OPINION FOR FREE BEACH GROUP re NORTH SHORE CITY COUNCIL BYLAW

By Barry Wilson MA (Cantab), LLB (NZ), Barrister.

My opinion is sought concerning the validity of North Shore City Council Consolidated Bylaw Clause 1902.7, Fifth Schedule, Chapter 10 NZS 9201, Beaches: Bathing and Control. The bylaw passed on 30th June 1992 effectively prohibits nudity on North Shore beaches. It states, 'No person over the age of 12 years shall be on, or remain upon, any part of any beach or beach reserve while their pubic areas are exposed to the view of other persons.'

It appears that the Bylaw is valid procedurally as it was passed pursuant to Section 716B of the Local Government Act 1974.

Section 684 of the Local Government Act 1974 empowers a Local Body to make bylaws for a number of purposes. Those purposes which could conceivably touch the above Bylaw are:

1) The good rule and government of the district;

8) Conserving public health, well-being, safety and convenience;

and,

30) Regulating the use of any reserve, recreation ground or other land or public place vested in the Council or under control of the Council.

That leaves the question of whether the Bylaw is unreasonable or *ultra vires* its empowering Act. In my view, the Bylaw could be struck down because of its inconsistency with the general law of the land.

That general law was declared in the case of Ceramalus v Police (High Court Auckland AP No. 76/91, Judgement July 5, 1991, Tomkins J.). This was a successful appeal by Mr Ceramalus against a conviction for offensive behaviour under Section 4/1a of the Summary Offences Act 1981.

It should be said that Tomkins J. agreed with the District Court Judge that a charge of Indecent Exposure (Section 27 of the Summary Offences Act) was inappropriate for people of naturist beliefs who were naked in a public place. (It could be argued on a fair reading of Section 27 of the Summary Of fences Act 1981 that nakedness in a public place is only an offence if accompanied by an obscene gesture or expression).

It is necessary to discuss the facts in the Ceramalus case. The defendant was sunbathing nude at Fitzpatrick Bay in an area frequented by naturists. He had earlier walked to the spot in sight of some 110 school children and 3 teachers, one of whom laid a complaint to the police. The defendant refused to move away from the group when questioned by the police. The underlying issue in the case was whether the actions of Mr Ceramalus amounted to offensive behaviour. The Appellant submitted that the human body was not a lethal object, it was not a threat to human society. Nakedness on a beach, he continued, was a valid form of free expression not proscribed by the Act. The Judge quoted from the comments of McCarthy J. in Mesler v Police (1967) NZLR 437: 'The task of the law is to define the limitations which our society for our social health puts on such freedom ... bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of the lower and less important ones.' In that case, the Court of Appeal was dealing with a charge of disorderly behaviour.

Mccarthy J. later observed that an offence against good manners, a failure of good taste, a reach of morality, even though these might be contrary to the general order of public opinion are not enough to establish disorderly behaviour.

Tomkins J also referred to Messiter v Police (1980) NZLR 586, a charge of using insulting words in a public place. The Judge said in that case it dealt with that part of the frontier between individual liberty and public right, between the individual's freedom of speech and expression and the State's right to intervene to protect the wider interests of the community.

Tomkins J examined the question of what was offensive behaviour. Adopting the words of an Australian case he concluded that it 'must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of the reasonable person.' The Judge concluded that the fact of Mr Ceramalus walking and sunbathing naked did not amount to anger, disgust or outrage and was not therefore offensive. His appeal was allowed and the conviction against him quashed.

The effect of this ruling is that nakedness itself is not illegal. Thus if someone is naked and is, for instance, sunbathing, swimming, or digging the garden, then the law has not been broken. In the course of his judgement, Tomkins J. commented, 'I have little doubt that in this day and age and in that place--a place where it was not uncommon for persons to sunbathe in the nude--adults on the beach would not be offended, in the more restricted meaning of that word as used in the section, by the appearance of the appellant, naked.'

Validity of the Bylaw

How then is the validity of the Bylaw banning beach nudity affected?

Bylaws are subject to review in the Court; the Courts may declare a Bylaw invalid on the grounds of ultra vires, unreasonableness or uncertainty. In my view, this one should be struck down on the basis that it is both unreasonable and *ultra vires* (see, for example, Kruse v Johnson (1898) 2Q.B.91). The Bylaw is contrary to the general law of the land. It is in my opinion, 'an oppressive and gratuitous interference' with those who for many years now have been able to sunbathe naked on North Shore beaches. A Bylaw of this kind might have been acceptable in 1975; in the 1990s it discriminates against those who choose to sunbathe naked; and in doing so runs contrary to the general law of the land.

The simplest way to challenge the Bylaw would be through the machinery provided by Section 12 of the Bylaws Act 1910, which allows the High Court to quash or amend an invalid Bylaw.

The Bylaw is also vulnerable on the basis that it is a breach of Section 19 of the Bill of Rights Act 1900: 'Freedom from Discrimination. Everyone has the right to freedom from discrimination on the ground of ... ethical belief.'

I am reinforced in my view that the Bylaw is unreasonable and *ultra vires* by the fact that when behaviour is offensive in the sense accepted by Tomkins J., an offender can still be liable under Section 4 of the Summary Offences Act. However, the fact that a person is merely naked on the beach does not render him or her so liable. It is not open to the North Shore City Council to achieve the same effect by maintaining a blanket ban of the kind asserted in this Bylaw.

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