

[2015] NZSSAA 084

Reference No. SSA 071/14

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Paraparaumu against a decision of
a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

APPEARANCES

Kay Brereton for the appellant

Mr P Frost for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to establish and recover overpayments of benefit paid in respect of the period 28 September 2003 to 11 May 2008 as follows:

Domestic Purposes Benefit (DPB)	28/9/03 to 11/5/08	\$50,290.43
Accommodation Supplement	28/9/03 to 11/5/08	\$10,441.14
Disability Allowance	28/9/03 to 01/2/04	\$680.39
Special Benefit	23/8/04 to 11/5/08	\$11,019.00
Special Needs Grants		<u>\$ 1,359.00</u>
Total		\$73,789.96

These debts have been established primarily on the basis that the appellant was living in a relationship in the nature of marriage with XXXX in respect of this period. In addition, the appellant's assets precluded entitlement to Accommodation Supplement and Special Benefit for some of the period.

[2] In respect of the period 12 May 2008 to 25 May 2010, a further overpayment has been established on the basis that the appellant received income from Mr XXXX during this period. This additional debt is made up as follows:

DPB sole parent and W/A	12/05/08 to 04/01/09	\$369.91
Accommodation Supplement	12/05/08 to 04/01/09	\$2,550.00
Special Benefit	12/05/08 to 04/01/09	\$2,125.00
Unemployment Benefit	05/01/09 to 22/03/09	\$360.57
Accommodation Supplement	05/01/09 to 22/03/09	\$646.00
Special Benefit	05/01/09 to 01/03/09	\$600.00
Non-Beneficiary		
Accommodation Supplement	16/03/09 to 25/05/10	\$3,504.28
Non –Beneficiary		
Special Benefit	16/03/09 to 05/04/09	<u>208.50</u>
Total		\$10,364.26

[3] The appellant has requested that the Chief Executive be directed to recover part of the overpayment of Accommodation Supplement in respect of the period 28 September 2003 to 11 May 2008 from XXXX pursuant to the provisions of s 86(3) of the Social Security Act 1964.

Background

[4] The appellant and Mr XXXX first met in 2001. After a period of courting, in 2003 they made a decision to start living together. The appellant already owned her own home. A decision was made to purchase a house together at 25 XXXX Avenue. Mr XXXX moved in to the appellant's own home a few weeks before the settlement of the purchase of XXXX Avenue took place. They moved to 25 XXXX Avenue on 28 September 2003. A relationship property agreement was signed on 5 December 2003.

[5] At the time that the appellant and Mr XXXX began living at 25 XXXX Avenue, the appellant's 10-year-old son was living with her. She was working part-time and received a partial Domestic Purposes Benefit and supplementary benefits. For reasons which the appellant was unable to explain, she did not advise the Ministry of her change in circumstances and did not cancel her benefits. Moreover, in December 2003 she represented to the Ministry that she was renting 25 XXXX Avenue from a company called QQQQ Investments Ltd and paying rent of \$250 per week. She was paid Accommodation Supplement on the basis of these representations.

[6] In 2010 the Chief Executive became aware of the appellant's relationship with Mr XXXX and an investigation commenced. As a result of this investigation the Chief Executive concluded that the appellant had lived in a *de facto* relationship with Mr XXXX in the period from 28 September 2003 to 11 May 2008. In addition, it was determined

that the appellant had received income from Mr XXXX in the period 11 May 2008 to 15 June 2009 and from 27 January 2010 to 26 May 2010, which needed to be taken into account in assessing her benefit entitlement during those periods.

[7] The appellant was advised of the Chief Executive's decision on 28 March 2011. She sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. That Committee confirmed the decision of the Chief Executive. The appellant then lodged an appeal with this Authority.

[8] The appellant was prosecuted. She pleaded guilty to eight charges laid under the Crimes Act 1961 of obtaining benefits dishonestly. She was sentenced on 19 November 2013.

[9] A Summary of Facts presented to the District Court suggests that at the time of the prosecution, the appellant accepted that she was in a *de facto* relationship with Mr XXXX from 5 February 2004 to 25 November 2004, from 11 January 2007 to 26 January 2007, from 1 May 2007 to 1 November 2007 and from 29 January 2008 to 20 March 2008.

[10] The position of the appellant at the hearing of this matter was that she accepted that when she and Mr XXXX began living together at 25 XXXX Avenue they were living together in a *de facto* relationship. However, it was not long before difficulties developed in the relationship. The appellant alleges that, on 27 November 2003, an incident of a sexual nature occurred which had a serious impact on the quality of the relationship and her view of it. She said that Mr XXXX moved out shortly after the relationship property agreement was signed on 5 December 2003 but he returned to 25 XXXX Avenue prior to Christmas 2003. The appellant said she allowed Mr XXXX to return prior to Christmas because she wanted everything to appear normal for her young son. Her recollection was that there was possibly a further short two-week separation in January 2004 and that Mr XXXX left three or four times in the course of 2004.

[11] The appellant claimed that the relationship finally came to an end, as far as she was concerned, in July 2005. On 17 July 2005 the Police were called to an incident at XXXX Road. The incident took place in the context of Mr XXXX moving his property from the house at 25 XXXX Avenue to a XXXX Road address. The appellant said that although Mr XXXX returned to live at 25 XXXX Avenue later in 2005, they never shared a room again. She saw very little of Mr XXXX during 2006 and she did not see him as her partner in 2007 and 2008. The appellant said that she and Mr XXXX finally separated after an incident on Mother's Day 2008.

[12] Mr XXXX gave evidence. He painted a different picture. As far as he was concerned the appellant was his partner from 2003 to 2008. He agreed, however, that arguments between himself and the appellant were not uncommon and he either left or was excluded from the house at 25 XXXX Avenue on a number of occasions. He recalled some of these occasions but was not able to be precise about all of them. He recalled that by and large his absences from 25 XXXX Avenue were relatively short.

[13] Mr XXXX said that on the various occasions he returned to live at 25 XXXX Avenue he might occupy a separate bedroom initially, but eventually he and the appellant would resume sleeping in the same room together. Their sexual relationship had been more frequent at the beginning but by the end of the relationship they seldom had sex. He confirmed that they enjoyed a sexual relationship on the cruise that they took in February 2008.

[14] Mr XXXX's view was that both he and the appellant were to blame for the failure of the relationship. He referred to many arguments about small things.

[15] Benefits under the Social Security Act 1964 are paid according to the relationship status of the recipient for benefit; in particular; according to whether the beneficiary is single or married or living in a *de facto* relationship. Where a person is living in a *de facto* relationship the income and assets of both partners is taken into account in assessing benefit entitlement.

[16] Domestic Purposes Benefit for Sole Parents is paid pursuant to the provisions of s 27B of the Social Security Act 1964. It is available to a woman who is the mother of one or more dependent children, who is living apart from or has lost the support of, or is being inadequately maintained by her spouse or partner.

[17] Section 3 of the Social Security Act 1964 defines "partner" as follows:

"partner, in the phrase "spouse or partner" and in related contexts, means a civil union partner or *de facto* partner".

[18] The meaning of "de facto relationship" is provided for in s 29A of the Interpretation Act 1999 as follows:

"29A Meaning of de facto relationship

- (1) In an enactment, **de facto relationship** means a relationship between 2 people (whether a man and a woman, a man and a man, or a woman and a woman) who—
 - (a) live together as a couple in a relationship in the nature of marriage or civil union; and
 - (b) are not married to, or in a civil union with, each other; and

- (c) are both aged 16 years or older.
- (2) Despite subsection (1), a relationship involving a person aged 16 or 17 years is not a *de facto* relationship unless that person has obtained consent for the relationship in accordance with section 46A of the Care of Children Act 2004.
- (3) In determining whether 2 people live together as a couple in a relationship in the nature of marriage or civil union, the court or person required to determine the question must have regard to—
 - (a) the context, or the purpose of the law, in which the question is to be determined; and
 - (b) all the circumstances of the relationship.
- (4) A *de facto* relationship ends if—
 - (a) the *de facto* partners cease to live together as a couple in a relationship in the nature of marriage or civil union; or
 - (b) one of the *de facto* partners dies.”

[19] In effect, if a couple are living in a relationship in the nature of marriage, they will be considered to be living in a *de facto* relationship.

[20] What constitutes a relationship in the nature of marriage in the context of the Social Security Act 1964 was discussed in *Thompson v Department of Social Welfare*¹ and *Ruka v Department of Social Welfare*.² In *Ruka*, the majority of the Court of Appeal considered that emotional commitment and financial interdependence must be found to exist before a relationship could be said to be in the nature of marriage for the purposes of the Social Security Act 1964.

Decision

[21] In considering whether or not the appellant and Mr XXXX were living in a *de facto* relationship in the period in question, in the first instance we have considered the evidence as it relates to cohabitation, financial interdependence and emotional commitment.

Cohabitation

[22] There are significant differences in the periods of time the appellant and Mr XXXX say they both lived at 25 XXXX Avenue.

[23] There is no dispute that the settlement of the purchase of 25 XXXX Avenue took place on 28 September 2003 and the appellant and Mr XXXX moved in over the weekend.

¹ [1994] 2 NZLR 369.

² [1997] 1 NZLR 154 (CA).

[24] There is agreement that arguments between the couple were not infrequent and that on occasion Mr XXXX either left the home or was locked out. Mr XXXX's assessment was that in the main, his periods of absence were often as short as a week and no longer than a month. In the case of the separation at the time of the XXXX Road incident in 2005, the period was longer. He suggested perhaps two to three months.

[25] The appellant's position, on the other hand, was that there was a major dispute in June or July 2005 (the time of the XXXX Road incident) and their relationship ended at that point. In addition, there were occasions prior to that when Mr XXXX had left for short periods of a few weeks.

[26] There are two independent sources of information about when Mr XXXX lived away from 25 XXXX Avenue. The first is contained in Police reports. The second is the evidence contained in Mr XXXX's bank statements.

[27] The Police reports give an insight into both the timing of Mr XXXX living elsewhere and the state of the relationship. The first report is of the incident which occurred on 17 July 2005, when Mr XXXX used a jointly-owned car to move his belongings to XXXX Road. The appellant pursued him in another vehicle and at some point the two vehicles met. The appellant was apparently able to get into the car driven by Mr XXXX. He put his hand through the window of the car to pull the keys out of the ignition of the vehicle. The appellant then bit Mr XXXX. The appellant called the Police. The Police attended. Their record of this incident states:

"XXXX completely unreasonable as XXXX is moving out. Argument over vehicle and joint ownership.

Marriage over, XXXX a very bitter woman as a result. She went to XXXX's new address to 'recover' a jointly owned vehicle.

A scuffle followed when XXXX reached into the car and removed the keys.

XXXX bit XXXX on the wrist and alleges that he threw her to the ground.

XXXX uncooperative and completely unreasonable. XXXX very level headed and good to deal with.

XXXX trespassed from 106 XXXX Road."

[28] Despite the fact that the appellant was the person who chased Mr XXXX to XXXX Road, and Mr XXXX is recorded in the Police report as the victim and the appellant as the offender, the appellant obtained a protection order against Mr XXXX a few days after this incident.

[29] In January 2007 there is a further Police report. This involved an incident when Mr XXXX, who had been excluded from the house at 25 XXXX Avenue, attempted to

gain access to the house through the basement door to obtain a ladder he wanted to use. The Police report is dated 26 January 2007. It states:

"Ongoing domestic problems between this couple. XXXX (sic) clearly an antagonist in the situation. XXXX claims ongoing argument over last few days, nothing physical. XXXX confirmed this and stated her son XXXX had overreacted in calling Police. XXXX reminded of his obligations under the Protection Order."

The report records 'Nil victim/offender entered'.

[30] A third report on 2 December 2007 states:

"Ongoing relationship problems. XXXX moved back into their jointly owned house in January 2007. Somers continually accusing XXXX of having an affair; arguments taking place all weekend. XXXX admitted to throwing a cup of coffee in frustration on Friday night. XXXX appears to be using the conditions of the Protection Order to antagonise XXXX.

XXXX left the address of his own volition on this occasion; reminded of the conditions of the Protection Order. XXXX happy to have matter reported only. XXXX warned pursuant to s 50 of the Domestic Violence Act."

[31] The fourth report is on 11 May 2008. This report states:

"On the 19th July 2005 a Protection Order was issued in Porirua Family Court to the applicant XXXX XXXX XXXX, the victim in this matter.

The respondent in this matter was the defendant XXXX XXXX XXXX.

The defendant and the victim have been in a domestic relationship for about 7 years.

At about 11.30 am on Sunday 11th May 2008 the defendant was at the victims XXXX Ave address.

The victim was sitting in the lounge room as the defendant walked into the room from the kitchen.

After a brief verbal discussion the defendant walked quickly towards the victim with his arm raised in the air.

The victim did not look at him but thought he was going to hit her, she raised her arms in front of her face to protect herself.

The defendant hit her three times to the face, each time being blocked by the victim's arms.

The defendant walked off to the bathroom and the victim went out side.

As a result the victim received bruising to the right front forearm and bent the victim's glasses.

The defendant was located by police he admitted the facts as outlined above but he offered no explanation for his actions.

The defendant is 51 year old truck driver. He has not previously appeared before the courts.

PRN 80431399

Const S WALKER"

[32] Of particular significance is that in reporting this incident, the appellant appears to have told the Police that she had been in a domestic relationship with Mr XXXX for about seven years. Mr XXXX is recorded as admitting the facts as outlined by the Police.

[33] Information about Mr XXXX living other than at 25 XXXX Avenue is contained in his bank statements. He operated a Westpac account until August 2006. From September 2006 most of his personal financial transactions were conducted through a National Bank account. From time-to-time, the address to which his bank statements were to be sent was changed. Thus, on 19 January 2005 the National Bank statements were sent to his work address care of XXXX XXXX XXXX Company but by February 2005 the address had reverted to 25 XXXX Avenue. In July 2005 the statements were redirected to PO Box XXXX, Paraparaumu but by 9 August 2005 the address to which the statements were to be sent had reverted to 25 XXXX Avenue. On 17 March 2006, the bank statements were to be sent to 15 XXXX Road, Raumati Beach, but by 19 April the address had reverted to 25 XXXX Avenue. In July 2006, bank statements were sent to 16 XXXX Grove, Paraparaumu but by August 2006 the address had again reverted to 25 XXXX Avenue. In October 2006 the address to which the Westpac bank statement was sent was C/- XXXX XXXX House, 12 XXXX Street, Paraparaumu, but by November 2006 it had reverted to 25 XXXX Avenue. Throughout 2007 and until 16 October 2008, the Westpac bank statements were sent to 25 XXXX Avenue, Paraparaumu. We note that October 2008 is well after the agreed separation date but by this time Mr XXXX was not generally using this account. His wages went into his National Bank account.

[34] From late July 2006 Mr XXXX operated a National Bank account. The statements begin in September 2006, at which point they were sent to 16 XXXX Road, Paraparaumu. By 8 December 2006 the address for the bank statements had reverted to 25 XXXX Avenue (the statement covers a three-month period). These statements continued to be sent to that address until July 2008, when the address to which the accounts were sent changed to 45 XXXX Road.

[35] The statements also evidence Mr XXXX paying for accommodation at XXXX Motor Camp on 6 April 2005, 9 May 2005 and 6 June 2006.

[36] The appellant and Mr XXXX apparently opened an online savings account with Westpac on 19 June 2006. The address shown on a statement for this account as at 31 July 2006 is 16 XXXX Grove, and at 26 September 2006 it is shown as XXXX XXXX House. By 1 November 2006 the address was 25 XXXX Avenue. It did not change from this address thereafter.

[37] An inference that might be drawn from the address information on the bank statements is that Mr XXXX regularly changed the address to which the statements

should be sent when he was not living at XXXX Avenue. The number of changes in 2006 in particular, suggests that Mr XXXX left or was excluded from 25 XXXX Avenue more often that year. Contrary to the appellant's evidence, these exclusions seem to have been for weeks rather than months. They do not demonstrate Mr XXXX leaving or being excluded from the house in 2007 (which coincides with the Police report in December 2007 that Mr XXXX had moved back in January 2007) or the first part of 2008.

[38] Other evidence of separation can be seen in the letters of 1 and 2 March 2006, written by Mr XXXX at the time he had moved out to 15 XXXX Road.

[39] The length of the July 2005 separation is reflected in the fact that Mr XXXX reduced his payments to the joint account from \$300 to \$175 from 20 July 2005 to 17 August 2005.

[40] Equally, the evidence that the appellant and Mr XXXX went on cruises together in December 2005 and February 2008 suggest they were not separated at those times.

[41] From this information we conclude that the appellant and Mr XXXX had a series of brief separations. The precise periods cannot be identified in many cases. We have estimated the periods Mr XXXX lived elsewhere as follows:

December 2003	–	Less than two weeks
January 2005	–	Estimated two weeks
6 April 2005 to 9 May 2005	–	Estimated two weeks
July to 19 August 2005	–	Estimated max, six weeks
1 March 2006 to 19 April 2006	–	Estimated max, seven weeks
July 2006 to August 2006	–	Estimated max, six weeks
Sept/Oct 2006 to November 2006	–	Estimated max, six weeks
January 2007	–	Estimated two weeks
December 2007	–	Estimated two weeks

[42] It is apparent that there were a greater number of separations in 2006, but equally the periods from January 2004 to July 2005 and from January 2007 to July 2008 appear to have been relatively stable. If Mr XXXX left 25 XXXX Avenue at other times during these periods, then we infer his absence was for a matter of days rather than weeks.

Financial interdependence

[43] A relationship property agreement completed by the appellant and Mr XXXX on 5 December 2003 records the financing of their joint purchase of 25 XXXX Avenue as follows:

“The parties purchased the family home for \$196,000 but borrowed \$125,000 made up as follows:

Contribution by XXXX (cash \$10,000)

Contribution by XXXX (clause 2.2.3) \$73,000

Westpac Bank mortgage loan (mortgage) \$125,000

Total = \$208,000

Legal costs and other joint expenses are to be paid from the surplus.”

[44] The agreement also records that the appellant and Mr XXXX had formed a Loss Attributing Qualifying Company, XXXX Investments Ltd. Each partner owned 50% of the shares in XXXX Investments Ltd. This company purchased 6A XXXX Grove from the appellant for \$135,000 and borrowed this amount from Westpac Bank to fund the purchase. The loan funds were paid to the appellant and she repaid the BNZ and Legal Aid Board, leaving the \$73,000 which she contributed to the purchase of 25 XXXX Avenue.

[45] The property at 6A XXXX Grove was sold on 31 March 2005. An amount of \$37,000 was received by the appellant and Mr XXXX from the proceeds of sale. Of this amount, \$20,000 was initially placed in a term deposit account and eventually used to reduce the mortgage on 25 XXXX Avenue. A further \$10,000 was used to purchase a motor car in the joint names of the appellant and Mr XXXX. The balance was used to purchase a bed and a lounge suite and to pay for a cruise in December 2005.

[46] At the time they moved to 25 XXXX Avenue, Mr XXXX was in full-time employment and the appellant was in part-time employment. The financial arrangement between them at the outset was that each week Mr XXXX paid an amount of \$300 into their joint bank account. The appellant paid in \$250 per week. This account was used to pay the outgoings on the house and utilities such as power and telephone. The bank statements show that, in addition, the account was also used to pay for food at the supermarket and, at times, a Farmers card. The appellant continued to pay in \$250 per week after she stopped working, and in December 2004 she paid \$350 per week into the account for a short period. By 2005 this had reverted to \$250 per week. For a period from 20 July to 17 August 2005 Mr XXXX's payments reduced to \$175 per week but increased again to \$300 a week on 24 August. This perhaps reflects the separation in the middle of 2005 previously referred to.

[47] In May 2007, Mr XXXX's contributions to the joint account increased to \$450 per week. The account continued to be used for the payment of outgoings on the house, supermarket purchases, takeaways, life insurance and a Farmers card. Shortly prior to the final separation, in April 2008, Mr XXXX's payments changed. We understand he may have left his employment at this point, but payments continued to be made. There

was approximately \$717.66 in the account at the time of separation in May 2008. After a brief pause, Mr XXXX resumed regular payments to the account in June 2008.

[48] Both the appellant and Mr XXXX held cards for the joint account. We believe Mr XXXX's evidence that the appellant was the person who was primarily responsible for the operation of the account.

[49] In June 2006 the appellant and Mr XXXX opened an online saver account with Westpac. From November 2006 this account generally had a credit balance of more than \$1,000 and, at one point in 2007, it had a credit balance of \$4,296.32.

[50] A further development in relation to the joint account was that the appellant began to periodically transfer significant amounts out of the account into her own accounts, particularly her credit card account.

[51] Both partners also operated accounts in their own names. Mr XXXX's account showed regular payments for supermarket shopping, a Farmers account and other purchases which appear to be related to the maintenance of the house, a hire purchase agreement for household items, and social outings at the Charter Club.

[52] The appellant's personal account shows family support and, until mid-2004, her wages were paid into this account in addition to benefit payments. The appellant's account appears to have been used for payments at supermarkets and an insurance policy. It was occasionally used for petrol and medical expenses and to make credit card payments. This was the account from which the appellant regularly paid \$250 into the joint account.

[53] The appellant held two credit cards. An unusual feature of her finances was that from 2006 she maintained a credit balance on her Visa card. The source of some of the money in Visa card account is not clear, but some came from the joint online savings account. For example, a payment of \$2,400 into her Classic Visa account on 13 May 2008 originates from the joint account. Some \$1,900 was paid into the joint account from the online account to enable this payment to be made. It appears from the bank statement in relation to her personal account that she also had a Bonus Bonds account.

[54] The evidence shows that the appellant and Mr XXXX pooled their financial resources throughout the period 2003 to 2008. There can be no doubt that there was significant financial interdependence between them throughout the period 28 September 2003 to 11 May 2008. In the context of the Social Security Act 1964, financial interdependence assumes particular significance.

Emotional commitment

[55] The appellant said that for her, there was a change in her attitude to the relationship as a result of the incident on 27 November 2003. Furthermore, she considered that the separation that occurred in July 2005 was the end of the relationship. She saw little of Mr XXXX in 2006 and did not consider him to be her partner in 2007 through to May 2008.

[56] She described Mr XXXX as being good at manipulating his way back into the house and said that she let him come back because she felt sorry for him.

[57] Mr XXXX said that as far as he was concerned, at least until 2005, he assumed that all was well with the relationship and he believed they both remained in love with each other. This state of affairs seems consistent with the decisions as to how the money from the proceeds of sale of XXXX Grove were spent, including the purchase of a new double bed and a lounge suite, a jointly owned car and a decision at some point during 2005 to spend part of the money on a cruise.

[58] Mr XXXX said that even in the latter part of the relationship he believed his love for the appellant was reciprocated by the appellant. Mr XXXX confirmed, however, that there were trust issues in that the appellant was convinced he was having an affair with someone. In fact, in the latter part of their relationship he went home at lunchtimes as a way of convincing the appellant that he was not having an affair. The appellant, on the other hand, suggested that this was Mr XXXX controlling her by keeping an eye on her.

[59] Although there was what appears to have been a significant break in July 2005, by December 2005 the appellant and Mr XXXX embarked on a cruise together. Similarly, in February 2008 they embarked on a cruise together. It is difficult to believe that the appellant would plan and embark on these trips with a man with whom she no longer had any emotional commitment.

[60] The parties' commitment to their relationship is also evidenced in the significant financial interdependence between them.

[61] Mr XXXX's return to the family home after leaving or being excluded on more than one occasion seems to have been by mutual agreement and can also be viewed as an ongoing emotional commitment to their relationship.

[62] Other evidence pointing to an ongoing emotional commitment includes the following:

- (i) On 19 September 2007, in a document entitled "Pre-employment Sheet", the appellant is described as Mr XXXX's next of kin.
- (ii) In a Patient Information form dated 11 April 2007, Mr XXXX's name is given as "Contact Person Two". We understand the first contact is a female relative of the appellant.
- (iii) Mr XXXX's son, Mr XXXX referred to his belief that when he met with the appellant and his father in 2007/2008 the appellant and Mr XXXX were in a relationship.
- (iv) The appellant herself described visiting the appellant's new-born grandchild with Mr XXXX in August 2007.
- (v) There was no suggestion that although Mr XXXX returned to live at XXXX Avenue, they lived separate lives in the same house. It appears to have been part of their custom to go to the supermarket on Sunday afternoons. Mr XXXX said that generally it was the appellant who chose what was required because she was the person at home and knew what was required. The appellant, on the other hand, said that Mr XXXX was very controlling about what was chosen.
- (vi) Mr XXXX said that he generally did the outside work at XXXX Avenue and the appellant was responsible for the care of the inside of the house but in some respects they both shared chores.
- (vii) Mr XXXX referred to his involvement with the appellant's son, noting that the son was usually away visiting his father at the weekends, but that in any event he had involved the son in outside maintenance work on the house at times and had shown him how to look after his car when the boy acquired his first car at around 16 years of age.

[63] This was clearly a relationship of many ups and downs. Given the number of times that Mr XXXX left or was excluded from the house there were apparently more ups and downs than many couples experience. Nevertheless, the evidence indicates that despite their ups and downs the emotional commitment of each to the relationship persisted and hence their many reconciliations. The situation is perhaps illustrated by the fact that it was only in July 2005 when there was a longer separation that Mr XXXX reduced his contributions to the joint account. Then in April/May 2008 when, firstly

Mr XXXX left his job and the relationship was apparently strained, there was a further disruption in the payment of his regular contributions to the joint account.

[64] We have considered whether the impact of the frequent arguments and short-term separations suggest that the relationship lacked the commitment and trust necessary for a relationship in the nature of marriage. Mr XXXX identified the appellant's lack of trust in him as being one of the factors that undermined their relationship. Arguably, many of their arguments were followed by 'time out' or a cooling-off period rather than a decision to end their relationship, and neither party considered the relationship at an end on many of those occasions.

[65] We are satisfied that, with the exceptions referred to in para [40], in the period 28 September 2003 to 11 May 2008 the appellant and Mr XXXX lived in the same house at 25 XXXX Avenue, pooled their financial resources and both had an ongoing emotional commitment to their relationship. Their continued residence in the same house over a relatively long period, their financial interdependence and the way they lived their day-to-day lives does not suggest that at any time the appellant and Mr XXXX lived separately in the same household. For present purposes we propose to accept that during the periods outlined in para [41] the appellant and Mr XXXX were living apart, although it is in fact arguable whether one or other of them considered the relationship to be at an end on any of those occasions. We further note that a number of the periods allowed for are possibly longer than the actual separation, to ensure the appellant is not disadvantaged.

[66] It was submitted on behalf of the appellant that not only was there violence in the relationship but the relationship was also psychologically and financially abusive and that these factors negated the proposition of a relationship in the nature of marriage as articulated by the majority of the Court of Appeal in *Ruka v Department of Social Welfare*.³

[67] The appellant estimated eight to twelve incidents of violence over the period of the relationship. This included the assault in 2008 for which Mr XXXX was prosecuted. She also explained that there were occasions where she said Mr XXXX had put his hands around her neck. The appellant gave no detailed description of any of these events, other than the incident of May 2008. This incident appears to have occurred after some verbal provocation on the part of the appellant. The appellant described receiving three blows to her arms, which she held up to protect her face. She sustained bruising as a result of that incident, sought medical attention and made a complaint to the Police.

³ [1997] 1 NZLR 154 (CA).

[68] Although the appellant obtained a Protection Order in July 2005, the basis on which she obtained that order is difficult to determine as we do not have the papers filed in support of the application. Certainly the Police regarded Mr XXXX as the victim of the incident to which they were called, which apparently resulted in the Protection Order being issued. The appellant's behaviour in pursuing Mr XXXX to the address he was moving to, and trying to commandeer the car he was driving, do not suggest that she was in fear of Mr XXXX.

[69] The evidence of violence in this case falls well short of the unremitting violence suffered by Ms Ruka when the majority of the Court of Appeal considered the level of violence as a factor which negated the proposition that the parties in that case were living in a relationship in the nature of marriage.

[70] It is submitted that Mr XXXX was also psychologically and financially abusive towards the appellant. This claim must be seen in light of all the evidence.

[71] Mr XXXX described the appellant's habit of cutting his father short in conversation and his perception that she was very controlling of his father. He described the appellant driving past the home that he and his father lived at after the final separation in May 2008 and the fact that the appellant was observed rifling through their mailbox. This had led to a Trespass Notice being sought against the appellant. He also referred to the way in which the appellant had tried to manipulate him after her separation from his father.

[72] The Ministry's investigator gave evidence that in her dealings with the appellant, she formed the opinion that the appellant was a strong person who knew her rights.

[73] We have considered the report of the consultant forensic psychiatrist who interviewed the appellant for the purposes of a report for the court proceedings. The report appears to rely heavily on the appellant's account of events. Dr Short draws a conclusion that at the time of her interview with the appellant, she presented symptoms of a complex traumatic stress reaction and mild/moderate depression "developed in the context of her abusive experiences with Mr XXXX and perpetuated by current legal proceedings". Amongst other things, the appellant apparently told Dr Short that Mr XXXX "withdrew money from the joint account, leaving insufficient funds to cover the mortgage and bills on occasion" and "he used her credit cards and misappropriated money from this account". These claims are not supported by the evidence. We can see no evidence in our examination of the joint account that Mr XXXX withdrew money from this account leaving insufficient monies to cover the mortgage and bills. Bank diary notes show that on 20 July 2006, the appellant contacted the bank and advised that Mr XXXX had cleared the account of funds set aside for the mortgage. The bank statements tell a different story. On 14 July 2006 the appellant withdrew \$1,250 from the

joint account and paid it to her BNZ Visa account which already had a credit balance. As at 19 July, the day before the mortgage payment was due, the appellant had a credit balance of \$3,599.59 on her Visa card. In fact, there were sufficient funds to meet the mortgage payment by 20 July as it appears, that wisely, the appellant decided to replace \$500 of the funds she had removed. There is no evidence of Mr XXXX using the appellant's credit cards. It is highly unlikely that the appellant would have accumulated credit balances in her credit card account if she was concerned about Mr XXXX's access to the account. In fact, what the statements show is that Mr XXXX was very consistent in his provision of financial support for the household. It is the appellant's withdrawal of money from the joint account and her accumulation of funds in her credit card account that are an unusual feature of the financial arrangements.

[74] We conclude that Dr Short's report is of limited assistance in determining the nature of the relationship between the appellant and Mr XXXX.

[75] The District Court Judge sentencing the appellant also concluded that the relationship was one of "abuse and domestic violence and controlling behaviour by your husband or partner". Because the appellant pleaded guilty to the charges she faced, the Judge did not have the opportunity of hearing the witnesses and receiving the documentary evidence received by the Authority in this case. The Authority is therefore better placed to assess the nature of the relationship.

[76] We are not satisfied that the extent of violence in the relationship or any claimed psychological or financial abuse negated the proposition that the appellant and Mr XXXX were living in a relationship in the nature of marriage and hence a *de facto* relationship during the period September 2003 to May 2008.

[77] Taking into account all the circumstances including periods of co-habitation, the degree of financial interdependence and emotional commitment, the apparent frequency of arguments and short separations, we are satisfied that it was appropriate for the Chief Executive to exercise his discretion, pursuant to the provisions of s 63B of the Act, to treat the appellant and Mr XXXX as living in a *de facto* relationship in the period 28 September 2003 to 11 May 2008, with the exception of the periods set out in para [41].

[78] To ensure that the appellant is not disadvantaged, we conclude that in the periods listed in paragraph [41] the appellant and Mr XXXX should be treated as living apart, but that in all other periods between 28 September 2003 and 11 May 2008 the appellant and Mr XXXX were living together.

Overpayment of Domestic Purposes Benefit

[79] Payment of Domestic Purposes Benefit – Sole Parent is paid on the basis that a woman has lost the support of, or is being inadequately supported by, her partner. We are satisfied that the Chief Executive was correct to establish an overpayment of Domestic Purposes Benefit on the basis that the appellant was living in a relationship in the nature of marriage during the periods mentioned. In the periods referred to in para [41] she received income from Mr XXXX which needed to be taken into account in assessing her entitlement to benefit.

[80] In the period from 11 May 2008 onwards, entitlement has been calculated on the basis that, first, Mr XXXX's payments should be applied to the outgoings on the house. The amount of his payments over and above the outgoings on the house have been treated as income and charged against the appellant's entitlement to benefit.

[81] Entitlement to Unemployment Benefit in the period 11 January 2009 to 16 March 2009 has been calculated in similar fashion.

Overpayment of Accommodation Supplement

[82] In the first instance, in the period 28 September 2003 to 4 February 2004, the overpayment of Accommodation Supplement has been established due to the appellant and Mr XXXX having cash assets of \$16,200, apparently on the basis of the equity in the property at 16 XXXX Grove. There is, however, no evidence that their shares in this property, at the point that it was transferred to XXXX Investments Ltd, were worth \$16,200. By March 2005 the shares were worth \$37,000, but at what point they achieved this value we do not know. The Chief Executive may have been justified in declining to grant Accommodation Supplement pursuant to s 61EC(4) during the period prior to the sale of the property, but it is not appropriate to guess that the equity and therefore the shares were worth at least \$16,200 in September 2003. We think it preferable that Accommodation Supplement be assessed on the basis of Mr XXXX's income for the first 12 months, and on the basis of the assets including the \$20,000 bond deposit and the value of the shares up to 12 September 2005.

[83] From 13 September 2005, entitlement has been assessed on the basis of Mr XXXX's income.

[84] In the period from 11 May 2008 onwards the overpayment has been assessed on the basis that, as Mr XXXX paid \$250 per week into the joint account to cover outgoings on the house (presumably pursuant to his obligation as a joint owner), the appellant's

accommodation costs were limited to \$17.50 per week (in the weeks in which this amount was paid) and she therefore had no entitlement to Accommodation Supplement.

[85] We accept that the establishment of the Accommodation Supplement debt was correct.

Disability Allowance

[86] Disability Allowance is an income-tested benefit. The appellant received a Disability Allowance in respect of the period 28 September 2003 to 1 February 2004. The Chief Executive has assessed that, taking Mr XXXX's income into account, the appellant had no entitlement to Disability Allowance.

[87] We accept the Chief Executive's calculation.

Overpayment of Special Benefit

[88] Special Benefit is third tier assistance directed towards alleviating hardship. When granting Special Benefit in the first instance, the decision-maker must carry out an assessment pursuant to the formula contained in the Ministerial Direction.⁴ This requires the Chief Executive to take into account the assessable income of the appellant and her partner and allowable costs.

[89] If, as a result of the assessment, it is demonstrated that an applicant had a deficiency of income over expenditure, the Ministerial Direction provides that the Chief Executive would be justified in granting Special Benefit at the lesser of the deficiency rate, or 30% of allowable costs, if the appellant's cash assets are less than a certain amount.

[90] What constitutes "cash assets" is defined in the Ministerial Direction. The Direction provides this means any of the assets of the beneficiary and his or her partner that can be readily converted into cash, and includes:

...

- (b) Bank accounts, including fixed and term deposits with any bank, friendly society, credit union or building society;
- (c) Money invested with or lent to any bank or other financial institution or other person;
- (d) The net equity held in any property or land not used as the person's home;

...

⁴ Direction in relation to Special Benefit.

[91] The cash asset limits for a *de facto* couple as at 1 April 2003 were \$1,347; as at 1 April 2004 \$1,367.97; as at 1 April 2005 \$1,404.94; as at 1 April 2006 \$1,449.34; as at 1 April 2007 \$1,487.46; as at 1 April 2008 \$1,534.76; and as at 1 April 2009 \$1,678.39.

[92] We accept in the first instance that Mr XXXX's income would have resulted in there being no deficiency of income over expenditure, at least until 2008. In addition, the existence of the house at XXXX Grove and the cash deposit which constituted the proceeds of sale of that house would have impacted on her entitlement until September 2005. From mid-2006 onwards, the cash balance in the appellant's Visa card would have affected her entitlement.

[93] We also consider that during any periods where we have found that the appellant and Mr XXXX were living apart, the amount received from Mr XXXX would need to be taken into account as assessable income.

[94] Regardless of the appellant's income and cash assets, the Chief Executive must still exercise discretion to grant or refuse to grant Special Benefit. On a retrospective review the issue will be whether discretion would have been exercised had the Chief Executive been correctly appraised of the appellant's circumstances.

[95] The Ministerial Direction gives the decision-maker guidance about the wide variety of factors to be taken into account in assessing whether or not the discretion to grant Special Benefit should be exercised. These include the matters in clause 1 and in clauses 3.3(a)-(h) of the Direction. The matters in clause 3.3(a)-(h) include: whether or not the applicant had any special or unusual financial expenditure; whether the applicant has special or unusual reasons for any expenditure which has caused or contributed to his or her deficiency; the nature and likely duration of the financial difficulty; the age and health of the applicant; the ability of the applicant to improve his or her financial situation; the causes of the applicant's financial difficulty; the extent to which the basic necessities of life would be at risk; and any other relevant matters.

[96] Not only did the appellant have access to the money deposited by Mr XXXX in the joint account, but Mr XXXX also used the money in his personal account for household expenses. In addition, as previously outlined, the appellant had access to the cash assets, and from February 2006 until the time of separation she had a credit balance in her Visa account which in most months exceeded the cash asset limit for Special Benefit. The idea that somebody who was able to afford to go on a cruise might need Special Benefit is untenable. The household did not have a substantial deficiency in its income over expenses and had cash assets to meet expenses. In addition once the appellant and Mr XXXX began living apart the appellant continued to have financial support from

Mr XXXX. We are in no doubt that the Chief Executive was correct to establish overpayments of Special Benefit throughout the period.

Special Needs Grants

[97] The appellant obtained three Special Needs Grants for food as follows:

2 February 2004	Food Grant \$150
16 March 2005	Food Grant \$105
17 March 2006	Food Grant \$104

[98] Special Needs Grants are made pursuant to the welfare programme known as the Special Needs Grant Programme. Grants are both income-tested and asset-tested. The debts in relation to Special Needs Grants have been established on the basis of the appellant's excess income; however she also has excess cash assets.

[99] The provisions in the programme relating to food grants require the Chief Executive to be satisfied that:

- the applicant or their immediate family had an immediate need to purchase food; and
- the applicant had no resources to meet that need and would otherwise have to rely on a food bank to meet that need; and
- that need or the lack of resource to meet it was caused by an essential expense which had to be met and which left insufficient to buy food.

Food grant – 2 February 2004

[100] Ministry records indicate the appellant received a food grant of \$150 on 2 February 2004. The appellant had a credit balance in her bank account of \$566.43 on 2 February 2004. The Visa account was also in credit around this time, having a credit balance of \$530.51 as at 21 January 2004 and a credit balance of \$830.13 as at 20 February 2004. The statement shows the appellant making a payment of \$400 into the credit card on 4 February, two days after her application for a food grant. On 2 February 2004 the joint account had a credit balance of \$529.13. That was after the appellant paid \$210.74 at Pak 'N' Save, Kapiti. The bank statement for the period 19 January 2004 to 19 February 2004 indicates the joint account had a credit balance of more than \$1,000 for most of the month. We are in no doubt that there was no basis on which the appellant could be said to have had no money for food as at 2 February 2004. The food grant is to be made recoverable.

Food grant – 16 March 2005

[101] The appellant made an application for a food grant on 16 March 2005 and a grant of \$105 was made. On 16 March 2005 the joint account had a credit balance of \$665.74. The closing balance on 18 March was \$1,655.75. At no point during the previous month had the account gone into overdraft and the balances held were generally healthy. Her Visa account was overdrawn at that date to the extent of \$561.80 but the appellant's financial situation did not stop her spending \$121 at a hairdresser the day after her application; on 17 March. The appellant's BNZ account had a credit balance of \$63.04 as at 16 March. It is apparent that the appellant had full access to the joint account and had sufficient funds to purchase food as at 16 March 2005. The Chief Executive was correct to make this grant recoverable.

Food grant – 17 March 2006

[102] A food grant of \$104 was made to the appellant as a result of this application made on 17 March 2006. As at 21 February 2006, she had a credit balance of \$167.84 in her Visa account. As at 22 March 2006, five days after her application for a food grant, the credit balance in her Visa account stood at \$1,390.39. The statements show she spent \$83.38 at Woolworths on 17 March and made a payment of \$350 to her credit card on the same day. On 17 March, her BNZ Visa account had an amount of \$10.77 in it. She had spent \$103.80 at the Paraparaumu Post Shop that day and \$62.43 at Woolworths the day before. On 17 March 2006, the joint account had a balance of \$1,399.68 at the beginning of the day and \$694.68 at the end of the day. It appears that the \$350 the appellant used to pay off her Visa card (which already had a credit balance) that day came from this account, and a further \$350 was paid off a Westpac Visa card on the same day. For the appellant to claim to the Ministry that she had no money for food was patently untrue. The Chief Executive was correct to make the grant recoverable.

Recovery of the debt

[103] Generally speaking, overpayments of benefit are debts due to the Crown and must be recovered. There is a limited exception to this rule contained in s 86(9A) of the Social Security Act 1964. This provision gives the Chief Executive the discretion not to recover a debt in circumstances where:

- (a) the debt was wholly or partly caused as a result of an error by an officer of the Ministry;
- (b) the beneficiary did not intentionally contribute to the error;

- (c) the beneficiary received the payments of benefit in good faith;
- (d) the beneficiary changed his position believing he was entitled to receive the money and would not have to repay it; and
- (e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[104] Pursuant to s 86(9B) of the Act, the term “error” includes:

- (a) the provision of incorrect information by an officer of the Ministry;
- (b) an erroneous act or omission occurring during an investigation of benefit entitlement under s 12; and
- (c) any erroneous act by an officer of the Ministry.

[105] The requirements of s 86(9A) are cumulative. If one of the criteria cannot be made out, it is not necessary to consider subsequent criteria.

[106] At no time did the appellant advise the Chief Executive that she was living in a *de facto* relationship with Mr XXXX. Nor did she advise of the money paid into the joint bank account by Mr XXXX, or of his other financial support. At no stage did she advise of the existence of the rental property, the \$20,000 cash deposit, or the credit balances in her credit card account. This was the case over a lengthy period. We are not satisfied that the overpayments have occurred as a result of any error on the part of the Ministry. The overpayments occurred because the appellant routinely failed to disclose her true circumstances to the Chief Executive. We are not therefore able to direct that the debts not be recovered pursuant to the provisions of s 86(9A) of the Act.

[107] Sections 86(1) and 86A of the Act at the time relevant to this appeal gave the Chief Executive a discretion to take steps to recover a debt. Section 86(1) applies to debtors who are still in receipt of benefit. Section 86A applies to debtors who have sources of income other than benefit. In our view, the principles will be the same whether the recovery action is under s 86(1) or s 86A.

[108] Parliament has specified the circumstances in which a debt should not be recovered in s 86(9A). The occasions, therefore, that the Chief Executive should exercise his discretion not to take steps to recover a debt or debts which do not meet the criteria of s 86(9A) must be limited.⁵

⁵ *Director-General of Social Welfare v Attrill* [1998] NZAR 368.

[109] The considerations to be taken into account in exercising the discretion include the Chief Executive's obligations under the Public Finance Act 1989 to make only payments authorised by law, and under the State Sector Act 1988 for the economic and efficient running of the Ministry. The context of the Social Security Act 1964 and the impact of recovery on the debtor, taking into account the International Convention on Economic, Social and Cultural Rights, are also relevant.

[110] The circumstances in which the discretion should be exercised have been considered by the High Court on a number of occasions in the context of s 86(1). The circumstances have been described as "*extraordinary*",⁶ "*unusual*",⁷ and as "*rare and unusual*",⁸ but these are not tests.⁹

[111] The debts in this case arose as a result of a significant level of dishonesty on the part of the appellant. The appellant had no explanation for her failure to tell the Chief Executive at the outset that she moved in with Mr XXXX. She was working at the time they moved into the same house and would have continued to receive Family Support and, we understand, Child Disability Allowance, even if her main benefit had been cancelled. There was simply no excuse for not telling the Chief Executive of her correct situation when the house at XXXX Avenue was purchased or at the time of the review in December 2003.

[112] Further, we think it more likely than not that the appellant was the architect of the idea to present a false tenancy agreement to the Ministry in December 2003. The appellant was an office manager who had worked in a rental agency and for an investment broker. She was also the person who knew how the benefit system worked. She would have known that if she had revealed she was living in a property she owned jointly with Mr XXXX, questions would be asked about the nature of her relationship with him. Moreover, the rent of \$250 specified in the tenancy agreement was more than the outgoings on the house. Only the appellant would have been aware of how this might affect her benefit payments.

[113] Mr XXXX had never received a benefit previously and was not familiar with the benefit system or the implications of presenting a tenancy agreement as opposed to advising the Ministry that the outgoings on the house related to the costs of home ownership. We do not think for one moment that he was an architect of the false claim for Accommodation Supplement.

⁶ *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.

⁷ *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.

⁸ *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC).

⁹ *Van Kleef v Chief Executive of the Ministry of Social Development* [2013] NZHC 387.

[114] The appellant's continued receipt of benefit was not just a case of making ends meet. She was apparently able to save money as a result of her fraud. Indeed, it appears that in addition to the savings on her credit card she had a Bonus Bonds account. She and Mr XXXX went on not just one, but two cruises.

[115] Maintaining the integrity of the social welfare system is one of the matters to be taken into account in deciding whether or not steps should be taken to recover the debt. As the High Court found in *Harlen v Chief Executive of the Ministry of Social Development*.¹⁰

Foregoing the possibility of recovery of debt incurred by fraud on the basis that the appellant would experience hardship would erode the purpose of the Act, and would undermine future efforts to recover debts from beneficiaries in similar circumstances. It would also be contrary to the widely recognised position that fraudulently incurred debts are not easily remitted.

[116] The appellant's current situation is that she continues to receive a benefit and has a small part-time job. The mortgage at XXXX Avenue has reduced to \$30,000. The appellant claims the source of the reduction on her mortgage was from family. In any event, she has sufficient equity in her house to repay the debt. We are not satisfied that the appellant would be without the basic necessities of food, shelter and clothing if the debt was recovered. We are not prepared to direct that the debt not be recovered pursuant to the provisions of s 86(1) or s 86A of the Social Security Act 1964.

Section 86(3)

[117] The appellant has requested that the Chief Executive be directed to seek recovery of part of the debt in relation to Accommodation Supplement in respect of the period 28 September 2003 to 11 May 2008 from Mr XXXX. The amount involved is \$10,441.14.

[118] Section 86(3) provides:

- (3) If, in the opinion of the chief executive, the spouse or partner of any beneficiary makes any false statement to or otherwise misleads any officer engaged in the administration of this Act, in relation to any matter, as a result of which the benefit or an instalment of benefit is paid in excess of the amount to which the beneficiary is by law entitled, the amount so paid in excess may be recovered from that spouse or partner as a debt due to the Crown at the suit of the chief executive, or the excess payment may be recovered by way of deduction from any instalments of any benefit or student allowance thereafter becoming payable to that spouse or partner.

¹⁰ *Harlen v Chief Executive of the Ministry of Social Development* [2015] NZHC 2663 (29 October 2015) at [60].

[119] In summary, s 86(3) applies where:

- (i) the partner of a beneficiary makes a false statement or otherwise misleads any officer engaged in the administration of the Act in relation to his income or other personal circumstances; and
- (ii) as a result of the false statement the benefit or an instalment of benefit is paid in excess of the amount to which the beneficiary is entitled; then
- (iii) the amount paid in excess may be recovered from the partner as a debt due to the Crown.

[120] A false tenancy agreement was provided to the Ministry in support of an application for Accommodation Supplement in December 2003. The tenancy agreement showed the landlord of 25 XXXX Road as XXXX Investments Ltd and the tenant as XXXX XXXX. The rental to be paid is shown as \$250 per week to be paid fortnightly in advance. Mr XXXX filled in the parts of the agreement relating to the landlord and the appellant filled in the parts relating to the tenant. The appellant alleged that it was Mr XXXX's idea. Mr XXXX said that the appellant had asked him to fill in the relevant parts of the tenancy agreement. He had trusted her in her judgement in relation to this matter. He had assumed that she knew what she was doing and that she would give it to the Ministry. Mr XXXX said he knew that the tenancy document was false and he knew the appellant was going to use it to get a benefit. He did not know how long it was going to go on for, or that she would use this form to gain benefits to the extent that she did.

[121] As previously outlined, we think it more likely than not that the appellant was the architect of the false tenancy agreement. However, we accept that in completing and signing the tenancy agreement Mr XXXX made a false statement which he knew would be provided to staff at the Ministry of Social Development. The tenancy agreement was a statement which misled the Ministry in relation to his personal circumstance in that it represented that the house of which he was a joint owner (25 XXXX Avenue) was owned by XXXX Investment Ltd and was being rented to the appellant. As a result, the instalments of Accommodation Supplement paid to the appellant between 3 December 2003 (being the date the tenancy agreement was presented to the Ministry) and 11 May 2008, were paid in excess of the amount to which the appellant was entitled.

[122] We are satisfied that the criteria of s 86(3) have been made out against Mr XXXX in relation to the period 3 December 2003 to 11 May 2008. There was no misrepresentation or false statement made by Mr XXXX to the Ministry in respect of the period 28 September 2003 to 3 December 2003. The appellant is solely responsible for the Accommodation Supplement debt in relation to that period.

[123] The Chief Executive has a discretion to take steps to recover the debt from Mr XXXX. The considerations to be taken into account in exercising the discretion include the Chief Executive's obligations under the Public Finance Act 1989 to make only payments authorised by law, and under the State Sector Act 1988 for the economic and efficient running of the Ministry. Also important is maintaining the integrity of the benefit system and the need to discourage fraud, and encourage the partners of beneficiaries to ensure that correct information is provided to the Ministry of Social Development and to accurately report their circumstances.

[124] Mr XXXX was a beneficiary of his actions in that the household had more money for discretionary spending than would otherwise have been the case. Moreover, while Mr XXXX said he did not approve of the appellant being on a benefit and he wanted her to get a job, it appears he was aware that the appellant was receiving benefit monies to which she was not entitled.

[125] We accept that during the periods of separation, Mr XXXX did not benefit from the appellant's receipt of Accommodation Supplement.

[126] Mr XXXX is in full-time employment. According to his statement prepared for the criminal proceedings he received \$35,000 in the relationship property settlement with the appellant. Apparently part of this money went to pay his lawyers. He does not have any significant assets. We consider that he is in a position to make periodic repayments of the debt. We consider that the Chief Executive should take steps to recover the debt from Mr W XXXX in addition to the appellant.

[127] Mr Frost pointed out at the hearing of this matter that the provisions of s 86(3) do not expressly limit recovery from another person to half or part of the debt. However the request from the appellant was that part of the debt be recovered from Mr XXXX. Accordingly the notice given to him by the Authority, specified that what was sought from Mr XXXX was a direction that part of the debt be recovered from him. Mr XXXX was not represented at the hearing of this matter, although he had consulted a lawyer prior to the hearing. As the power to recover under s 86(3) is discretionary, we direct that the Chief Executive limit recovery from Mr XXXX to half the Accommodation Supplement debt in the period 3 December 2003 to 11 May 2008.

Summary of findings

1. The appellant and Mr XXXX should be treated as living in a *de facto* relationship in respect of the period 28 September 2003 to 11 May 2008 with the exception of the periods set out in paragraph [41].

2. In the periods the appellant and Mr XXXX were living apart, the appellant should be treated as having entitlement to benefit, and money received from Mr XXXX should be treated in the same way it has been treated in the post-11 May 2008 period.
3. The debts will need to be recalculated in accordance with this decision.
4. The debts are to be recovered.
5. Mr XXXX is to be treated as jointly and severally liable with the appellant for the debt in respect of Accommodation Supplement paid in respect of the period 3 December 2003 to 11 May 2008 but the Chief Executive is directed to limit recovery from Mr XXXX to half the debt in respect of the period 3 December 2003 to 11 May 2008.

[128] The appeal, as it relates to the application of s 86(3) and the calculation of debt during periods of separation, is allowed. In all other respects the appeal is dismissed.

[129] We direct that a copy of this decision be provided to Mr XXXX.

DATED at WELLINGTON this 13th day of November 2015

Ms M Wallace
Chairperson

Mr K Williams
Member