IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2004-409-002299

IN THE MATTER OF	the Bylaws Act 1910
BETWEEN	WILLOWFORD FAMILY TRUST First Applicant
AND	TERRY REX BROWN Second Applicant
AND	CHRISTCHURCH CITY COUNCIL Respondent

Hearing: 20-21 June 2005

Appearances: JGX McCoy QC, P A Joseph and C B Morrall for Applicants
DJS Laing and PMS McNamara for Respondent

Judgment: 29 July 2005

JUDGMENT OF PANCKHURST J

Introduction

[1] Following enactment of the Prostitution Reform Act 2003, the Christchurch City Council in July of the following year made the Christchurch City Brothels (Location and Signage) Bylaw 2004. The applicants challenge the validity of that part of the bylaw by which the location of brothels in Christchurch is regulated, namely to within a defined area in the central business district. The applicants contend that this part of the bylaw is invalid for unreasonableness, repugnancy and for effecting a prohibition.

[2] The Willowford Family Trust owns properties at 437-439 Colombo Street and at 40 Welles Street, Christchurch. The Colombo Street property is not within the defined area prescribed in the bylaw, whereas Welles Street is. The Trust wants to operate brothels at both properties. It has previously operated massage parlours.

[3] Mr Brown is described as a beneficiary of the Trust. He has made three affidavits on behalf of himself and the Trust, for which he is entitled to speak. He deposes that it is his wish that 437-439 Colombo Street be available to operate as a brothel, but that this outcome is only one of the objectives of this case. The other is to overturn the bylaw as it affects small owner-operator brothels (SOOBs). Mr Brown claims an "abiding interest" in law reform and speaks with obvious enthusiasm and some knowledge concerning the industry throughout his affidavits.

The grounds of challenge

[4] The bylaw contains seven clauses. Clauses 1-4 set out the short title, the commencement date (7 July 2004), the object and the definition of certain terms used in the bylaw. Clause 5 defines what signage may be used to advertise commercial sexual services.

[5] The present challenge is confined to clause 6:

> **LOCATION OF BROTHELS**
>
> Subject to clause 7, no person may operate, or permit or suffer to be operated, a brothel in any part of the City other than within an area delineated on the map contained in the First Schedule.

[6] Clause 7 prescribes an exception for:

> **EXISTING BROTHELS**
>
> (1) Any premises described in the Second Schedule and upon which a brothel has operated continuously since the day this bylaw came into force is exempt from the location control in clause 6. However this exemption does not apply if, after this bylaw comes into force, the use of the premises as a brothel changes in character or increases in scale or intensity.
>
> (2) Any premises described in the Second Schedule shall, for the purposes of the signage controls in clause 5, be regarded as premises situated in an area of the City which is delineated on the map in the First Schedule.

The premises identified in the Second Schedule are situated at Kilmore and Worcester Streets, Christchurch. The map in the First Schedule is appended to this judgment.

[7] The grounds upon which clause 6 is challenged are set out in paragraphs 5 to 7A of the amended statement of claim:

> 5. (a) Clause 6 of the Bylaw is unreasonable and/or unlawful in its geographical limitation, character and extent and is contrary to s12(5) Bylaws Act 1910.
>
> (b) Clause 6 of the Bylaw unreasonably and/or unlawfully interferes with the common law right to use real and personal property in pursuit of a lawful endeavour which does not constitute a nuisance at law, namely, keeping a brothel.
>
> (c) Clause 6 of the Bylaw is an unlawful discrimination on the basis of ethical belief, contrary to s19(1) New Zealand Bill of Rights Act 1990.
>
> (d) Clause 6 of the Bylaw is an unreasonable or unlawful interference with the existing use rights of brothel owners or the other rights conferred on owners or occupiers of properties under the District Plan of the Respondent, prior to the introduction of the Bylaw, which permitted and permits brothels in Business Zones as of right and permitted or permits brothels in Living Zones, upon compliance with the other requirements of the District Plan.
>
> 6. Clause 6 of the Bylaw is an unreasonable or unlawful interference with the right to work, as guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights (as extended to New Zealand), the common law and also by s28 New Zealand Bill of Rights Act 1990.
>
> 7. Clause 6 of the Bylaw is ultra vires s14 Prostitution Reform Act 2003 as it is so restrictive in its geographical ambit, that it is not a lawful "regulation" of the location of brothels.
>
> 7A. The 2 zones delineated by the First Schedule to the Bylaw as areas where brothels are permitted, are so unreasonably or unlawfully drawn as to include within them properties that it could never have been intended by the Respondent to be so included.

[8] The contention in para 5(c) that the bylaw gave rise to unlawful discrimination on the basis of ethical belief contrary to s19(1) of the New Zealand Bill of Rights Act 1990, is not pursued. By leave, however, a further ground of challenge was introduced, being the contention that clause 6 was repugnant because it inhibited the right of prostitutes to freedom of association contrary to s17 of the Bill of Rights Act.

[9] For the purposes of this judgment it is convenient to group and consider the grounds of challenge under three broad heads:

[a] the geographical character of the bylaw,

[b] the right to work, and

[c] the right to freedom of association.

These three pervasive themes are pursued by virtue of diverse arguments based on different recognised grounds of challenge to the validity of bylaws.

The process adopted by CCC

[10] The applicants do not contend that clause 6 is bad for procedural invalidity. Indeed, Mr McCoy QC commented in his written submission that:

> CCC has acted admirably and candidly in setting out through the evidence it has filed the factors which actuated its decision-making process and its final decisions.

Nonetheless it is important to an understanding of the Council's case to appreciate the process of consultation and deliberation which preceded the bringing down of the bylaw.

[11] Mr Terence Moody, the Environmental Health Policy Leader employed by the Council, described the processes which were followed in a very detailed affidavit. The Act came into force in late June 2003. On 11 July 2003 the Regulatory and Consents Committee considered a report from the Council's Director of Legal Services which summarised the implications of the new Act and recommended the establishment of a Prostitution Reform Sub-committee to consider whether there should be and, if so, the content of a bylaw. It was resolved to establish such a Sub-committee.

[12] The Sub-committee met and reported to the full Council at its meeting on 24 July 2003. The Sub-committee recommended a process of consultation with stakeholders and a public consultation process to occur between August and

December 2003, which would culminate in a special Council meeting on 19 December to decide the direction of any regulatory controls. The Council adopted these recommendations.

[13] During August 2003 the Sub-committee met with the police, health and youth aid organisations, massage parlour owners, escort agencies and street workers. It emerged that the police maintained a register of about 800 persons who worked as escorts in Christchurch, in addition to which there were thought to be approximately 50 to 100 street workers. The owners of existing massage parlours indicated that there were 14 licensed massage parlours in Christchurch, 11 situated in the central business district, two in Small Business zones in suburban locations and one in a residential area. A meeting with the NZ Prostitutes Collective confirmed that escorts comprised a numerically significant part of the local sex industry. They typically worked alone, from their homes or from rented accommodation, advertising their services through newspapers or on the internet.

[14] During October-November 2003 public consultation occurred. The Sub-committee formulated a questionnaire which was widely distributed. It asked:

> Should brothels be allowed only in a certain part or parts of Christchurch? If so, which part or parts of Christchurch do you suggest?

Other questions addressed the issue of signage.

[15] Written submissions were received from 1500 members of the public. Included in the results obtained were the following:

[a] 61% of respondents thought that brothels should be confined to the central business district or within the four avenues,

[b] 2.9% considered that brothels should be allowed anywhere, while .3% of respondents considered that brothels should be permitted in residential areas,

[c] 17% of respondents favoured permitting brothels to operate in industrial or commercial zones outside the central business district.

I need not detail the results in relation to signage.

[16] On 1-3 December 2003 the Sub-committee held public meetings at which 52 persons spoke in support of written submissions they had filed. Following such hearings the Sub-committee prepared a detailed report which was presented to the Council meeting on 19 December 2003. The recommendations in the report included that:

> the Council commence the process of introducing a bylaw regulating the location of brothels in Christchurch in accordance with the provisions set out in the report of the Sub-committee.

A timetable for promulgation of a draft bylaw, which would be the subject of further consultation and a further report to the Council on 27 May 2004, was included. Annexed to the report was a map which depicted the same three areas within the central business district as are shown on the appendix to this judgment. The Council resolved to adopt the recommendations of the Sub-committee.

[17] A draft bylaw was prepared, together with a statement of proposal in terms of the special consultative procedure prescribed in s86 of the Local Government Act 2002. An analysis in terms of s155 of the same Act was also prepared, which identified as problems perceived by the Council the nuisance impact of brothels permitted to operate in predominantly residential areas on the one hand, and the undesirability of creating a "red light district" by confining brothels to a very small area on the other.

[18] At a further meeting of the Council on 26 February 2004 various recommendations of the Sub-committee were adopted, including that the draft bylaw was appropriate to meet the perceived problems, that the bylaw was necessary, that the statement of proposal and summary of information attached to the bylaw were appropriate for, and that a special consultative procedure should follow.

[19] During March-April 2004 public submissions on the draft bylaw were received. There were 88 submissions in all. Some submitters requested to be heard in person and this was accommodated at meetings of the Sub-committee in late April. After further meetings of the Sub-committee in May and June a report was prepared for consideration by the Council. Arising from the consultative process the Sub-committee identified three issues which required decisions:

- the extent of the scheduled brothel area
- whether small owner-operated brothels (SOOBs) should be exempt from the location control
- whether certain existing brothels which fell outside the scheduled area should be exempted from the location control

[20] In the end result the Sub-committee concluded that the scheduled area should not be changed, but that SOOBs should be allowed to operate in residential areas, being Living Zones as described in the City Plan. Further, the Sub-committee concluded that there should be an exemption in relation to three premises (one in Kilmore Street and two in Worcester Street), where existing massage parlours registered under the Massage Parlours Act 1978 had operated without problem over a considerable number of years.

[21] The Council at its meeting on 1 July 2004 resolved to make the bylaw in accordance with the recommendations of the Sub-committee, save for deletion of the proposed amendment to allow SOOBs in Living Zones. In the result the bylaw which came into effect on 7 July 2004 restricted the location of all brothels to the scheduled area, subject only to the exception in relation to the three established businesses (see paras [5] and [6]).

The affidavit evidence

[22] Mr Terry Brown swore three affidavits in support of the applicants' case. Those confirmed why the Trust of which Mr Brown is a beneficiary desired to have the brothel zone expanded to include the Colombo Street premises owned by the

Trust, but also extended to other matters in relation to which Mr Brown claimed expertise, including:

> That there has been a significant increase in the rentals now required by landlords for properties inside the areas where brothels are permitted.

That:

> as a consequence … many sex workers have now been unable to secure employment as sex workers because of the prohibitive cost of rental,

and that particularly SOOBs were affected. Mr Brown also identified as a further consequence of the bylaw:

> That there are now unmet sexual or companionship needs for persons residing in suburbs and those parts of the wide expanse area of Christchurch city who find it difficult or expensive or too costly to travel to the (scheduled) area.

That previously:

> the majority of clients who attended brothels, during daytime hours, were persons aged 60 or over (often pensioners), who go to their local SOOBs (which) option is no longer lawfully available.

[23] Mr Brown, especially in his third affidavit, advanced a number of contentions concerning the unsuitability of the defined brothel zone, on account of its size, the premises within it which are unavailable to the operators of brothels, the unsuitability of other areas on account of their industrial characteristics, the fact that many buildings of special sensitivity are within the zone and that the effect of the bylaw was to create a red light zone and perpetuate the belief that "the sex worker occupation (is) illicit and clandestine".

[24] Mr Brown's standing to express these opinions was not elucidated, save for his confirmation that he is a beneficiary of the Willowford Family Trust and that he has an abiding interest in law reform.

[25] The other two affidavits filed in support of the applicants' case were from Ms A M Reed who is the Regional Coordinator of the New Zealand Prostitutes Collective. This body was formed in 1987. Ms Reed has held her position since 1989. She was actively involved as a lobbyist for the decriminalisation of

prostitution prior to the passing of the new Act in 2003. Similarly she made submissions to the Sub-committee in relation to the then proposed Christchurch City bylaw. Ms Reed's evidence was focused upon the effect of clause 6 of the bylaw upon SOOBs.

[26] Ms Reed's evidence included a number of pertinent opinions. She considered that in real terms the effect of the bylaw was to expose the estimated 50 to 60 workers who operate SOOBs in the suburbs to do so unlawfully, that is in breach of the bylaw, when a principal purpose of the Act was to decriminalise prostitution. Ms Reed considered that those sex workers who choose to operate or work in SOOBs do so because they control their earnings, select their hours of work, decide which clients they will accept and are not subject to the risk of abuse by brothel managers or owners. Many are sex workers who previously worked in parlours or brothels but who had chosen to work from a SOOB, sometimes as a means of transition out of the sex industry. Ms Reed did not consider that SOOB workers would be able to comply with the bylaw. To do so would require that they move from the suburbs and obtain rental accommodation within the scheduled zone. She questioned both the availability of such accommodation and whether the rentals would be affordable. In the event she was of the view that SOOBs, by nature, are much more suited to a suburban habitat, typically a private home. Many customers used SOOBs for the very reason they were discreetly situated in suburban areas.

[27] Two affidavits were sworn and filed in support of the respondent's case. The first has already been referred to, being that of Mr Moody. It both describes the history of the bylaw and exhibits the reports and materials which preceded its being made by the Council.

[28] The other affidavit was from Ms C P Elvidge, a senior planner employed by the Council. Her evidence was directed to the allegation that the bylaw was unreasonable or unlawful because it interfered with the rights otherwise enjoyed by owners and occupiers of properties in Business zones or in Living zones to establish brothels in their properties, either as of right or upon compliance with certain requirements of the District Plan. By reference to the Christchurch City Council Proposed Plan Ms Elvidge analysed whether a brothel, as defined in the 2003 Act,

would comply with the provisions of the Living and Business zones. In general terms she concluded that there was but limited scope for a brothel to be established within the Living zones as a permitted activity because of restrictions upon the hours of operation (7.00 am to 11.00 pm) and because of the likely requirements for parking spaces on site. Therefore, a resource consent for a discretionary activity or for a restricted discretionary activity, would be required. With reference to Business zones (those outside the scheduled area) Ms Elvidge concluded that permitted activity status was likely provided bulk, location and traffic standards were met.

The statutory context

[29] Three statutes are of greater or lesser importance to this case.

Prostitution Reform Act 2003

[30] Section 3 of the Act provides:

> **Purpose**
> The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that –
> (a) safeguards the human rights of sex workers and protects them from exploitation:
> (b) promotes the welfare and occupational health and safety of sex workers:
> (c) is conducive to public health:
> (d) prohibits the use in prostitution of persons under 18 years of age:
> (e) implements certain other related reforms.

[31] The interpretation section, s4, contains definitions of a number of terms, including the following which are relevant to this case:

> **brothel** means any premises kept or habitually used for the purposes of prostitution …
>
> **business of prostitution** means a business of providing, or arranging the provision of, commercial sexual services
>
> **prostitution** means the provision of commercial sexual services
>
> **sex worker** means a person who provides commercial sexual services
>
> **small owner-operated brothel** means a brothel –
> (a) at which not more than 4 sex workers work; and
> (b) where each of those sex workers retains control over his or her individual earnings from prostitution carried out at the brothel

[32] Section 5 provides a further definition being who is an "operator" in relation to the business of prostitution, which is defined to include persons who alone or with others own, operate, control or manage a business of prostitution. However, ss(2) provides:

> (2) Despite anything in subsection (1), a sex worker who works at a small owner-operated brothel is not an operator of that business of prostitution, and, for the purposes of this Act, a small owner-operated brothel does not have an operator.

[33] Section 8 of the Act under the sub-heading "Health and safety requirements" provides that operators must adopt and promote safer sex practices and, to that end, prescribes various steps to be taken to protect and educate sex workers and their clients.

[34] Sections 11 and 12 provide for advertising restrictions which may be affected by bylaws made by a territorial authority.

[35] Section 13 prescribes the "Procedure for making bylaws", being:

> (1) A bylaw made under section 12 must be made in the same manner in all respects as if it were a bylaw made under the Local Government Act 2002.
>
> (2) Despite subsection (1), a bylaw may be made under section 12 even if, contrary to section 155(3) of the Local Government Act 2002, it is inconsistent with the New Zealand Bill of Rights Act 1990.

[36] Of central importance to this case is s14:

> **Bylaws regulation locating of brothels**
> Without limiting section 145 of the Local Government Act 2002, a territorial authority may make bylaws for its district under section 146 of that Act for the purpose of regulating the location of brothels.

[37] Sections 24-33 of the Act prescribe powers of entry and inspection which are vested in inspectors under the Health Act 1956. The detail of these powers is not presently relevant. However, I note that whereas s26 allows entry and inspection of *premises* without warrant provided there is reasonable grounds for belief the premises contain a brothel, s27 governs "entry of homes" for which a District Court warrant is required. The latter provision is obviously directed to SOOBs which, as

the evidence of Ms Reed confirmed, are often operated by the owner from a private home.

[38] Part 3 of the Act, sections 34-41, sets out the requirements in relation to operator certificates. Again it is notable that SOOBs are in a special position, to the extent that s5(2) exempts SOOBs and sex workers who work in them from the definition of operator, and therefore from the requirement to hold a certificate.

[39] Part 4 of the Act contains miscellaneous provisions, which in the main relate to the establishment of a Prostitution Law Review Committee which after not less than three, and not more than five years, is to review and report to the Minister of Justice upon the success or otherwise of the legislation.

Local Government Act 2002

[40] Mr Laing helpfully analysed the provisions of the Act most relevant to the bylaw making powers of local authorities. This exercise supplied a background to better understand the processes followed by the Council between July 2003, when the Prostitution Reform Sub-committee was established, and July 2004 when the bylaw finally came into force.

[41] Section 3 sets out the purposes of the Local Government Act, including that the Act:

> (c) promotes the accountability of local authorities to their communities; and
>
> (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural wellbeing of their communities, taking a sustainable development approach.

[42] Of most relevance for present purposes are Parts 6 and 8 of the Act. These parts contain provisions which regulate decision-making by local government, and define the power to make bylaws, respectively. Section 77 headed "Requirements in relation to decisions", s78 headed "Community views in relation to decisions" and s79 headed "Compliance with procedures in relation to decisions", prescribe a code for local authority decision-making.

[43] In broad terms the local authority must follow a staged process by which the relevant problem is defined, options to address it are identified, proposals to that end are developed and assessed and, finally, a solution is adopted. In terms of s79 the local authority has a discretion as to how compliance with the earlier two sections is achieved. Where public consultation is necessary, s82 prescribes: "Principles of consultation". However, in this instance and because a bylaw was in contemplation, the "Special consultative procedure" in s83 of the Act applied. I shall return to its terms in a moment.

[44] The procedure for making bylaws is contained in Part 8 of the Act, in particular in Sections 155-156. Section 155 enacts three requirements:

> (a) That the local authority must determine whether a bylaw "is the most appropriate way of addressing the perceived problem."
>
> (b) If so, it must determine whether the proposed bylaw is "the most appropriate form of bylaw".
>
> (c) Finally the local authority shall determine whether the proposed bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990.

However, in addition to these base requirements, s156(1) imports the "Special consultative procedure" set out in s83 as applicable to bylaws (subject to limited exceptions set out in ss(2) which are of no application in this instance). Hence, it is the special procedure for public consultation which applied, and was followed, in this case.

[45] Section 83 sets out detailed requirements with reference to the preparation of a "statement of proposal" and a "summary of information", which are to be considered at a council meeting, made available for public inspection, distributed widely and also advertised. Submissions upon the summary are also to be invited within a defined period.

[46] In drawing attention to the statutory requirements Mr Laing noted that s82 of the Act which defines "Principles of consultation" included a requirement in ss(1)(e):

> That the views presented to the local authority shall be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration.

Counsel also submitted that the procedural requirements which surround the making of bylaws in terms of the Local Government Act "introduce a new degree of rigor and accountability" in contra-distinction to the less exacting procedure which applied under the previous Act of 1974. I agree.

Bylaws Act 1910

[47] This proceeding is brought in reliance upon s12:

> **Order by High Court to quash or amend invalid bylaw** – (1) At any time before or after the coming into operation of any bylaw any person may by motion apply to the High Court for an order quashing the bylaw, or any part thereof, on the ground that the bylaw or such part thereof is for any reason invalid, and if the Court is of opinion that the same is invalid an order may be made quashing the same accordingly.

[48] The other section of the Act which is of possible relevance is s17:

> **Part of bylaw only may be deemed invalid** – If any bylaw contains any provisions which are invalid because they are *ultra vires* of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

It is unquestioned that a challenge to the bylaw is available, since s144 of the Local Government Act provides that the bylaw-making power contained in it is subject to the Bylaws Act 1910. The latter "prevails" over the former.

The geographical limitation, character and extent of the bylaw

[49] The several grounds of challenge contained in the amended statement of claim (refer para [7]) include four allegations which can be conveniently grouped under this head. They are 5(a) that the bylaw is unreasonable on account of its geographical limitation, character and extent, 5(b) that it is unreasonable for interference with the common law right to use property for a lawful endeavour, 5(d) that it is unreasonable for interference with existing use rights under the Christchurch City District Plan and 7A that the bylaw is unreasonably drawn to include properties

that could never have been intended to be within the scheduled brothel area. Before I turn to these contentions it is necessary to refer to the arguments advanced by counsel with reference to the character and extent of the scheduled area under the bylaw.

Arguments as to the scheduled area

[50] Mr McCoy drew attention to various features of the scheduled area and made colourful submissions concerning the implications and effect of the bylaw. The schedule zone is about 90 hectares in area, whereas the area of greater Christchurch is over 45,000 hectares. Counsel therefore characterised the scheduled area as very small, comprising less than a fraction of 1% of the city area.

[51] Turning to the south, middle and north parts which comprise the scheduled area, Mr McCoy pointed out that the District and High Courts, the City Council Chambers, the City Council Creche, the Canterbury Public Library, the Christchurch Town Hall, the Christchurch Convention Centre and the Canterbury Provincial Council buildings were all situated within it. There were at least four places of worship within, and a further eight in close proximity (say 100 metres), of the scheduled area. Other included premises were the Central Bus Exchange, the Discovery School, the Centennial Leisure Centre, the Theatre Royal and other similar establishments.

[52] This range of established uses within the scheduled zone led Mr McCoy to the submission that the Council must have been so fixated on the concept of the scheduled area within the central business district, that it paid no attention to the content of the area and arrived at a result which was absurd. He submitted that "a great proportion of the area in the schedule is unsuitable, unusable or unavailable".

[53] This argument was further amplified by reference to the extent to which commercial premises and car parks are situated in the scheduled area as well. By reference to Mr Brown's evidence, including his reference to premises owned by the Council in Bedford Row which were recently let subject to a covenant that they not be used as a brothel or for associated activities, counsel argued that there are

numerous premises within the area which would not in fact be available to brothel operators, because landlords would not countenance a business of prostitution in their building.

[54] Specific submissions were also made in relation to the southern part of the scheduled area which was characterised as predominantly a commercial and semi-industrial area. Counsel submitted that the intention of the Prostitution Reform Act was to allow regulation of the location of brothels to avoid their being situated near to places of special sensitivity (churches, schools etc), but at the same time not to confine them to "dank, semi-industrial areas". Mr McCoy submitted:

> To require sex workers to operate in only the least desirable areas is to create a red light zone. This concept is antithetical to the personal autonomy and dignity of the sex workers.

With reference to the boundaries of the scheduled area, counsel submitted:

> The boundaries it (the Council) has designed prove to be not only remarkable in the extreme, but peculiar if not downright bizarre.

[55] Mr Laing accepted none of these criticisms. In light of the solid majority of respondents to the questionnaire who favoured confining brothels to the central business district, the Council had defined the scheduled area accordingly. However, it determined it was not appropriate to have one single zone, but rather three, in order to exclude certain prime tourist focal points such as the art gallery, the museum, the Arts Centre and Cathedral Square. Consideration was given to providing buffer zones around places of special sensitivity, but this option was rejected. The conclusion reached was that such zones were not likely to be effective, nor workable. Counsel noted that previous massage parlours, now brothels, exist within close proximity to places of special sensitivity, and without apparent problems.

[56] The contention that the effect of the bylaw was to in fact create a red light area, situated in the southern part of the scheduled area, was rejected. As it happened seven of the previous massage parlours now operated as brothels were situated in the southern portion of the scheduled area, but this showed that this area was attractive to massage parlour operators in the past and to brothel owners at present. While accepting that many premises within the scheduled area may not be

available to brothel operators, counsel submitted that this merely reflected the wish of some property owners not to have brothels situated in their premises. This was commercial decision-making within the rental market.

[57] Mr Laing also criticised aspects of the affidavit evidence of Mr Brown. His evidence that rentals within the scheduled zone had risen significantly, that brothel operators were excluded from the market as a consequence, and that there were, therefore, unmet sexual needs, was characterised as unsubstantiated assertion. Mr Brown supplied no specific information in support of his opinions and it was not accepted he was competent to advance them.

Conclusions about the evidence

[58] Much of the evidence, and some of the argument, was to my mind unhelpful. The percentage area of the scheduled zone as compared to greater Christchurch does not shed much light. Nor did the rhetoric concerning the number of premises which are devoted to various specific and private uses and which are therefore unavailable to brothel owners. The criticism of the method adopted by the Council, a defined zone without specification of areas of special sensitivity, I did not consider helpful either. It was for the Council to determine its own methodology. Provided its approach was one within the power to regulate the location of brothels conferred by the Act, then criticism of the methodology was not productive. I also accept that at least certain of the opinions voiced by Mr Brown constituted assertion rather than valid opinion evidence.

[59] In order to properly assess the impact of the bylaw empirical evidence concerning the availability of premises and the rentals demanded for them on the one hand, and as to the likely demand for premises from brothel owners on the other, would have been helpful. It may, I accept, be difficult to obtain clear evidence of this nature. However, I anticipate that persons having experience in relation to the rental market within the Christchurch central business district would be able to provide opinion evidence directed to whether the scheduled area is likely to be sufficient and able to meet the demand for premises from brothel operators.

[60] Absent informed market-based evidence, I am ill-placed to assess the impact of the scheduled area upon the industry. On the basis of such material as is before me I am only able to form impressions about the likely effect of the bylaw. I accept there will probably be only a limited number of premises within the scheduled area which are both available to, and suitable for, brothel owners. It is to be expected many landlords will not want to have brothels situated in their premises. Whether the demand for premises will outstrip supply, I do not know. Given the extent of the scheduled area, and the evidence as to the location of brothels to date, I do not consider that the contention as to creation of a "red light" district is substantiated.

[61] That said, it is perhaps surprising that the Council resolved to confine brothels to the central business district alone. The evidence as to the location of massage parlours registered under the previous legislation, suggested that, while there was a concentration of parlours within parts of the central business district, they were by no means confined to that area. The premises owned by the Willowford Family Trust at 437-439 Colombo Street, and others, were situated in business areas on certain main arterial roads outside the central business district. This historical pattern may afford the best evidence concerning where premises suitable for the business of prostitution are to be found.

[62] My impression is that the location of the restricted area exclusively within the central business district is likely to produce problems. Prostitution is said to be the oldest profession in the world. It would be idle to think that a bylaw intended to regulate the location of brothels, if ill-conceived, will nonetheless be observed.

[63] But these observations are largely as to the merits of the bylaw, whereas my concern, of course, is confined to its validity – a much narrower inquiry.

Is the bylaw shown to be unreasonable?

[64] The first issue is what is meant by unreasonableness in this context. As to that question counsel advanced conflicting viewpoints. Mr McCoy, supported by Mr Joseph in oral argument, contended for an approach based upon proportionality. Mr Laing, unsurprisingly, argued that *Wednesbury* unreasonableness supplied the

appropriate test, since the Council's decision upon the bylaw was of an "intensely political nature". Therefore, the question for determination was whether the bylaw was of a character that no reasonable body of persons could have resolved to make.

[65] *Kruse v Johnson* [1898] 2 QB 91 remains the most influential English decision in relation to bylaws. It concerned a prohibition upon playing music in a public place and within a defined distance of dwelling-houses. With regard to local authority bylaws Lord Russell CJ observed that they were not to be condemned simply because Judges thought they went further than was prudent or necessary or convenient. The Judge, said at 99-100, of bylaws found to be:

> … partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men …

that unreasonableness was then established.

[66] In New Zealand *McCarthy v Madden* (1914) 33 NZLR 1251 represents the necessary starting-point. The case was heard by a Full Court of four Judges of the then Supreme Court. It concerned a decision to dismiss informations because a bylaw was deemed to be unreasonable. The bylaw proscribed driving cattle on streets at defined times. It was considered unreasonable because its effect was to seriously impede the operation of the Christchurch saleyards and also to interfere with the public right to use highways.

[67] The joint judgment of Denniston and Edwards JJ contained at 1268:

> *The question whether a by-law is reasonable or unreasonable being essentially one of fact, it is not possible to define in advance any test which will be conclusive upon the validity or invalidity of any particular by-law.* Certain general principles may, however, we think, be deduced from the decided cases, or necessarily result from the principles so deduced, which will aid in arriving at a just conclusion in such cases. These are, we think, as follows …" (emphasis added)

The seven matters of general principle then listed begin with the proposition that Judges should defer to the assessment of the elected representatives of a community where the bylaw is one which regulates the conduct of members of that community.

However, Judges may assess the productive benefits and negative effects of a bylaw by reference to all the surrounding facts, including whether public or private rights are unnecessarily or unduly infringed. Where the bylaw impinges upon a public right and does not produce a corresponding benefit to the community affected by it (as was accepted to be the case in *McCarthy v Madden*), generally the bylaw will be unreasonable. The principles discussed in the joint judgment are summarised in more modern terms by D Knight in "Power to make Bylaws" [2005] NZLJ 165.

[68] With reference to the contention that proportionality should supply the test of unreasonableness in this context, the separate judgment of Thomas J in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) was cited as at least supportive of a lesser test of unreasonableness in the bylaw context. A rating decision of the Council had been successfully challenged by way of judicial review. On appeal that decision was reversed. Richardson P and Blanchard J considered that a restrained approach was to be taken when reviewing a rating decision of a local authority, being the approach described in *Wellington City Council v Woolworths New Zealand Limited (No. 2)* [1996] 2 NZLR 537 (CA).

[69] Thomas J, in a separate judgment, and in contending that the concept of unreasonableness was more flexible than the *Wednesbury* standard (being also variable depending on the subject-matter), said at 404 with specific reference to bylaws:

> Similarly, reasonableness has always been the criterion applied when assessing the validity of a bylaw, but it has been done without undue embellishment or resort to the language of *Wednesbury* unreasonableness. In *Kruse v Johnson* [1898] 2 QB 91, Lord Russell of Killowen CJ stated at p 99 the test which stood the test of time. Bylaws should be benevolently construed and supported if possible. Bylaws which are found to be partial and unequal in their operation as between different classes, which are manifestly unjust, which disclose bad faith, or which involve such oppressive or gratuitous interference with the rights of those subject to them that no reasonable justification could exist in the minds of reasonable persons, may be held to be invalid on the basis that Parliament could not have intended to give the local body authority power to make such rules. As such they are unreasonable and ultra vires. Lord Russell of Killowen CJ stressed, of course, that a bylaw is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient. Courts in New Zealand considered that Judges here have a "somewhat freer hand" than their English brethren because of the checks and safeguards which are imposed on local authorities in the United Kingdom,

> namely, ratification by an external body and the power of disallowance by the Crown. See *Grater v Montagu* (1904) 23 NZLR 904 at p 906; and *McCarthy v Madden* (1914) 33 NZLR 1251 at p 1268. These cases suggest that it is easier to establish that a bylaw is unreasonable than it is to establish *Wednesbury* unreasonableness. Yet, unless the procedural requirements differ markedly, it is anomalous that a local body decision which is to be implemented by way of a bylaw should in effect attract a different approach from a decision which is not incorporated in a bylaw. By and large the considerations directed towards establishing whether the decision is unreasonable should be much the same.

[70] Perhaps the highpoint of the New Zealand cases where proportionality has been considered is *Wolf v Ministry of Immigration* [2004] NZAR 414 (HC). Wild J at paras [25]-[36] considered the concept at some length, but doubted its application in the particular statutory setting. For my part I do not consider this is the case in which to seek to define the outer edge of the jurisdiction to review bylaws. I think there is already a well-established approach to unreasonableness in the present context. I have already referred to the facts of this case, or rather to certain problems in relation to the evidence. It is not, I think, a case the answer to which is dependent upon the limits of the jurisdiction.

[71] Despite the doubts and concerns I have expressed as to the appropriateness of the scheduled area as struck by the Council, I am unpersuaded by quite a margin that the bylaw is unreasonable on account of its geographical limitation, character and extent. Put simply and directly, and looking for the moment at the scheduled area alone, I do not consider that anything about it is challengeable. It is neither unreasonable in any of the acknowledged senses, nor disproportionate, if that were to be an apt approach. To the contrary the definition of the scheduled area reflects the considered view of the Sub-committee, after full public consultation, as to what was appropriate. It is apparent, I think, that both the Sub-committee and the Council were most conscious of the prevailing view of respondents to the questionnaire, that brothels should be confined to the central business district. Their concern on that score was understandable. In terms of the size and definition of the area itself, it is not in my view demonstrated to be of a nature that reasonable people could not arrive it.

[72] To the extent that the arguments that the bylaw unreasonably interfered with the common law right to use property for a lawful endeavour and unreasonably

interfered with existing use rights under the District Plan, I am similarly unpersuaded. The former argument was perhaps more relevant in the context of the second aspect of the applicants' case, the right to work. Such submissions as were made directed to existing use rights, were also more relevant in the context of SOOBs and the right to work contention.

The right to work under the bylaw

[73] Mr Joseph advanced the main arguments in support of this aspect of the case. His focus was the impact of the bylaw upon workers who wished to provide commercial sexual services in a SOOB rather than in a certificated brothel. To recap the draft bylaw which was prepared in early 2004, and which became part of the material available in the course of the further consultative process, did not make provision for SOOBs. However, following the special consultative process undertaken in March-April 2004, the Sub-committee in its further report to the Council recommended an amendment to the draft bylaw.

[74] This was to the definition of "brothel" in clause 4, the interpretation provision. Whereas previously brothel had been defined as having the same meaning as in s4(1) of the Prostitution Reform Act, the Sub-committee recommended an exclusion to the definition as follows:

> That premises situated in the Living Zone as defined in the District Plan:
>
> (i) at which no more than two sex workers work, and
>
> (ii) where one of those sex workers permanently resides, and
>
> (iii) where each of those sex workers retains control over his or her individual earnings
>
> be excluded from the definition of a brothel contained in the bylaw.

[75] The Sub-committee's report to the Council for its meeting on 1 July 2004 included this:

> The issue of allowing (SOOBs) to operate outside the scheduled area was given extensive consideration by the Subcommittee. It was accepted that such premises existed presently, largely in residential areas, with few complaints being received about such activities. While concerns were raised by members of the Subcommittee about compliance with District Plan requirements in some cases there was little evidence that these had caused

> significant problems. The Subcommittee took into account the views expressed by a number of submitters that brothels should not be allowed to operate in residential areas, regardless of scale. Conversely there were significant submissions on the draft bylaw arguing that excluding the SOOBs from a large part of the City could be seen as unreasonable and may go against the spirit of the Prostitution Reform Act as well as making it difficult for health and other agencies to provide their services. Some consideration was given to recommending an amendment to the draft bylaw to permit SOOBs to operate in any business zone. In terms of the District Plan they could operate in these zones as of right.

The latter point, permitting SOOBs to operate in any business zone, was rejected because it was thought likely to compromise the integrity of the scheduled area and to encourage brothels generally to commence operating in the business zones.

[76] The Council, on 1 July 2004, adopted the draft bylaw, but reverted to the previous definition of brothel. Thereby the exemption to permit SOOBs in living zones was removed. All brothels were restricted to the scheduled area.

The arguments

[77] The extensive written submission of the applicants, as supplemented by Mr Joseph's oral argument, raised various grounds referable to the contention that the bylaw interfered with the right of sex workers to work in the business of prostitution.

[78] The arguments fell under three heads. These were that the bylaw was invalid on grounds of conventional unreasonableness (although counsel couched the submission in terms of proportionality). The second contention was that the bylaw was repugnant to constitutional principle. In this context Mr Joseph argued that some rights were properly characterised as constitutional in nature, that the right to work was one of them and that a restriction upon such right imposed by a bylaw required very clear parliamentary authority. Here, it was said, the right of sex workers to work in SOOBs was effectively removed by the bylaw, when the extent of the Council's authority was to regulate the location of brothels, including SOOBs. The third argument was that, if sex workers' rights under the Prostitution Reform Act were not constitutional in nature, nonetheless the bylaw was repugnant to the common law which similarly recognised the right to work as a fundamental value. Before a bylaw could restrict that right, plain authorisation to do so was required.

Such was not conferred on the Council under the Act. A plethora of cases were cited in support of the various elements of each argument.

[79] The submissions in reply from Mr Laing and Mr McNamara questioned the applicants' reliance upon Article 6 of the International Covenant on Economic, Social and Cultural Rights and on s28 of the New Zealand Bill of Rights Act 1990, in this context. While accepting that the common law guarded the right to work from unreasonable intrusion by a bylaw, the thrust of the argument in opposition was directed to the terms of the Prostitution Reform Act and to the effect of the bylaw, in support of the contention there was no, or very minimal, interference in this case.

[80] To my mind the ultimate questions in relation to this aspect are what rights are conferred upon sex workers under the Act and whether the bylaw unreasonably interfered with those rights. I shall consider each question in turn.

What rights are conferred?

[81] The argument for the Council distinguished between the right to work and the first purpose of the Act, being "to decriminalise prostitution", without "endorsing or morally sanctioning prostitution or its use …" : s3, (refer para [30]). Hence it was said that to the extent the Act gave rise to a right to work, it was only through decriminalisation.

[82] I do not accept this distinction. To my mind the Act first recognised the fact of the existence of prostitution and decriminalised it. Although neither prostitution, nor the use of prostitutes, were endorsed or morally sanctioned, the rights of sex workers to engage in the business of prostitution was expressly recognised. Indeed the Act sought to "create a framework" that:

> (a) safeguards the human rights of *sex workers* and protects them from exploitation:
>
> (b) protects the welfare and *occupational health and safety* of sex workers:
>
> (s3, refer para [30]).

This is the very language of work or employment.

[83] The further dimension to the Council's argument was that, if the Act signified an entitlement to work in the business of prostitution, the right was not unqualified. It was subject to s14 which expressly permits regulation of the location of brothels. That power should not be read down. It is commonplace for there to be regulational restriction of the right to work, whether in terms of the need for personal qualifications, or with reference to time, place or other circumstances. Moreover, the bylaw does not intrude upon the right of sex workers to work to any significant degree. The limitation relates to work in SOOBs situated outside the scheduled area. This is a restriction on only one form of prostitution. Sex workers may still work in brothels (and even SOOBs) located in the scheduled area, as street workers and even from private homes in order to provide out-call and escort work. Hence, the sole restriction is upon conducting the business of prostitution in small owner-operated brothels situated outside the scheduled area. This minimal level of restriction was in response to the articulated concerns of the community and secured the benefit that residents of Living Zones were not exposed to the business of prostitution within their community.

[84] I am in agreement with the thrust of the submissions for the Council on this aspect. It is the case that only one form of sex work is restricted. That is work in SOOBs situated outside the scheduled area. Whether this level of restriction is unreasonable, repugnant to the Act or gives rise to a prohibition of SOOBs is a mixed question of fact and law. That question is : at what point does a restriction imposed by a bylaw upon the right to work become unlawful?

The legal test

[85] The leading case of *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 (PC) provides the starting-point. The Council made a bylaw which prohibited the operation of hawkers in eight streets in the city of Toronto. It did so pursuant to a power to pass bylaws for the purposes of "licensing, regulating and governing hawkers …". The Supreme Court of Canada, by a majority, found the

bylaw to be invalid. The Privy Council upheld that decision. Lord Davey in delivering the judgment of their Lordships said at 93, with emphasis added:

> It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all *in a substantial and important portion of the city no question of any apprehended nuisance being raised.* It was contended that the by-law was ultra vires, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately.
>
> No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words.

He added at 94:

> It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the city. Their Lordships cannot accede to this argument. *The question is one of substance and should be regarded from the point of view as well of the public as of the hawkers.* The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying their goods of or of trading with the class of traders in question.

[86] These passages demonstrate that invalidity involves questions of extent and degree. The eight streets in question comprised "a substantial and important portion of the city". The argument that hawkers could still operate elsewhere was viewed as a question of substance, which was to be judged both from the point of view of the public and of the hawkers. It is also important to note that there was no evidence to show the bylaw was necessary "to prevent a nuisance or for the maintenance of order".

[87] *Virgo* was considered and applied in *Hanna v Auckland City Corporation* [1945] NZLR 622 (CA). The Auckland City Council made a bylaw which prohibited the erection of buildings except under the supervision and in accordance

with plans prepared by a registered architect or engineer "who (was) in the opinion of the City Engineer properly qualified to prepare the plans for and supervise … the work." The bylaw was challenged by a qualified and experienced architect who, however, was unregistered. Non-registration did not prevent his practising as an architect or using that description. The empowering section relied upon by the Council only enabled it to make bylaws concerning the construction and repair of buildings.

[88] Myers CJ in delivering the principal judgment said at 628:

> There can be no doubt that the by-law under consideration may very seriously interfere with the practice of the plaintiff or of any other person in the like position. No doubt, as Mr Stanton said in his argument, many by-laws, as to the validity of which there can be no question, may interfere with or restrict the rights of individuals; but very strong authorizing words are required in a by-law-making power before it can be held that the authority upon which the power is conferred can be allowed to interfere with the lawful carrying on of a lawful business.

After reference to *Virgo*, in particular to the marked distinction between prevention of a trade and its regulation or governance, the bylaw was found to be ultra vires and unreasonable as well. The other three members of the Court agreed that the bylaw was ultra vires and one of them that it was unreasonable, the remaining two members expressing no concluded opinion concerning unreasonableness.

[89] The present case is of course distinguishable upon the grounds that the Act expressly empowered the Council to regulate the location of brothels. The bylaw is not ultra vires in the classical sense. Rather the question is whether on account of the restriction placed upon SOOBs the bylaw is unreasonable, or amounts to an unlawful restriction on trade or effectively prohibits SOOBs. As in *Virgo*, the question whether the bylaw crosses the line involves an assessment of its substantial effect, in this instance in the context of rights created under the Act.

[90] Numerous other cases were cited by counsel, but I doubt that further reference to authority is necessary or helpful. Instead, I turn to an examination of the effect of the bylaw in relation to the right to work as recognised in the Act.

Is the bylaw unreasonable or otherwise invalid?

[91] The evidence of Ms Reed (refer para [26]) concerning the operation of SOOBs was unchallenged. She considered that a significant number of sex workers in Christchurch chose to work in SOOBs for reasons which she articulated. Ms Reed deposed that SOOBs are located in the suburbs, typically in a private home, because both workers, and their clients, welcomed the relative anonymity of that situation.

[92] In my view the final report of the Sub-committee, and its recommendations to the Council, were essentially confirmatory of Ms Reed's evidence. The extract cited from the final report (refer para [75]) indicated the Sub-committee likewise concluded that SOOBs existed essentially in residential areas and, moreover, without occasioning "significant problems". Hence, the Sub-committee recommended that SOOBs be permitted in premises in living zones, where one sex worker permanently resided and at which no more than two sex workers were engaged. (refer para [74]).

[93] This recommendation represented, I think, a realistic squaring up to the clear intent of the Act. SOOBs are recognised in it as a constituent part of the business of prostitution. Reflective of the Act's definition of SOOBs, that they are small and are operated by the sex workers, who control their individual earnings, there is no requirement to hold an operator's certificate. Further, and by way of direct acknowledgement that brothels are situated in homes, s27 of the Act proscribes entry into homes (as opposed to other premises), save with the consent of the owner or pursuant to a District Court warrant.

[94] In the face of this evidence and the terms of the Act, is the bylaw as it affects SOOBs valid? In my view it is not. Borrowing the words in *Virgo* the effect of the bylaw is to prohibit sex workers "from plying their trade at all in a substantial and important portion of the city no question of any apprehended nuisance being raised". Whether this conclusion is characterised as one based upon unreasonableness, prohibition or unreasonable restraint of trade, does not greatly matter. In substance, and whether viewed from the point of view of sex workers or of the public (to again use the words of *Virgo*), the practical effect of the bylaw is to deny the existence of SOOBs in the city of Christchurch. In that regard I am unable to accept the

contention that any intrusion is minimal, because SOOBs may still be established within the scheduled area, or because work in SOOBs is only one facet of the business of prostitution and need not be accommodated in terms of a location bylaw. The evidence to which I have already referred indicates otherwise. For these reasons I conclude that the location aspect of the bylaw is invalid in relation to its impact upon SOOBs.

[95] For completeness two further points should be noted. First, the majority view of respondents to the questionnaire who favoured confining brothels to the central business district can, of course, afford no protection to the bylaw. Elected representatives, although entitled to give weight to the views of, or mandate from, constituents, may not regard themselves as bound to that viewpoint : *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL) at 853.

[96] Second, my conclusion that SOOBs may not be rendered practically extinct by bylaw does not mean that their operation in private homes is necessarily authorised. The relevant requirements of the District Plan still apply. If not met, then the proposed activity will be permissible only with a resource consent : *Paprzik v Tauranga District Council* [1992] 3 NZLR 176 (HC).

Freedom of association

[97] This head of the applicants' case was also directed to sex workers engaged in SOOBs. The contention was not that the bylaw denied them freedom of association, but rather that its practical effect was to require them to work in a certificated brothel within the scheduled area. Instead of being able to work in the company of a limited number of sex workers, to retain control over their earnings and to not be answerable to a brothel operator, these freedoms were said to be removed. Put another way, the effect of the bylaw was to deny the *freedom of limited association* to sex workers.

[98] While accepting that conceptually freedom of association included freedom *from* association, Mr Laing and Mr McNamara did not accept that the effect of the bylaw was to require sex workers to associate by working in brothels other than SOOBs. Alternatively if the bylaw had an associational effect, this was minimal

and, in terms of s5 of the New Zealand Bill of Rights Act 1990, was a limitation that was demonstrably justifiable in a free and democratic society.

[99] Given the conclusion which I have already reached in the previous section of this judgment, I need not consider this ground of challenge at any length. It is sufficient to say that, standing alone, I am doubtful that the freedom from association argument would have succeeded. While the bylaw does have a dramatic effect upon the operation of SOOBs, I am not persuaded that thereby freedom from association is established. Other options remain open to sex workers. The bylaw does not necessarily require them to work in a much more associational situation, although it does have that tendency.

Result

[100] The applicants, having succeeded in relation to one of the grounds of challenge, are entitled to an order pursuant to s12(1) of the Bylaws Act 1910 quashing the bylaw as it relates to the location of brothels. Although, pursuant to s17 of that Act, it is competent to quash and sever part only of a bylaw, the Council did not suggest that the location provisions were severable. It follows that clauses 6 and 7 of the bylaw, which together govern the location of brothels, are quashed. The clauses relevant to signage are unaffected.

[101] Costs must follow the event. My tentative view is that costs assessed on a 2B basis are appropriate, but if agreement is not possible on the basis of that indication memoranda may be filed.

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