IN THE COURT OF APPEAL OF NEW ZEALAND

CA122/2013
[2013] NZCA 410

BETWEEN	GARY BRIDGFORD AS EXECUTOR OF THE ESTATE OF ELVA BRIDGFORD OF WHANGAREI Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing:	7 August 2013
Court:	Harrison, Wild and Asher JJ
Counsel:	J K Scragg and P H Higbee for Appellant U R Jagose and D L Harris for Respondent
Judgment:	2 September 2013 at 12.30 pm

JUDGMENT OF THE COURT

A The three questions of law are answered "no".

B The appeal is dismissed.

C The appellant is to pay the respondent's costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] This appeal concerns the assessment of assets for the purposes of determining the eligibility of applicants for a residential care subsidy who have a spouse or partner. The point at issue is whether gifts that reduce the applicant's assets should be assessed singly for each partner, or on a combined basis. On the facts of this appeal, the question is whether gifts by Mrs Bridgford and her husband reducing the debt owed to them by their family trust were properly regarded as gifts of $27,000 each totalling $54,000, or whether, for the purposes of the exemption for gifts in the Social Security Act 1964 (the Act), the exemption was limited to a combined sum for both of them of $27,000.

[2] Gift duty exemptions can reduce the available asset pool for the purpose of determining whether a person is eligible for government residential care subsidies. At the relevant time, the Act provided that those persons whose assets exceeded $180,000 were ineligible for a residential care subsidy. The threshold has since been increased to $213,297.[1]

[3] The question as to how the Bridgfords' gifting should be treated first arose when Mrs Bridgford sought residential care subsidies. It was determined by the Chief Executive of the Ministry of Social Development that for the purpose of calculating their assets they should be credited with gifts of only $27,000 per annum and not $54,000. The Bridgfords challenged that decision, but it was upheld by the Benefits Review Committee, which determined that the Bridgfords were ineligible for a residential care subsidy. The Bridgfords then appealed that decision to the Social Security Appeal Authority, which dismissed their appeal.[2] The Bridgfords appealed that decision by way of case stated to the High Court where it was determined by Collins J in a decision of 28 November 2012.[3] Collins J declined the appeal. That decision is now appealed to this Court.

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1 Social Security Act 1964, sch 27, pt 1, cl 1(2).
2 *An appeal against a decision of the Benefits Review Committee* [2011] NZSSA 91.
3 *B v Chief Executive of the Ministry of Social Development* [2012] NZHC 3165.

The gifts

[4] In 1987, the Bridgfords had established a family trust, and they advanced considerable sums to that trust with debts back. The Bridgfords then proceeded to gift $27,000 each to the trust per annum from 1987 to 2004, which reduced that debt.

[5] In March 2009, Mrs Bridgford moved into a resthome. She applied for a residential care subsidy under the Act. The Ministry conducted a financial means assessment to determine whether Mrs Bridgford was eligible for the subsidy. It determined that her assets considerably exceeded the limit for those who were eligible for a residential care subsidy. In doing so, it rejected the argument that the debt of the trust to the Bridgfords could be reduced by $54,000 per annum under the Act. It determined that the reductions were limited to $27,000 per annum for both Mr and Mrs Bridgford, rather than the combined sum.

[6] Mrs Bridgford has died since the issue of these proceedings, which are now pursued by her executor Mr Bridgford. By consent, Mr Bridgford is substituted as appellant. It is submitted by Mr Scragg, counsel for the estate, that Mr and Mrs Bridgford could each gift $27,000 per annum and thus reduce their assets by a total of $54,000 per annum, rather than being limited to the single gift of $27,000 per annum recognised by the Chief Executive and upheld by the Benefits Review Committee, the Social Security Appeal Authority and the High Court. It was asserted that if the Chief Executive's decision was correct, then a significant number of otherwise successful applicants would be ineligible for the residential care subsidy, and that this is a test case.

The three points of law

[7] In the High Court, the three points of law were as follows:

(a) Did the Authority err in law in interpreting s 147A of the Act to mean that the deprivation of assets by both the assessed person and his or her spouse are to be considered in carrying out a financial means assessment under pt 4 of the Act?

(b) Did the Authority err in law in interpreting reg 9B of the Social Security (Long-Term Residential Care) Regulations 2005 (the Regulations) to require the total assets of the appellant and her husband to be assessed, including the assets they have deprived themselves of less $27,000 per annum of allowable gifting in the period outside the "gifting period"?

(c) Did the Authority err in law in declining to accept that gifting by the appellant and her husband could be aggregated in the relevant period?

[8] In the High Court, all three questions were answered in the negative.[4] It was common ground between the appellant and respondent that the first question was answered correctly by the High Court, and the contest relates to questions two and three.

Social Security Act 1964

[9] Mr Scragg argued that the correct interpretation of the Act is that an applicant for a residential care subsidy, and an applicant's spouse or partner, may each gift up to $27,000 per annum during the relevant period without such gifting constituting a deprivation of assets. He submitted that this approach was supported by s 147A of the Act and reg 9B of the Regulations, and also by the intention disclosed by relevant Cabinet papers at the time. He relied on the application of the presumption of statutory interpretation in s 6 of the New Zealand Bill of Rights 1990 (NZBORA) that a meaning consistent with that Act's rights and freedoms should be preferred, and said that to adopt an interpretation that combined their assets or gifts constituted an infringement of the appellant's right to be free from discrimination.

[10] Ms Jagose for the respondent submitted that to the contrary, the Act and Regulations created a regime where couples, whether they have a marital or de facto relationship, are treated as unitary economic units for the purposes of the aggregation and deprivation of assets. She submitted that the clear words of the Act, interpreted

4 *B*, above n 3, at [79].

purposively, meant that total per annum gifting per couple that would not constitute deprivation was limited to $27,000 per annum.

[11] We see the issue as involving an exercise in statutory interpretation. Section 1A(b) of the Act, which was inserted in 2007, provides that a purpose of the Act is, amongst other things, to enable in certain circumstances the provision of financial support to people to help alleviate hardship. It is provided at s 1A(c) that a further purpose is:

> (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—
>
> (i) that *where appropriate they should use the resources available to them before seeking financial support* under this Act; and
>
> (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
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> (Emphasis added.)

[12] The concern of the legislation can be seen in the light of this as being to provide financial help to people who cannot adequately support themselves.[5] In a similar context it has been recognised by this Court that social security benefits are to be reserved for those who truly need them.[6] Financial support will only be provided after claimants have, down to a defined limit, used the personal financial resources available to them.

[13] The part of the Act relevant to this appeal is pt 4. The purpose of this part is stated at s 136A(a) as being to specify the circumstances in which persons are required to pay for their long-term residential care, and under s 136A(b) the circumstances in which a funder must contribute towards the cost of those persons' long-term residential care.

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5 See *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) at 161 decided prior to the 2007 amendment.

6 *Tapp v Chief Executive Officer of the Department of Work and Income* [2003] NZFLR 761 (CA) at [19]; and *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50 (CA) at [30].

[14] To be eligible for long-term residential care in a hospital or resthome, individuals must undergo a needs assessment[7] and a means assessment.[8] If persons are assessed as being in need of long-term residential care, they are obliged to pay for their care up to a maximum contribution.[9]

[15] Under s 146 of the Act, a means assessment as to assets must be conducted. That means assessment is provided for in pt 2 of sch 27 of the Act. Under s 146(3), if a person's assets are assessed as being above the applicable asset threshold, the person must pay the cost of contracted care services up to the maximum contribution. If the cost of contracted care services exceeds the amount, then the additional costs will be paid by the funder.

[16] Part 2 of sch 27 therefore sets out how a means assessment is conducted. It provides at cl 4(b):

> **4 Definitions**
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> For the purpose of a means assessment as to assets conducted under section 146,—
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> **assets**, in relation to the person being means assessed, means the assets of the person and his or her spouse or partner (if any) that are capable of being realised by the person or his or her spouse or partner; and *includes*—
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> ...
>
> (b) *the value of assets that have been gifted by the person, the person's spouse or partner, or both during the prescribed gifting period* immediately before the date of means assessment; but does not include any allowable gifts, or the value of any allowable gifts, prescribed by regulations made under section 155:
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> ...
>
> (Emphasis added.)

[17] The position in relation to the assets of spouses or partners and any gifting by them is therefore clearly stated. When individuals in relationships are seeking entitlement to means tested state assistance, they are to have their resources considered together as a couple (spouses or partners), rather than as individual

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7 Social Security Act, s 137.
8 Sections 144–151.
9 Sections 136 and 139.

persons. Their combined assets include the value of any non-allowable gifts that either or both have made. This is consistent with the principle that people should use their own resources before obtaining benefits, and that their assets be reduced down to the prescribed amount before they can claim on the public purse. They are not allowed to preserve their resources for the use of their families or themselves by gifting beyond a permitted limit. Applying cl 4(b) to Mrs Bridgford's situation, the combined assets of her and her husband, including all gifts that are not allowable, are to be treated as her assets for assessment purposes.

[18] Section 147A is the section that deals specifically with deprivation of assets, including by gift. It provides:

> **147A Deprivation of assets and income**
>
> (1) If the chief executive is satisfied that a person who has applied for a means assessment, or the spouse or partner of that person, has directly or indirectly deprived himself or herself of any income or property (other than an exempt asset), the chief executive may in his or her discretion conduct the means assessment as if the deprivation had not occurred.

[19] This section replaced the former cl 4(c) of sch 27, which was of similar effect.[10] The Chief Executive must be satisfied that a person who has applied for a means assessment "or" the spouse or partner of that person has directly or indirectly deprived himself or herself of property. The Chief Executive then has a discretion to conduct the means assessment as if the deprivation had not occurred. The section is not concerned with any exemption for gifts, but rather the proposition that direct or indirect actions depriving a party of assets may be disregarded by the Chief Executive for the purposes of calculating means.

[20] We have had conflicting submissions from the parties as to whether the word "or" in s 147A has a conjunctive or disjunctive effect. In our view, s 147A(1) must be read with the definitions in cl 4(a) and (b) of sch 27. Under those clauses the assets of the person and his or her spouse or partner are put together for the purposes of asset assessment and specifically include the value of assets that have been gifted

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[10] The explanatory note recorded that by the amendment the deprivation provisions were aligned more closely with the wording of the previous legislation, and the Chief Executive has a discretion as to the inclusion of the value of the deprivation in the means assessment.

by the person and the person's spouse or partner. Gifts of the applicant, the applicant's spouse or partner or both are to be included in the value of assets in the assessment process. It follows that under s 147A acts of deprivation such as gifts are approached on the same combined basis.

[21] When s 147A is read against the backdrop of the purpose of ensuring that the parties' own resources are first used and the combining of assets and gifts under cl 4(b) for the purposes of assessing means,[11] the openness of the wording of s 147A and the use of the word "or" is unsurprising. Section 147A establishes the general proposition that all deprivation by couples whether it is individual or collective can be put to one side. Once this is appreciated, the issue of whether the word "or" has a conjunctive or disjunctive meaning is irrelevant. It does not matter whether the deprivation is by the individual or the couple. Either way it can be put to one side by the Chief Executive, consistent with cl 4(b).

[22] Therefore, the provisions of the Act explicitly require the Chief Executive conducting a means assessment process to treat the assets of two spouses or partners as one for the purposes of assessing the value of assets that have been gifted. In assessing the effects of deprivation all gifts, whether they are treated as individual, combined or joint, can be disregarded by the Chief Executive for the purposes of calculating assets.

The Regulations

[23] Regulations are made under s 155(1)(e) of the Act. That section allows the making of regulations that prescribe "for the purpose of section 147A, rules relating to deprivation of property, income, or both, and the circumstances in which those rules apply". The Regulations place a limitation on the Chief Executive's discretion in s 147A to ignore acts of deprivation, by allowing gifts of $27,000 per annum to be deducted. Regulation 9B(a) provides:

> **9B Deprivation of property and income**
>
> For the purposes of section 147A of the Act, instances of deprivation of property or income include, but are not limited to, the following:

[11] Schedule 27, pt 2, cl 4(b).

(a) gifts that are gifted in the 12-month period prior to the commencement of the gifting period, or in any 12-month period preceding that period, to the extent that the total value of the gifts in each such period exceeds $27,000:

Example

In the year before the commencement of the gifting period the person being means assessed *and that person's spouse jointly* make gifts having a total value of $100,000.

The person being means assessed *and his or her spouse* may be treated as having deprived themselves of $73,000 in respect of the gifts.

(Emphasis added.)

[24] In the regulation itself (as distinct from the example which was not relied on by either side) there is no reference to persons, whether they are individual persons or couples. For the purposes of s 147A there is a $27,000 exemption. In conjunction with the means assessment carried out under ss 146, 147 and sch 27, there is a limited exemption to the ability of the Chief Executive to put to one side acts of deprivation in that gifts of up to $27,000 must be allowed.

[25] The Regulations must be interpreted in the light of the purpose, the definitions and the specific provisions of the Act under which they are made.[12] Given that the provisions of the Act require the assets of couples and any deprivation of assets to be considered on a combined basis, the permitted gifting of $27,000 must, in the absence of words to the contrary, also apply to the combined assets and gifts of couples.

[26] It follows that we must reject Mr Scragg's key submission that under reg 9B(a) gifts of $27,000 each are allowed, and that a couple may avoid deprivation for gifted sums up to a combined total of $54,000. If that interpretation were correct, reg 9B(a) would be inconsistent with cl 4(b) where the references to the assets and gifting of couples are to them both collectively. It follows that the Ministry was right to take into account the aggregated value of the assets less aggregate gifts of $27,000 per annum, and that we agree with Collins J's conclusion to this effect.[13]

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12 Interpretation Act 1999, ss 5 and 29.

13 *B*, above n 3, at [44].

The example

[27] The example was not relied on by either party, or in the end by Collins J.[14] Regulation 3A(2) of the Regulations provides that an example "… is only illustrative of the provision to which it relates. It does not limit the provision."

[28] Like Collins J we see force in Mr Scragg's submission that the reference to persons and that person's spouse "jointly" making gifts must be read in the context of earlier regs 9(1)(a)(iii) and 9A(2) (which set up a particular five year gifting regime which is not relevant to the issues in this appeal). Those earlier regulations use the word "jointly" in a sense that clearly means persons jointly granting gifts. "Jointly" is not used in the sense of "combined".

[29] However, we agree with Collins J and with counsel that the example does not assist. Plainly a joint gift of $27,000 will be excluded from the calculation of assets. The example does not directly or indirectly indicate whether the gifts of each spouse are treated as individual or combined for the purposes of the assessment.

[30] Therefore, the example being a single illustration which is neutral on the point in issue, does not assist in resolving the interpretation issue.

Other material

[31] Mr Scragg relied on a Cabinet Business Committee paper,[15] a Cabinet minute[16] and a letter to various persons from the Deputy Chief Executive of Social Services Policy,[17] to support his submission. He relied in particular on references in these papers to the use of the $27,000 guideline amount as being based on the gifting provisions used in the calculation of tax for gift duty purposes. He relied on the fact

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14 At [43].

15 Cabinet Business Committee Paper "Social Security (Long-term Residential Care) Amendment Regulations 2005" (12 August 2005) CBC (05) 178.

16 Cabinet Minute "Social Security (Long-term Residential Care) Amendment Regulations 2005" (12 September 2005) CAB Min (05) 32/4.

17 Letter from Nicholas Pole (Deputy Chief Executive of Social Services Policy) to Marian Hobbs (Deputy Chairperson of the Regulations Review Committee) regarding the Social Security (Long-term Residential Care) Amendment Regulations 2005 (SR 2005/265) (15 December 2005).

that under the Estate and Gift Duties Act 1968, the $27,000 threshold applies to single persons only.

[32] We do not gain any assistance in the interpretation exercise from these references. The statements relied on by Mr Scragg do not in any direct way deal with the intended ambit of reg 9B(a). The inference that he asks us to draw from the reference to the Estate and Gift Duties Act can be countered by the equally open inference that the $27,000 figure was chosen by the Committee because it was a familiar figure already used in other legislation. The figure may have been picked for that reason only without any further thought as to the estate and gift duties regime.

[33] This Court has doubted whether Cabinet material of this kind would ever be of assistance in interpreting specific statutory provisions.[18] In any event, an extrinsic aid to interpretation is of no value if the meaning of or inference arising from the material that supports the suggested interpretation is not clear.[19] We do not find it possible to reach any firm conclusion as to what Cabinet or the Ministry intended from the choice of the Estate and Gift Duties Act figure. We cannot therefore infer an intention from the material supportive of the appellant's case. The Judge found the references in these extrinsic materials to be consistent with the interpretation favoured by the Authority. We do not go that far, but we conclude that those materials do not assist Mr Scragg's argument and can be put to one side.

The discrimination argument

[34] In the High Court Mr Scragg raised an additional argument, that the interpretation favoured by the Authority was inconsistent with the anti-discrimination provision in the NZBORA. The Judge was prepared to deal with that argument, but found that there was no inconsistency with the NZBORA.[20] He did not consider it necessary to consider s 5 of the NZBORA.

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18 *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [40]–[42].

19 At [52]–[55].

20 *B*, above n 3, at [75].

[35] We do not consider that s 5 of the NZBORA has any relevance to Mr Scragg's argument, because we agree with Collins J that the natural and ordinary meaning of the provision is not discriminatory. It is not suggested by the appellant that there should be any declaration that the Chief Executive had made an unlawful decision, which could invoke a s 5 justified limitations assessment. Rather, Mr Scragg's argument was that s 147A of the Act and reg 9B(a) should be given a meaning consistent with the prohibition on discrimination.

[36] The prohibition on discrimination at s 19 of the NZBORA provides:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[37] A ground of discrimination set out in the Human Rights Act 1993 is at s 21(1)(b):

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the **prohibited grounds of discrimination** are—
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> ...
>
> (b) marital status, which means being—
>
> (i) single; or
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> (ii) *married, in a civil union, or in a de facto relationship; or*
>
> (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or
>
> (iv) separated from a spouse or civil union partner; or
>
> (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:
>
> ...
>
> (Emphasis added.)

[38] It was stated in *Ministry of Health v Atkinson* that the correct approach in assessing whether there was discrimination is:[21]

> ... to [first] ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

[39] Mr Scragg argued that the appropriate persons in comparable situations were single persons. We do not agree. Single persons by and large organise their financial affairs on a different basis from couples. Certainly in this case, Mr and Mrs Bridgford lived together and set up their family trust together. They appeared to have pooled their assets and financial activities. In that regard, their financial position is different from a single person, and there is no analogy or comparable situation to a single person. We agree with Collins J that in these circumstances it is artificial to try to compare a single person with couples.[22]

[40] We see the correct comparator to be a person who applies for a residential care subsidy who, like the Bridgfords, is in a long-term relationship with another person, where there are real economic consequences arising from the relationship. If the comparison is to such persons in a relationship, it is not possible to see a differential treatment between other persons in a relationship, and the treatment of the Bridgfords.

[41] We conclude therefore that there is no prima facie breach of the NZBORA that arises from the interpretation favoured by the Chief Executive and Collins J, and which we also have reached. There is no need for us to treat the respondent as contending for an interpretation that has a discriminatory result. The meaning we have given to the Act and Regulations does not involve there having being an act of discrimination by the Chief Executive. It is not necessary therefore for us to carry out a s 5 analysis as outlined in *R v Hansen.*[23] On the natural and ordinary meaning of the section there is no breach of the s 19 right.

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21 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].
22 *B*, above n 3, at [74].
23 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [57]–[61].

Conclusion

[42] We conclude that the Authority did not err in law in interpreting reg 9B of the Regulations to require the total assets of the appellant and Mr Bridgford to be assessed, including the amounts they have deprived themselves of less $27,000 per annum of allowable gifting in the period outside the "gifting period". It did not err in declining to accept that gifting by the appellant and her husband could be aggregated in the relevant period to a total of $54,000 per annum. All three questions of law are answered "no".

Result

[43] The three questions of law are answered "no".

[44] The appeal is dismissed.

[45] The appellant is to pay the respondent's costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Duncan Cotterill, Wellington for Appellant
Crown Law Office, Wellington for Respondent