Once he learned on 28 August that no appeals had been lodged against the consent, he and Mr Walls also proceeded to complete their sale and purchase transaction and Mr White prepared to establish his business.

26. On 30 August 2000 the applicant discovered an appeal had been filed against his consent. It is his testimony that this left him without a job, having already given notice to his employer and being informed he had already been replaced. The applicant had also informed Mr Walls that he was going ahead with the purchase.

27. The applicant states he has since moved into the yard and he and his partner and four children are living in the house located there. He cannot now establish the business as intended and cannot risk terminating either of the two agreements. Although the appeal was lodged out of time by only a few days, he made commitments in terms of moving, leaving his job and changing his life in reliance on there being no appeals. He cannot provide for his family and is forced to operate his

business as a "home occupation", permissible under the council's plan. His partner too, was hoping to work for the business but has been forced to obtain other work. Owing to the appeal, the applicant is not able to expend monies on the development of his property for the purposes of his business. The applicant and his family and Mr Walls have all suffered significantly as a result.

The Council's Position

28. The council is also of the view that a waiver of time should not be granted in this instance.

Considerations

The Validity of the Appeal

29. Section 325 reads:

> **352. Service of documents-**
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> **(1) Where a notice or other document is to be served on a person for the purposes of this Act, it may be served-**
> **[(ca) Where the person has specified as an address for service a Post Office box address, a document exchange box number, or a facsimile number, -**
> **(i) By posting the document to that Post Office box address; or**
> **(ii) By leaving the document at a document exchange for direction to the document exchange box number; or**
> **(iii) By transmitting the document to that facsimile number; or]**
>
> **(5) Where a notice or other document is sent by post to a person in accordance with subsection (1)(c) [or (ca)], it shall be deemed, in the absence of proof to the contrary, to be received by the person at the time at which the letter would have been delivered in the ordinary course of the post.**

30. In Slipper Island Resort Ltd v Thames Coromandel District Council[11], the Court. on reviewing s.352. held that there is a presumption by the applicant that a document has been served on the intended recipient at the time at which the letter would have been delivered in the ordinary course of the post. That presumption may be rebutted by proof that the document was not in the ordinary course of the post delivered to the intended recipient. It follows that where the document is attempted to be served under s.352 of the Act by postal delivery, a successful service may only arise if the document is delivered at the addressee's house or office or into his or her letterbox or rural delivery box. However, if the document was returned to the sender, as it was in that case, the document cannot be deemed to have been received by that person under s.352 of the Act at the time at which the letter would have been delivered in the ordinary course of the post.

[10] A149/97.
[11] A8/93.

31. Applying the law to the present case, Mr White can presume that the council's decision was served on the appellants at the time at which the letter would have been delivered in the ordinary course of the post, that is, on 4 August 2000. The appellants state that they did not receive the decision until they checked their box on 8 August. However, the issue under s.352(5) is not when the appellants actually received the decision (in this instance, upon checking their post box) but when, in the ordinary course of the post, the appellants are deemed to have received the decision at their post box. As the applicant submits, the appellants have proffered no evidence to prove that the decision was for some reason not received at their post box on 4 August and have not therefore rebutted the presumption.

32. Accordingly, under s.352, the decision is deemed to have been received by the appellants on 4 August 2000 pursuant to s.352 of the Act and the Notice of Appeal was therefore received out of the statutory time requirement.

The Waiver Application

33. Section 281 of the Act requires two tests to be met by any applicant relying on the section. The first that is imposed by s.281(1) - whether the Court should exercise its discretion to grant the waivers or directions sought.

34. The second test under s.281(2) and/or s.281(3) is logically prior. It requires that before exercising its discretion to grant the waivers[12] the Court must be satisfied that there is no undue prejudice to the parties. Because s.281(2) and (3) are stated as being "unless" conditions, they impose threshold tests to be met by any applicant. The applicant must therefore not only meet the threshold in s.281(2) and/or (3), but also satisfy the Court to exercise its overall discretion in her or his favour. That this is the correct approach is shown by the passage in the Baker case where Judge Sheppard stated:

> "I add that even if I had not found that those parties would not be unduly prejudiced, I would not have exercised the Court's discretion to grant a waiver in this case."

35. Turning to the facts of this case I have to see whether the threshold test about "undue prejudice" is satisfied. The meaning of those words. as pointed out by counsel for the applicant, was also considered in the Baker case:

> "Undue prejudice' means prejudice greater than that which would necessarily follow in every case from waiving compliance with the time for appealing. Delay in implementing

[12] Section 281(1)(a) of the Act.

> a consent is inevitable when an appeal is lodged.[13] Factors which have contributed towards findings of undue prejudice have included the amount of money involved or at risk[14]; the level of expenditure already committed to a project[15]; and the fact that an applicant has waited longer than the statutory period for appealing before taking steps to exercise the consent[16]."

I respectfully adopt this list of circumstances as being appropriate considerations, although each case will turn on its own facts.

36. It is common ground that mere delay in itself may not be a prejudice, although it is always relevant to the exercise of the discretion. I do not accept that the delays involved in awaiting disposal of this appeal should be treated as unreasonable, nor do I accept that they amount to prejudice to the applicant from granting the waiver. The applicant has not expended any funds on the establishment of his new business. We note from a letter from Daniell-Smith Stallard and Hunter of 6 September 2000 to Mr White's solicitor that there is a conditional agreement for sale and purchase in place "until such time as the matter is dealt with by the Environment Court". Extensions of time have been granted on the agreement until the matter is heard. Meanwhile, Mr White is carrying on business as best he may on the site under the very restrictive provisions of a "home occupation". This will be considerably difficult although offset by the fact that his wife has taken a job elsewhere until this issue is resolved.

37. On the other hand, I note there are two purported appellants in this case. Even though Mr Harris might not have been available to clear his post office box, there is no evidence his partner was not available. And whilst I note the appeal identifies this site as a sensitive one, Mr Harris is not new to the procedures of the Court and at all times was acting through his solicitors.

38. Of much more seriousness is the fact that Mr White gave up his job acting in reliance on the fact there was no appeal at the time he gave notice. I consider this is undue prejudice. The fact that the appeal was only two days out of time does not mitigate against the fact that it was a critical two days for Mr White in the way he scheduled his arrangements.

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[13] See Noel Leeming Appliances v North Shore City Council (1992) 2 NZRMA 113. Reilly v Northland Regional Council (1993) 2 NZRMA 414; and Shardy v Wellington City Council 1 & 2 NZPTD 412

[14] Terekia v Gisborne District Council 4 NZPTD 675.

[15] Vink v Hikurua Holdings High Court, Auckland, M 1748/89, 28/11/90, Jeffries J.

[16] Referring to Terekia (supra).

Determination

39. On the material placed before me I find that Mr White would be prejudiced by granting the waiver sought. I hold that the threshold test in section 281(2) has not been met and therefore I decline to grant the waiver of the statutory time requirement.

40. Accordingly, the application for strike-out is granted and the Court orders the appeal contained in RMA 703/00 is struck out.

DATED at WELLINGTON this 18th day of December 2000

S E Kenderdine
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND