IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Misc No: 54/04

IN THE MATTER	of the Section 28 of the Electoral Act 2004
BETWEEN	**TWIN TONITARA** of Penrhyn, a registered elector for the constituency of Penrhyn
	Applicant (Appellant)
A N D	**TEANAU TARIPO** Registrar of the constituency of Penrhyn
	First Respondent
A N D	**BRIAN TERENCE HAGAN** Chief Registrar of Electors
	Second Respondent
Hearing:	10 August 2003
Appearances:	Mr C Little for Applicant Mr J McFadzien for First and Second Respondents Mrs T Browne for Electors
Date of Decision:	10 August 2004
Date of Reasons for Decision:	25 August 2004

REASONS FOR DECISION OF DAVID WILLIAMS J

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INTRODUCTION

[1] This case involves an appeal under section 28 of the Electoral Act 2004. The appeal sought to challenge the Registrar's decision rejecting objections filed by the Applicant, now the Appellant, against six electors whose names appeared on the Penrhyn constituency Main Roll namely:

HERIA Doreen;

HERIA Rutera Purua;

IOBA Margaret Leonie;

MATARA Christmas;

MATARA Rakoroa; and

NIKAU Tinonui Akamura.

[2] The matter came before the Court by way of a telephone hearing on Saturday 7 August 2004. During that hearing, it became apparent that there was a major issue as to the timeliness of the appeal. There was insufficient information before the Court to rule on the contention made by counsel for the electors that the appeal was out of time. For that reason the matter was adjourned until August 10 when there was placed before the Court a great deal more information and especially a helpful memorandum from counsel for the Respondents on the question of the timing and publication of the Registrar's impugned decision.

[3] After hearing argument from all counsel by way of a telephone hearing on August 10, the Court decided that the appeal was out of time and therefore it had no jurisdiction to deal with the substantive matters raised in the appeal. For reasons which will become apparent, the question of costs was reserved and the Court directed that any party might file and serve an application for costs within fourteen days from August 10. In that event the opposing parties would be entitled to reply to any such applications within a further fourteen days.

RECENT LEGISLATIVE REFORMS

[4] New provisions governing the eligibility or otherwise of electors to be enrolled to vote in the Cook Islands or in a particular constituency were introduced by the Constitution Amendment (No 26) Act 2003 and by the Electoral Act 2004. The Constitution Amendment (No. 26) Act 2003 amended Article 1(1) of the Constitution by repealing the definition of "to reside" (that definition having been inserted by the Constitution Amendment (No. 9) Act 1980-81). The Constitution Amendment (No. 26) Act 2003 also substituted a new Article 28 as to the qualification of electors. The Electoral Act, in section 7 followed the Article 28 formula in its new provisions dealing with the qualifications for registration of electors.

[5] These new provisions, through the Articles 28(1)(b), and 28(2), and section 7 of the Electoral Act, introduced the concept that a person becomes eligible to enrol as an elector, upon actually residing in the Cook Islands, or in a particular constituency, for which he or she is then enrolled, until such time as the person leaves the Cook Islands, or the constituency as the case may be, for a continuous period exceeding 3 months: Article 28(2) and section 7(4). If the person leaves the Cook Islands for that period, that person, subject to the exceptions referred to below, loses his or her right to be enrolled in any constituency and is thus disenfranchised. If on the other hand that person remains in the Cook Islands, that person does not become disenfranchised, but instead, on having been actually resident in another constituency for 3 months, simultaneously qualifies for enrolment in that other constituency.

[6] The effect of Article 28(2) and section 7(4) are, however, subject to the exceptions set out in Article 28(4) of the Constitution and in section 7(6) of the Electoral Act. The latter provides:

> "(6) The following shall not be regarded or treated as a period of absence from the Cook Islands or from a constituency as the case may be for the purposes of subsection (4) -
> (a) any continuous period not exceeding 4 years spent by a person outside of the constituency for the purpose of -
> (i) receiving education, technical training or technical instruction; or
> (ii) receiving medical treatment;
> (b) any period spent by a person outside the constituency as -
> (i) a member of a Cook Islands diplomatic or consular mission outside of the Cook Islands; or
> (ii) a spouse, partner or member of the household of a person referred to in subparagraph (i); or

(c) any occasional absence for any purpose, for a period not exceeding 3 months."

[7] All of the six challenged electors sought to rely upon one or other of the section 7(6) exceptions.

ELECTORAL PROCEDURE – SECTIONS 13 – 28 ELECTORAL ACT 2004

[8] Section 13 imposes a system of compulsory registration of electors. Section 14 provides for the compilation of the Chief Registrar of Electors of Main Rolls for each constituency, and a Supplementary Roll for each constituency compiled when required for an election or a by-election. Section 15 provides that for the purposes of a general election, which is what is involved in this case, the Main Roll shall be closed 7 days following the date on which the Queen's representative publishes notice of the general election and that the Supplementary Roll shall open the day following the closing of the Main Roll and shall be closed 14 days thereafter. Section 17 provides for public inspection of Rolls. Sections 19 and 20 outline the procedure for applications for registration by electors. Sections 21 – 23 make provision for changes of registration details.

[9] The provisions with which this appeal is concerned are to be found in sections 24 – 28. Section 24(1) provides that an elector may at any time object to the name of an elector whose name appears on the same roll, on the ground that he or she is not qualified to be registered as an elector or is not qualified to be registered on the roll on which his or her name appears. Such objections must be made within 7 days after the closing of the relevant roll for a general election. Under section 25 the Registrar on receipt of such an objection must forthwith serve written notice of the objection on the elector objected to and provide details of the objection. Section 26 provides that the Registrar himself may object to the name of any elector being on the roll for any constituency. The same 7 day time limit applies to objections by the Registrar. Section 27 provides that the Registrar may amend the roll if the elector objected to fails to provide any satisfactory evidence of eligibility or alternatively notify the Registrar that he or she consents to the removal of his or her name from the roll.

APPEALS TO THE HIGH COURT

[10] The precise provision with which this appeal is concerned is to be found in section 28 which provides as follows:

"28. Appeal against Registrar's decision to Court – (1) If an objector or the elector objected against is dissatisfied with a decision of the Registrar made pursuant to sections 20, 24 or 27, either the objector or the elector may within 7 days of the Registrar's decision being made, appeal to a Judge of the Court for a review of that decision.

(2) The Court may, after conducting such review either -

(a) retain on the roll the name of the elector objected to; or

(b) remove from the roll the name of the elector objected to; or

(c) if satisfied that the person objected to is qualified to be on some other roll, transfer to that other roll through the Chief Registrar of Electros, the name of the elector objected to; or

(d) make such amendment to any roll as may be necessary to give effect to the determination.

(3) The determination of the Court on any appeal to which this section applies shall, subject to section 102(2), be final and conclusive and without further appeal."

[11] Section 102(1) provides that every determination or order by the Court in respect of any proceedings under section 28 shall be final and conclusive and without appeal. Section 102(2) provides that, notwithstanding subsection (1), where any party to any proceedings under section 28 is dissatisfied with any decision of the Court as being erroneous in any point of law, that party may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law only. In appeals under section 102, the Court of Appeal has powers to refer appeals back for reconsideration.

[12] As to evidentiary matters on appeals it is relevant to note that section 99 of the Electoral Act provides as follows:

"99 Real justice to be observed – At the hearing of any election petition the Court shall be guided by the substantial merits and justice of the case and the Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Court."

[13] While this provision is not expressly made applicable to appeals under section 28, it is clear that a similar approach should be adopted, especially when the Court is dealing with the democratic right to vote. In any event, as was pointed out by counsel for the Respondents, an appeal under section 28 is a civil proceeding to which section 3 of the Evidence Act 1968 applies. That provision, which is of universal application to civil proceedings, states as follows:

"PART I – GENERAL RULES OF EVIDENCE

Discretionary Power

3. Discretionary power of admitting evidence – Subject to the provisions of this Act, a Court may in any proceeding admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law."

[14] This approach required by section 99 of the Electoral Act 2004 can be seen at work in the Chief Justice's recent decision in the *Manahiki* election case to which reference is now made.

[15] In the present context, the critical part of section 28 is the phrase "may within seven days of the Registrar's decision being made appeal". This phrase was considered in the recent judgment of the Chief Justice in the Manahiki Election Case, *Kairua v Solomona and Hagan* Application OA 14/2004. The Chief Justice said:

"[4] The two objections dealt with were dated 22 June 2004. Mr McFadzien proposed that the Registrar's decision, under s 27(3) of the Act, was made on 30 June 2004 in the form of a fax of that date which contains some comment on the objection and the hand written word "retain" beside the two electors. There is no evidence that the Registrar complied with s 25 giving notice to the elector or that the elector provided any evidence, pursuant to s 27(2), of the qualification to be on the roll. Likewise there is no evidence that the Registrar gave notice of the decision on the objection in accordance with s 27(2). Mr McFadzien did not suggest that there had been any notification in writing or orally. Mr Puna informed me that the objector became aware of the Registrar's decision when the supplementary roll became available on Saturday 10 July 2004. The application to review was filed in Court on 16 July 2004. I note the faxed letter dated 21 July 2004 from Taggy Tangimetua to the Registrar referring to a conversation on 16 July in which it was said that the Registrar had advised the Applicant of the decision and asking the Registrar to confirm that in writing. I am not aware of seeing any reply.

[5] It was submitted that the application was out of time. The time limit under s 28 is "within 7 days of the Registrar's decision being made". Clearly the application was made later than 7 days after the decision if that was the document of 30 June 2004. It was in time if it was timed from the date the objector first knew of the decision by the publication of the supplementary roll.

[6] I believe that, in spite of the wording of the section, the time runs from the time the objector first knows of the decision. There is the difficulty of the lack of knowledge of the elector's address and the difficulty of communicating with electors in distant parts of the Cook Islands or beyond the Cook Islands. That is at least in part resolved by the provision in ss 25 and 26 which deems the last known address as a sufficient address. That must apply equally to the Registrar's decision. It is also to be noted that this is the only appeal right in

> respect of the names on the roll. There is now no right to petition after the election about the names or absence of names on the roll. It would be wrong in these circumstances to prevent a right of review by the absence or lateness of notice of the decision when there is an obligation on the Registrar to give that notice."

THE CIRCUMSTANCES OF THE PRESENT CASE

[16] The appeal was against the "decision of the First Respondent and/or the Second Respondent or both of them for rejecting the objections filed by the Applicant against the following electors whose names appear on the Penrhyn constituency main roll". The Notice of Appeal was dated 23 July 2004.

[17] Counsel for the Applicant advised that he received instructions to act late on the afternoon of 21 July 2004. On 22 July 2004 counsel consulted with his client and was able to determine in respect of which elector the Applicant wished to lodge an appeal and prepared the appeal documents accordingly. At approximately 2.00pm on 23 July 2004, counsel's secretary attended the High Court in Avarua to file the appeal but the High Court had closed early because of the Constitution Celebrations. Counsel had not been aware that this was going to occur. Being mindful of the time limits counsel faxed a copy of the application on 23 July 2004 to the High Court at 2.26pm. The time of transmission recorded on the facsimile is 2.26pm on 23 July 2004. I find that the appeal was lodged on 23 July 2004.

[18] On behalf of the electors Mrs Brown made the following submissions to support her contention that the appeal was out of time.

> "1. The Main Roll closed on the 22 June 2004.
>
> 2. The Supplementary Roll opened on the 23 June 2004 and closed on the 06 July 2004.
>
> 3. The electors objected to were on the Main Roll such that in accordance with Section 24(2) the objections must be made no later than 7 days after the closing of that roll. The objections therefore should have been lodged on the 29 June 2004.
>
> 4. The record contain letters from the applicant dated 28 & 29 June objecting to various electors.
>
> 5. The Supplementary Roll was published on 13 July 2004. The list of deletions in the Supplementary Roll did not include the electors objected to. It is submitted that that was 'notice' to the applicant of the Registrars decision. The appeal under Section 28 should have been filed no later than 20 July 2004.
>
> 6. The appeal was not filed until 27 July 2004 and accordingly it was out of time.

7. The applicant places reliance on the Registrar's letter of 19 July 2004. It is submitted that the Registrar does not have power to extend time to appeal.

8. Unlike the Manihiki case the record shows that the electors objected to were notified and were asked to provide information as to whether their names should be retained on the roll.

9. As was the case in Manihiki the date of publication of the Supplementary Roll (in this case it was the 13 July 2004) ought to be the date of the Registrar's decision."

[19] Thus the crucial issue in this case is the date from which time runs. The Applicant submitted that time ran from the date the Applicant received the letter from the Registrar dated 19 July 2004. That letter was from the Electoral Office of the Cook Islands at the Ministry of Justice Office in Avarua, Rarotonga, and stated as follows:

"Electoral Office
Cook Islands

July 19, 2004

Ministry of Justice
Post Office Box 111
Rarotonga
Cook Islands
. . .

Twin Tonitara
Registered Elector
Penrhyn Constituency
Penrhyn

Kia orana,

Objections to Elector Registration

On 29th June 2004 you lodged ten (10) objections to electors on the Penrhyn Main Roll. In accordance to Sec 25 of the Electoral Act "... *notice shall be deemed to have been given if the Registrar delivers the notice to that elector's last known address in the constituency.*" Most of those you have objected to are not within the constituency making it difficult to contact and obtain responses from them.

I am attaching a list of those objections including the decisions of the Registrar.

If you are dissatisfied with a decision made, you may within 7 days after receipt of this letter, appeal to a Judge of the Court for a review of that decision.

Regards

Taggy Tangimetua
Registrar of Electors
All Constituencies

cc: Teanau Taripo
Registrar of Electors
Penrhyn Constituency"

[20] Putting to one side for the moment the effect of the 19 July letter, it was apparent that the critical question as to this appeal was the date upon which the Applicant was notified of the decision because, applying the Chief Justice's decision in the *Manahiki* case, that date would be the date from which the 7 day appeal period runs. This in turn was connected to the question of date of publication of the Supplementary Roll and when the Applicant came to know of its publication and its contents.

[21] It is first necessary to record several matters confirmed in the Applicant's affidavit of the 2nd of August 2004. First, the Applicant resides in the village of Omoka, Penhryn and has been so resident there for all of his life. Second, the population of the Island of Penhryn is small. Third, on the 29th of June 2004 the Applicant lodged with the First Respondent 10 objections against electors whose names appeared on the main roll for the Penhryn constituency. All objections against the 10 electors were rejected, and 6 of those electors were the subject of this appeal. It is clear from these matters and from the fact that the applicant was chosen by his political party as the elector who would have the responsibility for pursuing appropriate objections on Penrhyn, that the question of the publication of the Supplementary Roll would be a matter of intense interest to the applicant.

[22] Next the court must address the circumstances surrounding the publication of the Supplementary Roll. The Court is obliged to counsel for the Respondents who investigated the matter through Mr Teanau Taripo, the Deputy Registrar of Electros for Penrhyn. In submissions to the Court counsel for the Respondents stated as follows:

> "(b) He [Mr Taripo] informed me that when received, the objections to the names on the Supplementary Roll, he notified those persons objected against who were in Penrhyn. He sought an explanation from them and sent that information to the Electoral Office in Rarotonga. He subsequently received the Supplementary Roll by fax from Rarotonga on 12th July after it had closed on 6th July and says that because the inter-island trading vessel Mataroa was in port, he did not make the roll public until that afternoon. (Mrs Browne for the Electors alleges this was not until the 13th July but the difference of one day does not appear to be significant).
>
> (c) Mr Taripo says that the complete supplementary roll was pinned to the public notice board in the main village of Omoka, Penrhyn. That notice board is where all public notices are customarily displayed. It is outside the main government building in Penrhyn which has within it key public offices such as Telecom, Bank of the Cook Islands, etc.
>
> (d) He also gave a copy of the supplementary roll that same day, to someone to post on a notice board in the other settlement on Penrhyn. He says that by this time one of the candidates for the

Penrhyn constituency, Mr Tepure Tapaitau, had already received a copy of the supplementary roll by fax from someone in Rarotonga.

(e) Mr Taripo was of the view that everyone in Penrhyn would have known by virtue of its being made public in the manner set out above, including those electros objected against who were present in Penrhyn and the persons who had filed objections to names on the main roll.

(f) However, subsequent to notification on the notice board, the Registrar for all constituencies Taggy Tangimetua, based in Rarotonga, sent a fax dated 19th July 2004 to Twin Tonitara, who had lodged the various objections to names on the main roll (attached Document 1 comprising 5 pages). That fax purported to give 7 days from receipt of that letter to file an appeal."

ISSUES FOR DETERMINATION

[23] The issues for determination were helpfully summarised in the submissions of counsel for the Respondents as follows:

> "(g) It is a question therefore as to whether the Court accepts the publication on the public notice board in Penrhyn as evidence of the date on which the Registrar's decision was made within the meaning of s 28(1) (or at least known). If so, the appeal filed in Court on 27th July was filed out of time. If not, and if the fax of 19th July is regarded by the Court as evidence of the date of the Registrar's decision (notwithstanding that publication of the supplementary roll in Penrhyn on the 12th or 13th July clearly indicates that a decision was made and published sooner) then the appeal filed on 27th July 2004 was filed in time, allowing for the fact that the Court closed early on Friday 23rd July for the 2004 Constitution celebrations float parade, that Monday 26th July was a public holiday in Rarotonga (Gospel Day) and by virtue of s 25(a) of the Acts Interpretation Act 1924 which is in force in the Cook Islands by virtue of s 622 of the Cook Islands Act 1915."

The reference to the fax of 19 July is of course a reference to the letter of 19 July.

[24] Counsel for the Applicant strongly contended that time should run from the date of receipt of the 19 July letter and not any earlier. Since there was no evidence that it was faxed, it was submitted that the Applicant should be taken to have received it several days later. However, even if time ran from the date of the letter of 19 July, it would make no difference because that would mean the application should have been filed by 26 July 2004 and it was lodged by fax on 23 July. Counsel for the Applicant submitted that:

> "10. Unfortunately, the letter of 19 July 2004 further compounds problems regarding compliance with time limits pursuant to section 28 of the Act as the Registrar of Electors has misinformed the Applicant in the letter by advising:

> *"... If you are dissatisfied with a decision made, you may within 7 days after receipt of this letter, appeal to a Judge of the Court for a review of that decision..."*
>
> That advice was clearly wrong and misled the Applicant who is not a legal practitioner, nor conversant with the Act. The Applicant I submit is entitled to rely upon advice provided to him by the Registrar of Electors, even if incorrect, and should not be penalized for relying on that advice. The Court will note in paragraph 6 above reference to the Chief Justice's comment that there is an obligation on the Registrar to give notice. There is no reference to deemed notice but to provide actual notice."

[25] In approaching this matter I respectfully agree with the Chief Justice in his *Manahiki* decision that the word "made" in section 28 must be read as meaning made known to the objector or other relevant party. To do otherwise would render the section 28 procedure unworkable and deprive objectors of their statutory rights because the 7 days could expire without them having become aware that the Registrar had made his decision.

[26] It is relevant to note the definition of "public notice" in section 2 of the Electoral Act 2004 which states:

> "Public notice", in relation to any act, matter, or thing required to be publicly notified, means the making of the act, matter, or thing generally known throughout the Cook Islands by any practicable means in addition to publication in the Cook Islands Gazette; and "publicly notify" as a corresponding meaning". [Emphasis added.]

In this present context one should read the phrase "throughout the Cook Islands" as being "in the constituency".

[27] I accept the evidence of Mr Taripo that everyone in Penrhyn, including the Applicant, had notice of the publication of the Supplementary Roll with its inclusion of the electors objected to, on 12 July, especially since:

(a) Each political party in Penrhyn has active and knowledgeable representatives on Penrhyn, and the Applicant was one of those representatives or at least associated with such a representative. He was or should have been aware that time ran from 12 July; and

(b) the notice board where one of the copies of the Supplementary Roll was displayed was in fact at Omoka where the Applicant resides and, more

importantly, on a building in which the Applicant worked as an administration officer.

It follows that I cannot accept the claim made in the Applicant's submissions at paragraph 9 that "the Applicant in this matter was not actually aware of the Registrar's decision to retain the electors on the Penhryn Roll until he received a letter from Taggy Tangimetua, Registrar of Electors to himself dated 19 July 2004".

[28] Even if one takes the word "made" literally, the Applicant must have known by the very fact of the publication of the Supplementary Roll that the Registrar had made his decision on the objections.

[29] Accordingly, time ran from 12 July and the appeal is out of time unless the Court is to uphold the submissions for the Applicant that in the particular circumstances of this case, time should only run from the date of receipt of the letter from the Registrar of 19 July.

LEGITIMATE EXPECTATION

[30] Although not couched in the language of legitimate expectation, the essence of the argument of counsel for the Applicant was that delivery of the letter of July 19 created a legitimate expectation that the Applicant was still able to file a timely appeal so long as this was done within seven days. In short, a legitimate expectation arose from the statement or assurance given in the letter that a valid appeal could be lodged within seven days from July 19 2004. The Applicant was therefore entitled to and did rely on the letter in that regard and his appeal should be allowed to proceed.

[31] It is true that the doctrine of legitimate expectation, first introduced by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904 at 909, is now well embedded in Commonwealth administrative law: see eg GDS Taylor *Judicial Review* (1991) at 13.06 – 13.13 and *Lawson v Housing New Zealand* [1997] 2 NZLR 474 at 488.

[32] Nevertheless it has always been accepted that the doctrine cannot operate to enforce the assurance or promise which has given rise to a legitimate expectation if to do so would be inconsistent with the statutory duties imposed on the person making the promise or inconsistent with the relevant statutory scheme. This qualification has

often been made in English cases: see for example, *R v Devon County Council* [1995] 1 All ER 73 per Simon Brown LJ at 88. It was made by the Privy Council in *AG for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. There the government of Hong Kong announced that certain illegal immigrants, who were liable to deportation, would be interviewed individually and treated on their merits in each case. The Privy Council quashed a deportation order where the immigrant had only been allowed to answer questions without being able to put his own case, holding that "when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should not implement its promise, so long as implementation does not interfere with its statutory duty".

[33] The same fundamental point has been made in New Zealand cases, for example, in *Brierley Investments Limited v Bouzaid* [1993] 3 NZLR 655, a case involving the relevance and enforceability of a letter written by an Inland Revenue Department official indicating that the Department did not regard certain gains as taxable. Later the Commissioner sought to take a different stance. It was held that the taxpayer was not entitled to a judicial review of the Commissioner's decision to re-open the matter and reinvestigate the affairs of the taxpayer since the Commissioner could not by contract or conduct abdicate or fetter the exercise of the Commissioner's duty to collect tax which was due. Richardson J said at page 661 that:

> "Statutory bodies cannot enter any contract or take any action incompatible with the due exercise of their powers ... The argument for Brierley is that the Commissioner would be acting unfairly in abuse of the statutory powers if the proposed investigation covering preceding years extended into areas affected by agreements or understandings (including legitimate expectations) as to the basis upon which the Commissioner would arrive at assessments and did arrive at the assessment for those past years. Whether or not the Commissioner can be held bound if such an understanding is established depends on the statutory regime under which the Commissioner is acting. As we have seen the Commissioner does not have a general dispensing or suspending power. Any failure on the Commissioner's part to assess or to pursue recovery in a particular case is simply that, a failure to act. ... Certainly there is nothing in the New Zealand legislation to justify the conclusion that the Commissioner may elect not to assess taxpayers or may elect to charge them with less tax than throughout the assessment and reassessment period the Commissioner considers due."

[34] These principles are fatal to the Applicant's contentions in this case. The statutory scheme provides that an appeal must be lodged within 7 days of the making of the Registrar's decision, subject to the necessary gloss as to the word "made" placed upon it by the Chief Justice in the *Manihiki* case. To hold that by the letter of 19 July the Registrar validly altered or extended the time for appeal would to be hold that

Registrar has the ability to ignore the statutory time limits and grant extensions of time or to dispense altogether with the time limits. This would be improper and illegal as a matter of principle as is shown by the *Brierley* case, especially as the statute makes no provision for the Registrar or indeed the Court to grant extensions to the 7 day time limit.

COSTS

[35] As noted above in paragraph [3] above I have reserved leave for any party to file an application for costs.

[36] Without making any final decision it seems to me that the Applicant would have an arguable basis for claiming costs on the basis that the letter of July 19 mistakenly led him to believe that, as at July 19, there was still seven days to file an appeal and that thereafter he incurred costs by taking the letter at face value and lodging the appeal.

CONCLUDING OBSERVATIONS

[37] It will be apparent from the decision of the Chief Justice in the *Manahiki* case and from my decision in this case that there are problems with the way in which the commencement of the seven day appeal period is connected to the time at which the Registrar's decision is "made".

[38] It may be appropriate for counsel for the Respondents to consider this issue and decide whether to suggest to the relevant authorities that the language of section 28 might be suitably re-cast.

SIGNED at Auckland on the 25th day of August 2004 at 4.45pm

David Williams J

DAVID WILLIAMS J