

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2003-404-7266

BETWEEN WAITAKERE CITY COUNCIL
 Plaintiff

AND JOHN MICHAEL HICKMAN AND
 STEPHANIE HICKMAN
 First Defendant

AND ROBERT SPARGO AND CAROL ANN
 SPARGO
 Second Defendant

Hearing: 2 August 2004

Appearances: R B Enright and B E McDonald for Plaintiff
 D M Carden and J P Steadman for First and Second Defendants
 J Caldwell and K Hill for Auckland City Council
 J F Verry for Rodney District Council
 G Bonham for the Master Pool Builders Guild

Judgment: 1 October 2004 at 9.30 am

RESERVED JUDGMENT OF RANDERSON J

Solicitors:

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Counsel:

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Introduction

[1] In 1987, Parliament passed the Fencing of Swimming Pools Act. The legislation applies to both swimming pools and spa pools, whether existing or new. Unless exempted, all such pools must be fenced to specified standards. The purpose of the legislation, as expressed in the long title of the Act, is to promote the safety of young children.

[2] There are approximately 50,000 pool owners in New Zealand, many of whom have complied with the requirements of the Act. But territorial authorities responsible for ensuring compliance with the Act are continuing to encounter difficulties in its interpretation and application.

[3] In this proceeding, the Waitakere City Council, supported by Auckland City and Rodney District Councils, seeks declarations under the Declaratory Judgments Act 1908 about the interpretation of some of the key provisions in the Act. Waitakere City has over 200 prosecutions pending against pool owners for alleged non-compliance with the Act. These prosecutions have been adjourned pending the outcome of this proceeding.

[4] The first and second defendants are the owners of properties with swimming pools in Waitakere City. It is alleged that the fencing of their swimming pools does not comply with the Act and specific declarations are sought in that respect.

[5] Under the Act, pool owners must fence the pool itself or the area around the pool described in the Act as the “immediate pool area”. The proper interpretation of that provision is a key issue in this case.

[6] Waitakere City takes a relatively restrictive view of the scope of this expression while the defendants contend for a broader and more flexible approach. A key difference between the parties on this issue is whether, as the Councils contend, the immediate pool area may only include activities or purposes carried on exclusively in conjunction with the use of the pool. In that respect, the defendants submit that the immediate pool area may include activities or purposes carried on in

conjunction with the use of the pool, whether or not they may also be carried on independently.

[7] A secondary issue concerns the interpretation of the requirements of the Act relating to doors providing access to a pool from a building. This issue arises because the Act permits a building to be part of the pool “fence” in certain circumstances.

[8] I record that a representative of the Master Pool Builders Guild appeared and advised that the Guild supported the defendants’ submissions but did not otherwise seek to be heard.

Jurisdiction

[9] The jurisdiction to make orders under s 3 of the Declaratory Judgments Act is wholly discretionary: s 10. The appropriate tests to be applied under that section are well established and are discussed, for example, by McCarthy P in *New Zealand Insurance Company Ltd v Prudential Assurance Company Ltd* [1976] 1 NZLR 84, 85 (CA).

[10] All parties support the making of declarations as to the true interpretation of the Act but, of course, they differ as to the scope of the declarations. I am satisfied on the basis of the affidavit evidence filed in support of the plaintiff’s application that there are genuine differences of interpretation and that it is desirable not only for the parties but also for other territorial authorities and the public generally, to give such guidance as the court is able to provide. It was evident from the numbers attending the hearing that there is significant public interest in the outcome. That reflects real concerns in the community about the impact of the legislation and the proper balance between the interests of pool owners and the wider public interest in the safety of young children.

[11] While I am content to consider the proper interpretation of the legislation so far as it applies generally, I am not willing to express a view or to make declarations relating specifically to the properties of the defendants. It would not be proper to do

so given that they are currently being prosecuted for a alleged breach of the Act. To express views in relation to their specific cases could pre-empt the outcome of prosecutions yet to be heard. It has been useful to examine the photographic evidence produced in relation to the defendants' swimming pools as illustrative of the general issues to be determined. But the application of the Act to their specific properties must be determined elsewhere.

History of the legislation

[12] Mr Carden for the defendants referred in some detail to the history of the legislation. Reference was also made to overseas precedents. I have considered all this material but it provides little assistance in interpreting the Act. Only a brief history is offered by way of background.

[13] In 1976 a model Swimming Pools Bylaw was prepared. The purpose of the bylaw was "to prevent access by pre-school children and particularly the under two year olds, onto properties which have swimming pools". The bylaw was not mandatory and was adopted by some, but not all, territorial authorities.

[14] With effect from 1 April 1980, s 684(34) of the Local Government Act 1974 was introduced to provide specific power for a territorial authority to make bylaws requiring the fencing of swimming pools. Again, not all Councils introduced bylaws under this power.

[15] In 1983, the Local Bills Committee on the Fencing of Private Swimming Pools concluded (page 59):

... that the overwhelming weight of evidence and argument required that private swimming pools should be fenced. In particular the Committee concluded that private swimming pools should be fenced because:

- (a) They are a significant childhood water hazard;
- (b) Pool fencing is the most effective means of preventing drownings of pre-school children in private swimming pools;
- (c) It is totally impossible for parents to supervise their children every minute of the day;

- (d) There are no equal or greater water hazards for pre-school children;
- (e) Where there is a reasonable and viable means of protecting young children from hazards created in the environment such as private swimming pools, then those children have a right to that protection; and
- (f) The value of aesthetically pleasing gardens cannot be placed above the value of human lives.

[16] As a result of the Committee's report, the Model Bylaw was redrafted in 1984. But it was not until the introduction of the Fencing of Swimming Pools Bill in 1986 that a definition of "immediate pool area" was inserted although the expression "immediate pool area" had been mentioned earlier.

[17] The foreword to the 1976 Model Bylaw referred to the "immediate pool area". A suggestion was made that "fencing the immediate pool area, especially where children are resident is more effective than fencing the perimeter of the property". This suggestion was noted as "impracticable". The Bylaw was said to concern "fencing the property or part thereof, or the recreational area within which the pool is situated". In the body of the Bylaw, reference was made to enclosing "the property on which the pool is located or that part of the property within which the pool is situated".

[18] The revised 1984 Model Bylaw defined "pool area" as meaning "the area immediately surrounding a swimming pool in which the activity related to the use of a swimming pool generally takes place". The foreword to the 1984 Model Bylaw noted that the intention was "to keep the pool area isolated from other areas in which children play or frequent".

[19] It is common ground that the Parliamentary debates relating to the passage of the 1986 Bill, did not include any specific discussion of the immediate pool area. However, the explanatory memorandum to the Bill stated:

The term "immediate pool area" means the pool itself and so much of the surrounding area as is used for activities or purposes in conjunction with the use of the pool. Each case will have to be determined on its own facts, but it is envisaged that changing sheds and barbecue areas would normally be within the immediate pool area, while a vegetable patch would not.

[20] The only other explanatory material produced to the court was a publication prepared in 1999 by the Department of Internal Affairs and described as “The Fencing of Swimming Pools Act 1987 Guidelines for Territorial Authorities”. At p 10 of the guidelines, the following passage appears:

In the Department’s view the “*immediate pool area*” could include the pool, its decking, and any changing sheds, but not a vegetable garden, a clothes-lines, a barbecue area, a children’s sand-pit, or a slide or swing. The most important factor is the location of the fence in relation to the rest of the property. The fence should prevent young children moving directly to the pool from the house, other buildings, garden paths, or other areas of the property normally open to them.

[21] The same guidelines show various illustrative diagrams of fences but none provides any material assistance in the present case.

[22] While the material submitted provides some general background, it is of little weight in deciding the interpretation issues and there are no decided cases which assist.

Approach to interpretation of the Act

[23] It is axiomatic that the meaning of an enactment must be ascertained from its text and in the light of its purpose: s 5(1) Interpretation Act 1999. Where common law rights of property owners are restricted by legislation, there is a presumption that those rights will not be adversely affected to any greater extent than is necessary to fulfil the requirements of the Act and its purpose. In situations such as that before the court, there is a need to balance the rights of the individual property owner against the needs of the community and the purpose of the legislation: *Laws of New Zealand*, Statutes, paragraph 173 and *Ashburton Borough Council v Clifford* [1969] NZLR 927, 943 (CA). It must be accepted, however, that the rights of property owners are to give way to the broader public interest where the legislation, on its true construction, clearly so requires. It follows that the essential exercise is to examine the legislation to ascertain its meaning in the light of its text and purpose.

Analysis of the Act

[24] As noted, the legislation has the single purpose of promoting “the safety of young children by requiring the fencing of certain swimming pools”. The expressions “swimming pool” and “pool” are defined in s 2 to mean:

... an excavation, structure, or product that is used or is capable of being used for the purpose of swimming, wading, paddling, or bathing; and includes any such excavation, structure, or product, that is a spa pool:

[25] The Act generally applies to all swimming pools and spa pools whether or not they were in existence at the date the Act commenced. The Act applies where any such pool is full or partly filled with water: ss 3 and 4. Certain pools are exempted under s 5 but none of these exemptions is relevant for present purposes. Special exemptions may also be granted by a territorial authority under s 6 in the case of any particular pool but only where “the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances and the conditions it imposes ... that such an exemption would not significantly increase danger to young children”.

[26] Section 8(1) of the Act is the operative provision and provides:

8 Obligations of owner and persons in control of pool

(1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

[27] The following points emerge:

- a) Unless exempted, the owner of a pool is obliged to fence it with a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools.
- b) There are two options for the location of the fence. The first is to fence the pool itself. The second is to fence some or all of the immediate pool area including all of the pool itself.

- c) It is common ground that the “owner” of the pool (see definition in s 2) may choose which option to adopt.
- d) At first sight, the requirement to fence “some or all” of the immediate pool area is puzzling. However, I take it to mean that the fence need not be located at the outer edge of the immediate pool area but may be located at an intermediate point between the edge of the pool and the outer edge of the immediate pool area.

[28] So much is clear. But the real questions are how the extent of the immediate pool area is to be determined and what may be included within such area. That requires consideration of the definition of “immediate pool area” in s 2 which provides:

... the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool:

[29] Considered in conjunction with s 8(1), I reach the following conclusions as to the scope of the immediate pool area:

- a) There are several meanings of the term “immediate” in the New Shorter Oxford Dictionary at p 1315 but the most apt is “Nearest, next, or close, in space or order”. The use of that expression indicates that Parliament intended a limited area commencing adjacent to the pool edge. The definition is expressed exhaustively and does not support an expansive reading. The existence of the exemption power in s 6 also indicates a Parliamentary intention to limit the scope of the immediate pool area.
- b) Subject to the issue of immediacy I discuss below, the outer extent of the immediate pool area is determined by its use. It will extend only so far as the surrounding area is used for activities or purposes carried on in conjunction with the use of the pool.
- c) Although the term “use of the pool” is not defined, it is evident from the definition of “pool” in s 2 that the use of the pool contemplated in the definition of immediate pool area is for swimming, wading, paddling, or bathing.

- d) It follows that the activities or purposes carried on “in conjunction with the use of the pool” are activities or purposes carried on in conjunction with swimming, wading, paddling, or bathing or similar.
- e) Again by reference to the New Shorter Oxford English Dictionary at p 480, the expression “in conjunction with” connotes activities or purposes which are closely connected, associated or combined with the use of the pool. There must be a sufficiently close nexus between the activity or purpose and the use of the pool.
- f) Whether an activity or association is sufficiently connected with the use of the pool is a matter of degree. Activities which are carried on independently of the use of the pool or which have only a remote or indirect association with the use of the pool are to be excluded from the immediate pool area which must be fenced. Examples of activities which would not usually be regarded as being carried on in conjunction with the use of the pool include clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscape purposes.
- g) On the other hand, there are activities which would ordinarily qualify as being carried on in conjunction with the use of the pool. Examples include the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas, and diving boards or other pool equipment.

Must an activity occur exclusively in conjunction with the use of the pool to qualify for inclusion in the immediate pool area?

[30] An associated issue is whether the immediate pool area may be used, for example, for recreational or entertainment purposes in conjunction with the use of the pool, even if activities of that kind are capable of occurring independently of the use of the pool. It was submitted for the Councils that such activities could not take place within the immediate pool area unless they occurred exclusively in conjunction with the use of the pool. It followed, the Councils submitted, that activities capable of taking place independently of the use of the pool must take place in areas outside the fenced immediate pool area.

[31] I cannot accept the submission made by the Councils in this respect. It is not supported by the definition of immediate pool area nor any other provision in the Act. The definition of “immediate pool area” is explicit in using the expression “so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool” (emphasis added).

[32] There is no qualification of the expression “is used” as the Council’s contended. So long as it can be demonstrated as a matter of fact that the area surrounding the pool is used for the relevant activity or purpose from time to time and that such activity or purpose is carried on in conjunction with the use of the pool, it does not matter that the activity might also be capable of being carried on independently of the use of the pool. So, for example, if the pool owner is able to demonstrate that barbecues or entertaining take place in the area surrounding the pool from time to time in conjunction with the use of the pool as described, then the area so used may be included within the immediate pool area.

[33] In modern society, barbecues and entertainment frequently occur in the vicinity of a pool and in conjunction with the use of it for swimming and similar activities. There is a sufficiently close nexus between the two to fulfil the statutory definition and I do not view the inclusion of such activities as compromising the safety of children. Provided there is a complying fence, young children should not be able to enter the area except in the presence of an adult or adults.

Immediacy

[34] Although the extent of the immediate pool area is determined in the first place by its use in terms of the definition, the size of the area is not governed solely by that factor. Some weight must be given to Parliament’s use of the expression “immediate”. It must be assumed that the legislature intended that the immediate pool area to be fenced would be relatively confined and that, for example, a fence around the perimeter of the property would not comply with the Act. It is not possible to define with precision the width (say in metres) of the immediate pool area. The width will depend upon the circumstances of each case. The further away one moves from the edge of the pool, the less likely it will be that an associated

activity or purpose can properly be said to be carried on “in conjunction with” the use of the pool and the less likely it is that the activity will be in sufficient proximity to the pool to be properly regarded as within the “immediate” pool area.

[35] It follows from this discussion that I cannot accept Mr Carden’s submission that the focus of the Act is on the effectiveness of the fence and that within reason, pool owners should be free to determine where they locate the pool fence. The location of the fence is governed by the permissible extent of the immediate pool area, assessed in the way I have described.

The purpose of the Act

[36] There can be no question about the purpose of the Act because it is clearly stated in the long title. The statutory intention to promote the safety of young children is also emphasised in s 6 which provides that exemptions from the Act’s requirements may only be granted where danger to young children would not be significantly increased by doing so.

[37] I am not persuaded that the safety objectives of the Act are likely to be compromised by the adoption of a less restrictive interpretation of the immediate pool area than that contended for by the Councils. There is no suggestion that pool fencing standards would be reduced in any way. It is simply a matter of where the fence is situated and what activities may lawfully be permitted within the fence in the immediate pool area. There was a suggestion (only elicited when I pressed counsel) that the existence of other activities near the pool could distract adults from properly supervising children in the pool. But no evidence was put forward to support that proposition and the existence of a complying fence does not exonerate parents or other responsible adults from the obligation to supervise children and to protect them from harm.

[38] It is possible that the risk to children could be increased through the immediate pool area being accessed more frequently for other activities. But the fencing requirements are designed to ensure that access by young children cannot take place without the assistance of an adult and it is only activities which may truly

be regarded as taking place in conjunction with the use of the pool which are permitted within the fence.

The relief sought

[39] Waitakere City sought a declaration on this aspect of the case in the following form:

- 12.1 The following factual situations fall outside the definition of “immediate pool area” under the Fencing of Swimming Pools Act 1987 and accordingly require the installation of a fence that complies with the Act for swimming pools that are located within the Waitakere City area:
- a. **Utility areas (not recreational)** being areas that are, by their nature, not used exclusively in conjunction with a swimming pool. Utility areas are used for utility purposes associated with residential activity and include walkways, accessways, and thoroughfares, clotheslines, gardens, landscaped areas, parking areas, shed.
 - b. **Recreational areas** that are not used exclusively in conjunction with a swimming pool. Recreational areas are used for recreation and amenity associated with residential activities and include entertainment areas, BBQ areas, play areas, gardens and landscaped areas.
 - c. **Any combination of the above.**
 - d. For the purposes of (a) and (b) a utility area or recreational area is not exclusively used in conjunction with a swimming pool if the area can be used independently of the use of a swimming pool for one or more of – utility purposes, recreational purposes or general residential use.

[40] It will be apparent from the foregoing discussion that I am not willing to grant a declaration in the form sought by Waitakere City. It will also be obvious that the Act is not capable of being interpreted in a way which would produce precise guidelines which are clearly understood and easy to apply in practice. It is not within the power of the court to prescribe guidelines in specific terms which do not flow from a legitimate construction of the Act. That would be to usurp the function of Parliament.

Application of the Fencing and Swimming Pools Act to gates and doors

[41] The Councils also seek clarification about the application of the Fencing of Swimming Pools Act to doors in a building which provide access to a swimming pool where the building forms part of the “fence” in terms of the Act. In this part of the judgment, I will refer to the Fencing and Swimming Pools Act as the 1987 Act.

[42] Until the Building Act 1991 came into force, s 8 of the 1987 Act provided that any fence a pool owner was required to provide had to comply with the requirements of the Schedule to the 1987 Act. By an amendment to the 1987 Act in 1991, the fence must now comply with the requirements of the building code in force under the Building Act in respect of swimming pools which are subject to the 1987 Act.

[43] The definition of “fence” was also amended in 1991 and now reads:

fence means a fence that complies with the requirements of the building code in force under the Building Act 1991 in respect of swimming pools subject to this Act; and includes any part of a building and any gates or doors forming part of the fence; and fenced has a corresponding meaning:

[44] The first question to be addressed is whether a fence required under s 8(1) must comply with the requirements of both the Building Act and the Schedule to the 1987 Act. The answer to that question is in s 13B of the 1987 Act which provides:

13B Fencing in accordance with Schedule deemed a means of compliance

Any provision that is made for the fencing of swimming pools which is in accordance with the Schedule to this Act shall, in respect of—

(a) Matters subject to the Building Act 1991, be deemed to be one of the documents establishing compliance with the building code for the purposes of section 49 of that Act, and the requirements of this Act:

(b) Buildings and premises not subject to the Building Act 1991, be deemed to be a reasonable and adequate provision for the purposes of this Act.

[45] It follows that:

- a) Unless the pool at issue is exempted, section 8(1) requires compliance with the provisions of the building code under the Building Act 1991

which apply to swimming pools. If the building code is complied with, there is no additional requirement for compliance with the 1987 Act.

- b) However, if the fence complies with the Schedule to the 1987 Act, the fence is deemed to be in compliance with the building code under the Building Act.
- c) If the building or premises in which the pool is situated is not subject to the Building Act, the fence must comply with the Schedule to the 1987 Act unless exempted.

[46] Regrettably, there are material differences between the standards specified in the 1987 Act and in the building code. The Schedule under the 1987 Act comprises eleven clauses. A copy of it is attached to this judgment. The following is a summary of the key provisions:

- a) Any fence required must meet the requirements of clauses 1 to 7 as to height, ground clearance, and materials;
- b) Gates and doors must be constructed and operate in accordance with clauses 8 to 10 (they must not open inwards towards the immediate pool area; they must have a complying latching device; and a complying automatic closing device);
- c) Under clause 11 (which relates to doors giving access to the immediate pool area), the requirements of clauses 8 and 10 need not be met (or fully met as the case may be) if:
 - i) The building forms part of a fence; and
 - ii) The pool is not contained within the building; and
 - iii) The territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw; and
 - iv) The door is fitted with a locking device that, when properly operating, prevents the door from being readily opened by children under the age of six years.
- d) Any exemption granted under clause 11 applies only to the extent that the territorial authority is satisfied of the matters specified.

[47] Where the Building Act is applicable, the building code (SR1992/150) contains relevant provisions under clauses F4.3.3, F4.3.4, and F4.3.5. A copy of those provisions is also attached to this judgment.

[48] In summary, unless exempted, the building code requires pools with a water depth of over 400 mm to comply with the following:

- a) There must be barriers complying with clause F4.3.4(a) to (e);
- b) Access to the pool or the immediate pool area by children under six years must be “restricted”;
- c) Under clause F.4.3.5, all gates and doors must have latching devices not readily operated by children;
- d) Automatic closing and latching devices must be constructed to operate in the way described. This last requirement does not apply to sliding and sliding-folding doors giving access to the immediate pool “surround” from a building that forms part of the barrier; and
- e) There must be no permanent objects on the outside of the barrier that could provide a climbing step.

[49] Some of the more significant points of difference between the Schedule to the 1987 Act and the building code are:

- a) The building code refers to barriers, not fences;
- b) No fence height is specified under the building code. It must only be “appropriate”;
- c) The Schedule under the 1987 Act is generally more specific than the building code in relation to the construction of a fence;
- d) For gates and doors in buildings giving access to the immediate pool area, sliding doors are automatically exempted under the building code from the requirements of clause F.4.3.5 although it would appear that the requirements of clause F.4.3.4(f) would still apply (restricting the access of children under six years to the pool or the immediate pool area);

- e) Under the Schedule to the 1987 Act, for gates and doors in buildings forming part of the fence, the requirements of clauses 8 to 10 apply unless and to the extent they are exempted and the required locking device is fitted. There is no specific exemption under the Schedule for sliding doors. All doors are treated alike and all may be subject to exemption under clause 11.

[50] I cannot help observe that a close comparison of the separate provisions of the building code and the Schedule to the 1987 Act reveals a most unsatisfactory inconsistency between the two. Having two sets of provisions can only add to the confusion surrounding the application of the 1987 Act. Given the specific application of the 1987 Act, the obvious course is to have all relevant provisions contained in the 1987 Act with a cross-reference to that Act in the building code. Alternatively, the provisions could simply be duplicated in both. Either way, early attention by the legislature to these difficulties is highly desirable. I add that the Building Act 2004 (which comes into force on 31 March 2005) will repeal the Building Act 1991. However, the provisions of the Building Code under the 1991 Act which relate to swimming pools are not materially altered (see Part 1 of Schedule 4 to the 2004 Act).

[51] During the course of the hearing, Mr Enright submitted alternative forms of declaration. I do not propose to make any formal declaration at this juncture in the light of my findings. Rather, I will reserve leave for counsel to apply as to the appropriate form of declaration if one is required.

Summary and conclusions

[52] Unless exempted, the Fencing and Swimming Pools Act 1987 requires swimming pools and spa pools to be fenced. The pool owner has the option of locating any required fence around the pool itself or around the “immediate pool area”. The scope of the immediate pool area is determined in the first instance by the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing.

[53] Activities in conjunction with the use of the pool need not occur exclusively in conjunction with such use and are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool.

[54] But to qualify as an activity or purpose in conjunction with the use of the pool, the activity or purpose must be closely connected, associated or combined with the use of the pool. As well, the area must be sufficiently confined so that it may properly be described as being in the “immediate” area of the pool.

[55] The size of the immediate pool area cannot be defined with precision and will depend on the circumstances of each case. That leaves both territorial authorities and pool owners in a situation of most undesirable uncertainty which is the inevitable consequence of well intentioned but vaguely worded legislation.

[56] It is not within the power of this Court to interpret the Act with any greater precision. That is the proper function of Parliament. Early attention should be given to this as well as clarifying the unsatisfactory inconsistencies between the requirements of the Schedule of the Act and the building code in relation to fences, gates and doors.

[57] Leave is reserved to the Waitakere City Council to file a memorandum if any formal declarations are required. Any such memorandum should be filed and served within one month of this decision. Any other party may respond by memorandum within two weeks thereafter.

[58] As this is a test case, I am not inclined to make any costs order in favour of the plaintiff or the supporting Councils. However my present view is that the plaintiff should pay costs to the defendants on a 2B basis. If there is no agreement as to costs, counsel are to file and serve memoranda within one month of the date of this decision.

Signed at _____ this 1st day of October 2004

A P Randerson J

Schedule to the Fencing of Swimming Pools Act 1987

[Sections 13B, 13C]

[Means Of Compliance] For Fences Under This Act

HEIGHT

1.

(1) The fence shall extend—

(a) At least 1.2 metres above the ground on the outside of the fence; and

(b) At least 1.2 metres above any permanent projection from or object permanently placed on the ground outside and within 1.2 metres of the fence.

(2) Notwithstanding subclause (1) of this clause, where the fence is constructed of perforated material, netting, or mesh and any opening in the material, netting, or mesh has a dimension (other than the circumference or perimeter) greater than 10 mm, the fence shall extend at least 1.8 metres above the ground or the projection or object.

GROUND CLEARANCE

2. Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.

MATERIALS

3. All materials and components shall be of a durable nature and shall be erected so as to inhibit [any child under the age of 6 years] from climbing over or crawling under the fence from the outside.

4. Except where the fence is horizontally close-boarded [or is made of perforated material, netting, or mesh], the spacing between adjacent vertical pales, panels, or other posts shall not exceed 100 mm at any point.

[5. All fencing supports, rails, rods, and wires, that are not vertical, and all bracing that is not vertical, shall be inaccessible for use for climbing from the outside.]

[5A. Notwithstanding clause 5 of this Schedule, a fence may have horizontal supports, rails, rods, or wires, that are accessible for use for climbing from the outside, and horizontal bracing that is accessible for such use, if—

(a) The distance between any 2 of them at any point is at least 900 mm; and

(b) There is no other support, rail, rod, wire, or bracing (other than a vertical rail) between the same 2 at any point.]

6. Where any perforated material, netting, or mesh is used, no opening in that material, netting, or mesh shall have any dimension (other than the circumference or perimeter) greater than 50 mm.

7. All perforated material, netting, or mesh material shall be firmly attached at both top and bottom to a rail, pipe, or similar firm structure, or otherwise be of such a nature that the fence cannot readily be crossed by children under the age of 6 years.

GATES AND DOORS

8. Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7 of this Schedule, and shall be so mounted that—

- (a) It cannot open inwards towards the immediate pool area:
- (b) It is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided:
- (c) When lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

OPERATION OF GATES AND DOORS

9.

- (1) Every gate or door shall be fitted with a latching device.
- (2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.
- (3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.

10. Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate the latching device when the gate or door is stationary and 150 mm from the closed and secured position.

DOORS IN WALLS OF BUILDINGS

11. Where any building forms part of a fence and the pool is not contained within the building, any door that gives access to the immediate pool area need not comply with the requirements for gates or doors set out in clauses 8 to 10 of this Schedule to the extent (if any) that the territorial authority is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years.

Building Code

Clause F4—Safety From Falling

Provisions

Limits on application

OBJECTIVE

F4.1 The objective of this provision is to safeguard people from injury caused by falling.

FUNCTIONAL REQUIREMENT

F4.2 Buildings shall be constructed to reduce the likelihood of accidental fall.

PERFORMANCE

F4.3.1 Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change of level within or associated with a building, a barrier shall be provided.

Performance F4.3.1 shall not apply where such a barrier would be incompatible with the intended use of an area, or to temporary barriers on construction sites where the possible fall is less than 3 metres [or to buildings providing pedestrian access in remote locations where the route served presents similar natural hazards]

F4.3.2 Roofs with permanent access shall have barriers provided.

F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall [have barriers provided].

Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

F4.3.4 Barriers shall:

- (a) Be continuous and extend for the full extent of the hazard,
- (b) Be of appropriate height,
- (c) Be constructed with adequate rigidity,
- (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,
- (e) Be constructed to prevent people from falling through them, and
- [(f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or the immediate pool area.]

[Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.]

[(g) Restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.]

F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:

[(a) All gates and doors fitted with latching devices not readily operated by children, and constructed to automatically close and latch when released from any stationary position 150mm or more from the closed and secured position, but excluding sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier, and]

(b) No permanent objects on the outside of the barrier that could provide a climbing step.