

[2018] NZSSAA 25

Reference No. SSAA 003/17

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of **XXXX** against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing on the papers

Appearances

The Appellant by her lawyer Mr K Callinicos, Willis Legal, XXXX

For Chief Executive of the Ministry of Social Development: Ms E Kirkman

INTERIM DECISION

Background

[1] In certain circumstances, older persons are required to pay for their own long-term residential care; but, if they are not able to do so, funding is provided under the Social Security Act 1964 (the Act). In this case, the appellant is receiving care, and the dispute concerns whether her assets include the value of her former home. That affects whether she is required to pay for her own care.

[2] The appellant first went into long-term care in early 2016, and in March of that year moved to a facility catering for a higher level of care. About that time, she lodged an application for a Residential Care Subsidy. The Ministry is required to undertake a “means assessment” following such an application. When doing so, it took the view that the appellant had disposed of two categories of assets:

[2.1] she had made gifts to family trusts; and

[2.2] on 14 March 2003, the appellant and her husband signed a deed of lease to occupy their home for life, and then transferred the property into a family trust.

[3] The Ministry says those actions amounted to a “deprivation of assets”. When that occurs, the assets may still be included as an asset for the purpose of the means assessment. The gifts to the family trusts which the Ministry included as assets are not disputed. However, the appellant says no “deprived assets” arise from the arrangements with her home; it was transferred to a trust and she does not need to include anything as “deprived assets”.

Interim decision

[4] The parties indicated that the Authority should hear the appeal on the papers. We convened a telephone conference to ensure the parties appreciated that would preclude them from having their reasoning tested in an oral hearing.

[5] As the parties affirmed that they wished the Authority to hear the matter on the papers, that has been the form of the hearing. However, we remain concerned that the parties have not addressed significant matters in the materials we are required to consider. Accordingly, this is an interim decision; it indicates our views based on the material we have considered. However, we will give the parties the opportunity to call oral evidence and provide further submissions. Our views in this decision are necessarily subject to receiving further information.

The issues and the facts

The role of this Authority

[1] This Authority is established as a judicial authority under the Social Security Act 1964¹ and has the powers the Chief Executive held in relation to the decisions subject to appeal. The appeal is by way of rehearing.² The Supreme Court has made it clear in *Arbutnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55 that this Authority is not limited to reviewing the decision made by the Benefits Review Committee. Instead, the Court said that an appeal before this Authority “opens up for further consideration the whole of the decision made by the BRC (or by the chief executive personally).” The Court went on to say that it is the

¹ Section 12I of the Act.

² Section 12M(1) of the Act.

duty of the Authority to “consider all relevant matters”.³ Similar views are expressed in *Margison v Chief Executive of the Department of Work and Income*⁴, where Justice Laurenson commented:

On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant’s case and determine those afresh and establish whether the appellant can provide the justification for doing so or not.

- [6] We make those preliminary observations, as the appellant has placed a good deal of emphasis on criticising the reasoning of the Benefits Review Committee. We are required to do more than approve or reject the Benefits Review Committee’s reasoning. We have approached the appeal, as we must, on a *de novo* basis; as it transpires, we have reached a preliminary view that is quite different from the Benefits Review Committee, and different from the position taken by the appellant and the Ministry. Our view differs both in reasoning and the outcome.

Facts

- [7] The parties agreed the facts are not contentious. The key facts are:
- [7.1] On 12 October 2016, the Chief Executive decided to include as “deprived assets”, a deed of lease (the deed of lease) to occupy a residential property the appellant and her husband had owned and occupied.
- [7.2] The essential elements of the deed of lease were:
- [7.2.1] It was executed on 14 March 2003 by the appellant and her husband as lessors, and also as lessees.
- [7.2.2] The recitals of the deed of lease noted that the appellant and her husband would dispose of the property subject to the deed of lease to a family trust. The family trust was established later.
- [7.2.3] The deed of lease says that it creates an irrevocable lease, terminating when either: the survivor of them dies, they both

³ At [20].

⁴ *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

cease to use the property as a permanent residence or they terminate the lease in writing.

[7.2.4] The appellant and her husband agreed as lessees to maintain the residence and meet outgoings relating to it.

[7.2.5] The rights conferred on the appellant and her husband as lessees were: to occupy the property, direct the sale of the property and substation of another property, and to receive all income from the property and the proceeds of sale when it was sold.

[7.3] On 21 March 2013, the appellant and her husband signed a deed establishing a family trust, as the deed of lease contemplated. The deed is a conventional discretionary family trust. The appellant and her husband are two of the four trustees and included among the classes of discretionary beneficiaries. However, they would be excluded as beneficiaries if they went into long-term residential care.

[7.4] On the same day as the family trust was established (the trust), the appellant and her husband sold their residence to the trust. The sale was for the price of \$194,360, which was \$235,640 less than the then full market value of the property. The terms of sale established that the sale was subject to the terms of the deed of lease. A term of the agreement set out how they calculated the sale price of the property subject to the lease.

[7.5] Some 10 years later, on 10 June 2013, the appellant and her husband ceased to occupy their residence. On 20 December 2013, the trust sold the residential property for \$690,000, the net proceeds being \$651,041.79.

[8] Other factual matters, including the establishment of a second trust, are not relevant. The appeal concerns only the extent to which the residence subject to the deed of lease contributes to the assets included in the appellant's means assessment.

The Ministry's approach

[9] The Ministry referred to the general legal regime governing whether the appellant is required to pay for her long-term care. The Ministry indicated that it relied on the following legal principles:

- [9.1] The means assessment under pt 4 of the Act in this case is as at the date the application for the means assessment was received.⁵
- [9.2] Schedule 27 of the Act prescribes a process for the means assessment. Materially “asset” is defined in cl 4 of sch 27, and in the Social Security (Long-term Residential Care) Regulations 2005. The definition is generally all the assets of the person and their spouse that are capable of being realised.
- [9.3] Section 147A of the Act also confers a discretion on the Chief Executive to disregard the deprivation of assets where:
- ... 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.
- [9.4] Regulation 9B of the Social Security (Long-term Residential Care) Regulations 2005 also provides guidance and examples of the deprivation of assets. Regulation 9B(b) refers to a disposition of property for no consideration, or less than the market value.
- [9.5] The principles relating to negating the effect of deprivation of assets was reinforced by a 2007 amendment to the Act adding s 1A which sets out the principle that for persons seeking support under the Act:
- ... where appropriate they should use the resources available to them before seeking financial support under this Act ...
- [9.6] The Ministry referred to authorities affirming the principle expressed in s 1A,⁶ and its application to the deprivation of assets.⁷
- [10] Against that legislative background, the Ministry contended:
- [10.1] The appellants had an interest in land, a residential property, and they held the fee simple title to that property. They transferred that property to the trust for \$235,640 less than the market value due to the lease for life which they claimed reduced the value.

⁵ Section 145(a) of the Act.

⁶ The submissions cite *Director-General of Social Welfare v W* [1997] 2 NZLR 104, which expresses the principle prior to its expression in s 1A of the Act.

⁷ The submissions refer to s 74(1)(d) of the Act as analogous to s 147A, both concerning the deprivation of assets. The submissions cite *Blackledge v the Social Security Commission* HC Auckland CP 81/87, 17 February 1992; *Bernice Keenan v the Director General of Social Welfare* HC Auckland APS24-SW00, 12 January 2000; and SSAA 74/10.

[10.2] In the Ministry's view, creating the deed of lease created a lease for life, which was a deliberate act that resulted in deprivation under s 147A. The Ministry presented this in two alternative forms:

[10.2.1] the lease for life had a value and should be included as an asset in the means assessment; or

[10.2.2] the deprivation related to the residential property, and the value of that deprivation included the value of the rights under the deed of lease.

[10.3] The Ministry contended that using sch 2 of the Estate and Gift Duties Act 1968 was the appropriate way to value life interests. Accordingly, the value of the rights created by the deed of lease interest should be calculated in that way, and the Ministry says the value was \$235,640. The primary contention was that the value at the time of the means assessment should be used or, alternatively, the time of the deprivation (when the deed of lease was executed in 2003) would be appropriate.

[10.4] The appellant and her husband had made an arrangement to live in their property for the whole of their lives, and the lease endured until then, or until certain other circumstances occurred. There was a further deliberate act of deprivation in retaining the right to live in the home.

[11] The Ministry elaborated on the application of the deprivation test. In particular, the Court of Appeal in *Chief Executive of the Ministry of Development v Morgan* [2015] NZCA 453, [2015] NZAR 1754 expressed the view that s 74(1)(d) of the Act was simply an inquiry into causation; a "but for" test was sufficient to determine the provision applied. The Ministry contends that there is an analogy with s 147A.

[12] The Ministry contended that the appellant and her husband had undergone an elaborate series of steps to deprive themselves of their home, and, if effective, that would cause the means assessment to produce an inappropriate result. The steps were:

[12.1] making deliberate decisions and taking actions so they no longer had access to certain assets;

[12.2] transferring assets to a trust;

[12.3] ensuring they could not access the assets of the Trust if they required long-term care;

- [12.4] transferring assets at a reduced value to lessen the price that the trust paid for the assets;
- [12.5] designing the life interest in the property to extinguish without recognising its value;
- [12.6] drafting the structure of the Trust deed with an intent to defeat the residential care subsidy thresholds; and
- [12.7] making decisions as trustees so as not to benefit in person.
- [13] The Ministry contended that the arrangement was deliberate asset planning, crafted to defeat the intended effect of the Act. The relevant trust deed included a provision stating that the term “discretionary beneficiary” did not apply to:
- ... any person who may otherwise fall into the above definition who is in receipt of permanent or long term care in any Hospital, Home or Rest Home facility as a result of age or infirmity ...
- [14] Accordingly, the Ministry contended that the discretionary power in s 147A should be exercised to ensure the Act had its intended effect. The Ministry referred to the elements of contrivance intended to create an inappropriate result.

The appellant’s approach

- [15] The appellant’s submissions were discursive, covering statutory interpretation, legal history, and the roles of Parliament and judicial authority. It is not necessary to discuss that background material. The matter to be determined is the application of a legislative regime in the Act and regulations under the Act.
- [16] The appellant’s approach to the legislation and its application to this appeal can be identified quite concisely:
- [16.1] The Ministry’s position relies on deprivation under s 147A and sch 27 of the Act.
- [16.2] Those provisions concern “assets”, and a thing is only an “asset” if it is “capable of being realised by the person or his or her spouse or partner”.⁸
- [16.3] If a thing is not attractive to anyone, it is not an asset; it is nothing. The lease deed is “a nothing or ‘RES NULLIUS’ because the very Deed states that only Appellant and Spouse can enjoy the occupation of the land.”⁹

⁸ Schedule 27 of the Act, definition of “assets” in cl 4.

[16.4] While not expressed explicitly, it appears that those propositions lead to the contention that:

[16.4.3] The land subject to the lease for life was disposed of to the trust for full value as the existence of the lease for life diminished the value.

[16.4.4] The lease for life itself was not an asset under the legislation, so it must be ignored.

[16.5] The trust deed prevented access to trust funds when in care, but that was not deprivation, as the appellant's husband was a conduit to discretionary benefits from the trust.

[16.6] The value of the fee simple estate transferred to the trust was \$194,360, and the value of the lease for life was nil.

[16.7] The appellant presented an alternative argument that if the lease for life had a value, it was \$84,250 and was determined on the date the lease terminated. The capital value of the whole property in 2003 (when the dead of lease was executed) should be used, and amortisation tables for the lives of the appellant and her spouse applied.

[16.8] The appellant contends that the arrangements were independent of long-term care issues. The arrangement was simply to protect their tenure in their home.

The issues we are to determine

[17] The issue has been framed as to whether the discretion in s 147A of the Act applies in this case, and, if so, how it should be applied. However, in our view, the primary issue is to determine what in fact occurred. The appellant and the Ministry have, to a significant extent, focused on what they identify as two assets and applied the deprivation principles to these two assets:

[17.1] the fee simple legal estate subject to the effect of the terms of the deed of lease; and

[17.2] the legal rights created by the deed of lease.

[18] We have a very different view of the value of those two things to the parties, though ultimately the value of the respective rights is determinative.

Discussion

The facts

[19] The parties said that the facts were not contentious, and they invited the Authority to hear the matter on the papers. There is one element of the facts we could not determine without hearing from witnesses (or simply applying the burden and standard of proof). The appellant claims she was not motivated to enter into the arrangements having regard to the effect on the support she would receive for long-term care. The explanation given to support that claim was implausible, and particularly so given the express reference in the trust deed to excluding her as a beneficiary of the trust when in long-term care.

[20] However, our view is that subjective motivation is not relevant in this case. If either party wishes to rely on subjective motivation, we record that we would find the arrangements in issue were intended to avoid the intended effects of the Act. However, for the reasons discussed below, we find that the arrangements fail to achieve that objective; and instead increase the liability beyond what it would have been if the deed of lease was never executed.

The lease arrangement

[21] We are required to consider one element of a means assessment as to assets,¹⁰ which is conducted under pt 2 of sch 27 of the Act. The Ministry correctly points out that the assessment is as at the date the appellant submitted her application for the means assessment. That was on 17 March 2016.

[22] The contentious issue is how to deal with the residence the appellant and her husband had lived in until 10 June 2013.

[23] Section 146(2) of the Act requires that we determine the value of the non-exempt assets of the appellant as at the date of the assessment. That process is undertaken pursuant to sch 27 of the Act and takes account of assets, but not exempt assets.¹¹ As at the date of the assessment, the residence was not owned by the appellant or her husband; and they held no proceeds from the home either. The trust had sold it and kept \$651,041.79 as the net proceeds of the sale. Those funds are still held by the trust as a term deposit.

¹⁰ Section 146 of the Act.

¹¹ The two classes are defined in sch 27, cl 4 of the Act.

[24] It follows that the house and the proceeds of the house are not an asset held by the appellant. If they are to have any significance in the means assessment, it must be due to s 147A(1) of the Act, which provides:

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.

[25] Alternatively, they are accounted for because the appellant gifted the house or the proceeds of the house during the five years preceding the assessment.¹²

[26] There is no time limit for the application of the provision relating to the deprivation of assets. There is some guidance provided by reg 9B of the Social Security (Long-term Residential Care) Regulations 2005 regarding the application of the deprivation of assets provision. The regulations provide guidance which includes examples, but these do not limit the scope of s 147A. The examples include gifts made outside the gifting period, and disposition of property before the commencement of the gifting period for no consideration or less than market value.

[27] In our view, there is no legal complexity in this case. Whether there was deprivation turns on the facts, and particularly the nature of the legal arrangements the appellant and her husband entered into.

[28] Accordingly, we turn to what the appellant and her husband did commencing on 14 March 2003. At that time, they owned the property subject to the deed of lease. They held the full fee simple title to the property. In short, it was their home and they owned it.

[29] On 14 March 2003, they entered a lease. For present purposes, it is not necessary to compare the rights created by this document with a life estate or a licence to occupy; or, a lease for life on conventional terms. What the deed of lease created was not at all conventional:

[29.1] It left the appellant and her husband with the right to occupy the house indefinitely,

[29.2] The right to require the lessors to sell the house and purchase another house,

¹² The definition of "assets" in cl 4 of Schedule 27 of the Act, and regs 8 and 9 of the Social Security (Long-term Residential Care) Regulations 2005.

- [29.3] The right to income from the house, and
- [29.4] To complete the suite of rights approximating complete ownership, they were entitled to the proceeds from a sale of the house.
- [30] In exchange, they met the usual outgoings, as they did before executing the deed of lease. In short, the only thing of substance the lessor did was to hold the title and account to the appellant and her husband.
- [31] When the appellant and her husband sold the title to their home to the family trust subject to the deed of lease, the trust gained nothing of value; all the benefits and responsibilities of ownership lay with the appellant and her husband.
- [32] The terms of the sale and purchase agreement ensured that the terms of the deed of lease governed the respective rights of the trust as purchaser and the appellant and her husband as lessees:
- The Purchasers acknowledge that they acquire the property subject to the terms and conditions set out in a Deed of Lease to Occupy the Property for Life which Deed is dated the 14th day of March 2003 wherein the Vendors are the Lessees and the sole right to occupy the property during the lifetime of either of them and otherwise on the terms and conditions set out in the deed.
- [33] Accordingly, the fee simple estate in the land was sold to the trust, subject to the terms of the deed of lease.
- [34] The deed of lease set out those terms in this way:
- [34.1] The appellants would have “the sole rights and privileges of the property”, as the lessees.
- [34.2] The deed of lease then prescribed those rights so they would have:
- [34.2.5] The right to “use and enjoy the property”;
- [34.2.6] The right to “require the Lessors to sell the property and ... purchase one or more substitute property or properties”;
- [34.2.7] The right “To personally have all income derived from or attributable to the property or its substitute or any surplus funds arising from the proceeds of a sale of the property or its substitute”.
- [34.3] The deed of lease provided that it was “irrevocable by the Lessors”. The lease terminated only through the death of both the appellant and her

husband, both of them vacating the property or them electing to terminate it.

[35] Those provisions ensured that the appellant and her husband had essentially the same rights as they had before executing the deed of lease, and the trust gained nothing of value when it became the lessor. We do not agree with the analysis of the appellant or the Ministry. To the extent this document created separate interests on the part of the lessor and the lessee:

[35.1] There was no value in the lessor's interest, as the lessor only had obligations. The lessor was required to hold the property pending the lessees' directions, allow the lessee to occupy it and give the lessees any money from the sale of the property. Only if the appellant and her husband abandoned their rights under the deed of lease would the trust gain anything of value; that did not occur until 2013. In 2013, they chose not to require the trust to purchase a substitute property, and failed to take the proceeds of sale. Those options were open to them.

[35.2] Accordingly, until 2013 the appellant and her husband held all the value in the property; they had the use of the property, met the usual expenses of owners and were entitled to the proceeds of sale. The financial value of those rights is materially indistinguishable from the value of the fee simple title.

[36] Therefore, we do not accept that this arrangement can sensibly have an amortisation table based on life expectancy applied to the interests. The financial benefits and costs of ownership lay entirely with the appellant and her husband until 2013, when they chose not to demand their rights to take the proceeds of the sale or otherwise secure the full value of the property as they could.

[37] It follows that the sale price of \$194,360 of the limited interest to the trust, was an over value to the full extent of the purchase price. Accordingly, when the appellant and her husband and the other trustees created a debt from the trust to the appellant and her husband in satisfaction of the purchase price, it was a distribution from the trust to the appellant and her husband. That debt was an asset they held at that point.

[38] The sale and purchase agreement contains an analysis claiming the purchase price was the true value of the property subject to the deed of lease. Presumably that was the intention, but it was clearly not the case; the trust would only gain any value if the appellant and her husband as lessees chose not to continue to claim

their rights of occupation under the deed, and their right to “any surplus finds arising from the proceeds of a sale of the property or its substitute.” The trust had no ability to gain value; only the appellant and her husband could give that ability to the trust by depriving themselves of their rights in the future.

The deprivation of assets

[39] For those reasons, we consider the effect of the deed of lease, transfer of the property and the creation of a debt to satisfy the sale price was that:

[39.1] The appellant and her husband retained the full market value of their residence; nothing changed in relation to their right to occupy and receive the proceeds from any sale of the property. Functionally, the role of the trust was distinguishable from a bare trustee.

[39.2] The appellant and her husband also created an asset in the form of a debt from the trust of \$194,360.

[40] In the years from 2003 when they put the arrangements in place, the appellant and her husband continued to make financial arrangements with the trust. They made gifts and reduced the debt the trust owed them to nil by 2007.

[41] The gifts had no effect on the rights the appellant and her husband held under the deed of lease. They continued to enjoy their use of the house as though it was their own. On 10 June 2013, the appellant and her husband vacated their residence, and under an arrangement with a different trust they purchased a different residence and relocated there.

[42] The appellant and her husband could have required the trust to sell their existing residence and purchase the substitute residence in 2013; they did not do that. Instead, they chose to vacate their home and the trust sold the property. The surplus the trust received was \$651,041.79. It is inescapable that the appellant and her husband in 2013 were in a position to demand all of those funds. Instead, the trust retained the funds. The rationale for the trust retaining the funds is not significant. For present purposes, it is sufficient that the appellant and her husband chose not to pursue their rights to the value in the property. They were two of the trustees of the trust and were also the lessees. The lease was irrevocable by the lessors; the lessees were both alive and they had the power to require the trust to purchase a substitute home and to take the surplus. Instead, the appellant and her husband deprived themselves of those rights and allowed the trust to take all of the proceeds when the trust was entitled to none of them without facilitation by the appellant and her husband.

[43] Accordingly, in 2013 the appellant and her husband deprived themselves of the value of the house or the proceeds of the house amounting to \$651,041.79. That was the surplus after meeting the costs of sale. Consequentially, they have deprived themselves of income on those funds. In our view, this is a clear case where s 147A of the Act applies; the appellant and her husband directly or indirectly deprived themselves of an asset in 2013. Accordingly, we are required to exercise the discretion in relation to the deprived funds for the appellant's means assessment.

The effect of the excessive purchase price

[44] Prior to exercising the discretion under s 147A of the Act, we discuss the effect of the purchase price the trust paid in the form of a debt back, without receiving any value. The effect of that action was to create a debt of \$194,360 which was an asset held by the appellant and her husband. We need to consider what, if any, effect that has on the exercise of the discretion under s 147A.

[45] Our first observation is that it was the appellants who created the arrangement. Viewed objectively, it appears to be constructed to avoid the effects of the long-term care legislation. If the arrangements had the effect apparently intended by the drafters, we would have little difficulty in finding there had been a deprivation effected over time using a series of steps. We would conclude the starting point is that the appellant and her husband owned a home, and used an arrangement to deprive themselves of the value of the home. The mechanism intended was to split the home into two estates, or, more accurately, bundles of rights; and value the two parts as less than the whole. The final step was to amalgamate the rights in the hands of the trust, and thereby transfer the asset to the trust without it paying the full value. The obvious flaw in the device is that the appellant and her husband deprived themselves of the value they held in the fee simple estate in their home.

[46] However, the appellant and her husband failed to execute the transfer with the values they anticipated. Instead, their legal arrangements retained control over their home and rights over all the value in it and overvalued the remainder, creating a valuable debt instrument. The valuable debt instrument was distribution from the trust, and an asset in the hands of the appellant and her husband.

[47] This debt was a new asset created in 2003 and expunged by gifting between its creation and 2007. It is quite a separate matter from the asset they held in 2013. The trustees could not have gained possession, or demanded that the appellant and her husband as lessees take less than \$651,041.79 being the surplus from the sale. The overvalue, creation of a debt and the gifting were a separate matter; the parties expunged the debt voluntarily. That will leave the appellant with the

difficulty that the gifting to expunge the debt likely triggers s 147A, but that relates to the debt without diminishing the rights created by the deed of lease. That aspect is not disputed in this appeal.

- [48] The effect of the arrangements has been that the appellant is potentially in a substantially worse position than would have been the case had she not been a party to the lease and she and her husband simply sold their home to the trust in 2003. However, the fact that the effects of the arrangements are not what the appellant expected under the Act does not isolate her from the consequences.

Exercise of the discretion in relation to deprivation of assets

- [49] We are satisfied that the sum of \$651,041.79 is to be included in the means assessment.

- [50] We have concluded s 147A applies for the reasons already expressed and propose to exercise the discretion in s 147A in favour of including the whole of the amount for the reasons expressed, particularly:

[50.1] In 2013 the appellant and her husband were able to ensure they received the full value of their residence, due to the terms of the deed of lease and the agreement for sale and purchase with the trust.

[50.2] In 2013, the appellant and her husband, in their capacities as lessees, and as trustee (two of four), conducted themselves so as to allow or cause the trust to retain the value of \$651,041.79; which the appellant and her husband could have claimed.

[50.3] The antecedent creation of a debt that was effectively a distribution by way of gift from the trust to the appellant and her husband, and their expunging the debt by gifting to the trust did not reduce the value of \$651,041.79 that the appellant and her husband could recover in 2013.

- [51] In this present case, the terms of the deed of lease and the actions in 2013 make this a very clear example of deprivation; the arrangement left the full value of the residence at the disposal of the appellant and her husband at that time. They chose not to pursue their rights and left the trust to take the full value.

Interim Decision

- [52] We are satisfied the Benefits Review Committee's decision is wrong, as was the Chief Executive's initial decision as to the value of the deprived assets. We propose to exercise our discretion to include in the appellant's means assessment

the sum of \$651,041.79 in deprived assets, arising from her and her husband's rights under the deed of trust.

- [53] We reserve the issue of any calculations that follow from our decision (including assessing the income level), and would anticipate dealing with that, if necessary, after issuing a final decision on the deprived assets.

Completion of the hearing

- [54] The parties chose to have a hearing on the papers notwithstanding the Authority expressing reservations. They have not focused on issues that, in our view, are fundamental to determining the appeal, and accordingly this is an interim decision. We are concerned to ensure the parties can address all issues arising in our decision. In the absence of further submissions or evidence justifying a different outcome, we will issue a final decision in the terms indicated. Accordingly, we direct:

[54.1] Within 15 working days the parties may provide written submissions, briefs of evidence, and/or an application for an oral hearing.

[54.2] If there are briefs of evidence or an application for an oral hearing, the Authority will convene a telephone conference to discuss the procedure.

[54.3] If nothing is filed, or there are only submissions, the Authority will complete the hearing on the papers and issue a final decision.

- [55] The parties may address any calculations, but unless they do so that issue is reserved for further consideration after the final decision is issued.

Dated at Wellington this 25th day of May 2018

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member

