IN THE DISTRICT COURT
AT AUCKLAND

CRI-2008-004-001938

BETWEEN	AUCKLAND CITY COUNCIL
AND	EROTICA EXPO LTD First Defendant
AND	STEPHEN CROW Second Defendant
AND	SANDY WATTS Third Defendant

Appearances: W Akel and W Loutit for the Applicant
J Soondram for the First and Second Defendants

Judgment: 19 August 2008

ORAL JUDGMENT OF JUDGE NICOLA MATHERS

The Application

[1] The application before me is an interim injunction to prevent what is called the, "Boobs on Bikes Parade" to be held tomorrow 20 August 2008.

[2] I wish everyone to appreciate from the outset what has been said by many judges over the years, that this is a court of law and not a court of morals. It is to do with the appropriate Council bylaw and in particular the view of the Council that the proposed parade is offensive in the way it is described in its decision which I will come to in more detail shortly.

[3] The issues raised for and against this application would normally demand a very full and elegantly reasoned decision. I make no apology for the fact that in the context of an interim injunction, the urgency of the matter and the limited time available to me, being overnight, it will not be possible to do full justice to the issues before me. I fancy that the Supreme Court could spend a considerable time on these issues in an appropriate case. I will therefore endeavour to set out my reasons concisely and it is simply not possible, in the time available, to record every fact and every argument.

The Background

[4] Briefly the facts appear to be as follows. Prior to 24 July 2008 parades were covered by a bylaw being Part 20 of Auckland City Council Consolidated Bylaw 1998. On 13 June 2008 the defendants lodged an application for a permit for the Boobs on Bikes parade. A process was then followed whereby Council officers dealt with the application and sought, in the normal way, information from the defendants.

[5] While all this was going on the Council had, since May 2008, been considering, together with a raft of changes, some new bylaws.

[6] On 24 July 2008 after considering recommendations of the Hearings Panel the part 20 Consolidated Bylaw was revoked and a new bylaw, 20.6.9 was substituted.

[7] The essential part of the new bylaw is 20.6.9(b)(iii) which provides that no permit shall be issued where the Council reasonably believes that:

> "there is any other objectively justifiable and reasonable ground for declining consent, for example, that the event will be or is likely to be offensive".

[8] The bylaw also provides for traffic disruptions and public safety and includes a definition of event. Mr Soondram for the first and second defendants accepts that the proposed parade is an "event" as defined, and I agree with that concession.

[9] In a helpful affidavit from Dr McPherson, on behalf of the Auckland City Council, she has provided me with all the background information including photographs of prior parades, plus the document trail and the final urgent decision of the Council on 12 August.

[10] The urgent decision is contained in Exhibit M and helpfully sets out the fact that the Police do not believe that the conduct of topless participants is covered by the concept of offensive behaviour as prohibited by s 4 of the Summary Offences Act 1981. The Police are recorded as supporting the granting of a permit to allow for better management of traffic and for public safety issues.

[11] The decision records the view of Council lawyers, that even if the parade does not meet the test required for offensiveness in relation to the Summary Offences Act, the Council may have other objectively justifiable and reasonable grounds to refuse the application. They also refer to accepted community standards and whether there is a sufficiently large number of members of the public to warrant taking account of who would find it undesirable, degrading, inappropriate and offensive to the community.

[12] In contrast the same lawyers say, which in some ways I find rather surprising, that those feelings held by those in opposition to the parade are stronger, more heartfelt and more readily articulated than the feelings of other members of the public who are either ambivalent about the parade or are in support of it as a form of harmless entertainment.

[13] There is little in the affidavit evidence to show the extent in numbers of these so-called heartfelt feelings. I have been given no evidence as to the numbers involved who might be in opposition but I have read some of the vehement views of certain Councillors.

[14] But there is evidence in the affidavit that between 80,000 and 100,000 people line the route of the parade and apparently enjoy it. The photographic evidence shows an orderly parade with many thousands watching it.

[15] The Council lawyers in the decision acknowledge that a refusal of the permit might amount to a restriction on the right to freedom of expression but say such a restriction can arguably be said to be demonstrably justified in a free and democratic society given the notice, location and timing of the parade.

[16] The decision records the reason for urgency being that a full Council is not scheduled until 20 August. The new bylaw, if offensiveness is to be considered, requires a decision of the full Council. In urgency, however, I am told there is delegated authority for the Mayor and Deputy Mayor to make the decision.

[17] There is then a recommendation which I take to be the actual and final decision which I set out in full below.

> "That pursuant to the Public Places Bylaw clause 20.6.9.b.iii. the Boobs on Bikes Parade permit application be declined as there are objectively justifiable and reasonable grounds to do so. Particularly that the nature, timing and location of the parade are contrary to accepted community standards and that it is the strongly held belief of some members of the public that the content of the parade is undesirable, degrading, inappropriate, and offensive to the community. The strength of these feelings held by those in opposition to the parade being stronger, more heart felt and more readily articulated than the feelings of other members of the public who are either ambivalent about the parade or are in support of it as a form of harmless entertainment."

[18] It can be seen at once that the recommendation is a compilation of the views of the Council lawyers but approved by two people, being the Mayor and deputy Mayor.

[19] Dr McPherson's affidavit and exhibits, together with the actual evidence of Mr Crow that I heard, demonstrates Mr Crow's strong views that the Council's actions are in breach of his freedoms enunciated in the New Zealand Bill of Rights Act 1990. He goes further and submits that it is a form of censorship.

[20] The Council's affidavit and Mr Akel's submissions point to Mr Crow's statements that he will defy the Council decision. Having heard Mr Crow I accept his sincerity as to his views, but I also accept entirely the sincerity and concern of the Mayor and Deputy Mayor.

[21] The parade in its proposed form has, as a matter of fact, been held on five previous occasions in Queen Street. Indeed, last year it was actually approved and a permit issued under the old bylaw. I accept as a matter of fact that each parade has not led to any public disturbance other than one incident in one year, which involved an employee of the Auckland City Council.

[22] I record that from the photographic evidence the parade is on only one side of the road with the viewing public on the footpath and in the middle of the road leaving the other carriageway comparatively free.

[23] I record that there is to be an Erotica Expo event but Mr Crow has accepted it was his original intention to give away 10,000 tokens as special tickets to the Expo, but that will not take place due to the views of the Council.

The Law

[24] Mr Akel in his submissions has helpfully set out the well-known principles to be applied by a judge when considering an application for an interim injunction. In the interests of brevity I adopt his submissions in this regard subject to the following comments. He acknowledges that this particular application will in fact be a final resolution. In this regard and in respect of the decision of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] FSR 316; (1975) 119 SJ 136; [1975] AC 396 (HL) I note Lord Diplock's later gloss where he added that

> "In the type of case where an interlocutory injunction in effect decided the case it will be necessary to have as precise consideration as possible of the chances of the plaintiff's ultimate success."

The *Cyanamid* decision has of course been applied in New Zealand in many cases.

[25] I turn now to the New Zealand Bill of Rights and in particular as it relates to the invalidity or otherwise of a bylaw.

[26] In the decision of Elias J, as she then was, in *Brady v Northland Regional Council*, (HC, Whangarei, AP 25-95, Oct 25, 1996) and in relation to a defence in proceedings for enforcement of charges. The learned Judge said:

> "This type of challenge is sometimes referred to as collateral challenge because raised in proceedings which do not directly impeach the validity of the bylaw, as would be the case for an application for judicial review is brought to quash it."

[27] I take care to acknowledge that I am not considering an application for review which is the province of the High Court. I am, however, considering the bylaw in the context of the Bill of Rights Act and in particular in the context of a submission by the second defendant that the decision of the Council amounts to a restriction on his perceived rights under the Bill of Rights Act and to the fact that it amounts to censorship. Much could be said in this regard if there was time to do so. There is then the issue, as Mr Akel submits, that such a collateral challenge is not appropriate in a situation such as this.

[28] I think it is important to look clearly at the recommendation forming the actual decision of the Council together with the actual bylaw. The bylaw provides that there must be objectively justifiable grounds for declining consent. For example, that the event will be or is likely to be offensive. I accept that in the context of the bylaw an objective justification has to some extent, to be subjective, but only to some extent.

[29] The decision equates the strength of feelings held in opposition to be "stronger, more heartfelt and more readily articulated than the feelings of other

members of the public who are either ambivalent about the parade or who are in support of it as a form of harmless entertainment."

[30] I have already commented that in my view the affidavit evidence does not support this proposition except to the extent that the feelings of some members of the Council are certainly vehement.

[31] I will come back to the Bill of Rights Act. But I turn now to the issue of what is offensive. The Police acknowledge that there is no issue with the Summary Offences Act and I agree. I refer in particular to the decision of *Brooker v Police*, [2007] 3 NZLR 91, and in particular paras 55 and 59 of the decision of Blanchard J. The learned Judge held

> "that behaviour which is offensive in a public place must be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs."

[32] Then at para 59 of his decision the learned Judge placed this in the context of the Bill of Rights Act. There is first a right to convey information or express an opinion as protected by s 14 of the Bill of Rights Act then, admittedly in connection with disorderly conduct, a characteristic of the behaviour of the defendant must be made in the context of the overriding requirement of s 5 of the Bill of Rights Act which right may be subjected only to such reasonable limits prescribed by law.

[33] The learned Judge went on to say that a Court must ask itself whether such behaviour, in such circumstances, constitutes a justified limitation on the defendant's exercise of the right in question. I do accept, however, that there is a degree of proportionality as to the rights being expressed and in this regard Mr Akel points me to the suggestion that Mr Crow is merely advertising his Erotica Expo. Having heard Mr Crow I do not consider that generalisation to be entirely appropriate. I consider and find that he wishes to make a point as to sexual expression and tolerance, rightly or wrongly.

[34] Delegated legislation such as a bylaw must be certain and must contain adequate information as to the duty of those who are to obey it and it must be

reasonable. The well known case of *Kruse v Johnson* [1998] 2 QB 91 has been applied for many years. A consideration of uncertainty is also appropriate.

[35] Section 145 of the Local Government Act 2002 allows the making of bylaws minimising the potential for offensive behaviour in public places. I agree that there is a general presumption of the validity of administrative acts but that is not an end of the matter.

[36] Bylaws in a review context can only be considered unreasonable in terms of the *Kruse v Johnson* test if they are found to be "partial and unequal in their operation as between different classes" or "if they involve such passive or gratuitous interference ... in the minds of reasonable men". These principles seem to have wider consequences in New Zealand as per the decision of *McCarthy v Madden* [1933] NZLR 1251. I adopt these principles.

[37] I turn now to s 155 of the Local Government Act, as to whether a bylaw made under that Act is appropriate. The Local Authority must consider whether it is the most appropriate form for a bylaw and whether it gives rise to any implications under the Bill of Rights Act. Then it provides that the bylaw must not be inconsistent with the Bill of Rights Act.

[38] Finally in respect to legal considerations I note further in the *Cyanamid* decision that Lord Diplock said, at an interlocutory stage:

> "It is no part of the Court's function ... to decide difficult questions of law which call for detailed argument and a mature consideration."

[39] In the end it is the exercise of a discretion, for me to exercise upon all the principles I have endeavoured to set out above.

The Decision

[40] This parade has operated successfully for five years and last year received approval under the old bylaw. Part of Exhibit J of Dr McPherson's affidavit reads:

> "As Council officers, we are concerned with the operational aspects of the events and are likely to recommend permitting the event as per last year,

> however, Council will make the decision on the offensive or otherwise of your event, and therefore whether we might permit it."

[41] It is clear, bearing in mind the past history and those comments that the decision rejecting the permit relates only to "offensive" in terms of the new bylaw.

[42] In approaching this decision I have been careful to distinguish my role from that of an application for review, which is not my province.

[43] In my view, and taking notice of the Supreme Court decision in *Brooker v Police*, the attitude of the Police, the lack of any public disorder on previous occasions and the fact that 80,000 to 100,000 people have voted with their feet and watch the parade, leads me to the view that the bylaw is uncertain and/or unreasonable in the way it refers to "offensive", and a so-called objective, test which in my view is inappropriate to the circumstances of this particular case. Furthermore the terms of the injunction sought, are, in my view, inappropriate and not capable of enforcement.

[44] Individuals are without question entitled to drive vehicles down Queen Street. It is not offensive per se for women to be topless. It may be tactless, it may be distasteful to some, but in my view the Council's reference to "offensive" cannot reasonably apply in these circumstances.

[45] An injunction as to the organisation of a parade, cannot, as I have said, prevent individuals carrying out these acts, even if there are a number of them. I refer to the recent example of the mass of trucks which invaded Auckland streets. The Court could be brought into contempt by the issuance of an injunction which could not adequately be enforced.

[46] Therefore adopting the Lord Diplock gloss on *Cyanamid* where an interim injunction may determine the issue, and assessing as precisely as I can the possible chances of the plaintiff's ultimate success, I am not sufficiently satisfied of such ultimate success. This is in the context of a serious issue to be tried, but in the context I have referred to.

[47] In addition I have doubts as to whether the bylaw complies with s 155 of the Local Government Act. There is also the issue raised by the defendants that the bylaw is an attempt at censorship. There are also the considerations I have referred to in connection with the Bill of Rights Act and more particularly as referred to by the Supreme Court in *Brooker v Police*.

[48] There is also an issue as to whether the bylaw restricts rights under the Bill of Rights Act and in this respect I refer to the decision of *Hosking v Runting & Ors*, [2005] 1 NZLR 1, and the issue as to reasonableness and justifiability when limitation is an issue. The Council's fears as set out in their adopted recommendation do not, in my view, seem to meet the threshold of seriousness or tolerance as per Blanchard J in *Brooker v Police*.

[49] Also, I have not overlooked the notice and timing element in the Council's decision. In my view this is overstated as shopkeepers will presumably be busy inside their shops and not outside. The photographs show that shoppers can still go about their business and I suspect that those walking behind the spectators will not see much of the parade unless they are determined to do so.

[50] That being so I do not need to consider further the balance of convenience but I add that to some extent the late change in the Auckland City Council bylaw during the consent process has led to urgency which might not otherwise have been necessary. Furthermore, even though the Council has given an undertaking as to damages I am of the view that it would be very difficult to assess the measure of damages experienced by the first and second defendants.

[51] I recognise that there are strong views held by opponents to the parade. It may well be that the parade is tasteless, but equally it may well be that in a more mature society the vast majority might consider it harmless fun. That is not for the Court to decide.

[52] Ultimately I am required to exercise a discretion upon a principled basis. I have endeavoured to follow those principles in the context of the factual position I have found.

[53] In my view for all the reasons I have given I am not prepared to grant an interim injunction. In reaching this decision I have done as Cooke J, as he then was, suggested and stood back and assessed the overall justice of the case.

[54] The application is therefore declined. If costs are sought counsel can file memoranda.

[55] I note for completeness and accept the third defendant was only a contact point and would not, in any event, be the subject of an injunction.

Nicola Mathers
District Court Judge