IN THE COURT OF APPEAL OF NEW ZEALAND

CA119/04

BETWEEN	FIONA PRASAD Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: 24 November 2005

Court: William Young, Chambers and O'Regan JJ

Counsel: T J McGurk for Appellant
C J Mathieson and M J Hodge for Respondent

Judgment: 22 December 2005

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make no order for costs.

REASONS

(Given by O'Regan J)

Introduction

[1] This is an appeal from a decision of John Hansen J (HC AK CIV 2003-485-040 11 December 2003), in which he answered three questions posed in a case stated by the Social Security Appeal Authority under s 12Q of the Social Security Act 1964 (the Act) adversely to the appellant. Leave to appeal was granted by Cooper J in a decision delivered on 24 May 2004. The appeal raises issues as to the interpretation of the provisions of the Act relating to accommodation supplements.

Background facts

[2] At the material time, the appellant was a domestic purposes beneficiary with two dependent children. After her marriage broke down in 1995, she had used funds received from the relationship property settlement to purchase a house divided into two parts, each part being a two bedroomed flat. She and her children lived in one of the flats. The other flat was rented out.

[3] The purchase price of the property was $159,000, of which the appellant paid $58,000 and the balance was funded by a bank loan secured by a mortgage over the property. Subsequently a further $50,000 was borrowed to finance renovations to both flats. At the time of the hearing before the Authority, the Government Valuation of the property was $200,000, and the appellant's borrowings secured by the mortgage over the property were approximately $151,000.

[4] The appellant received the domestic purposes benefit (DPB) and an accommodation supplement. Differences arose between the appellant and the Ministry as to the treatment of the outgoings for the property for the purpose of determining her entitlement to an accommodation supplement, and as to the treatment of rental income derived from the rental flat. The Chief Executive determined that the rental income should be deducted from the total cost of the property. The appellant sought a review by the Benefits Review Committee, which took a different approach to that of the Chief Executive: it treated costs and income in relation to the property separately.

[5] The appellant then appealed to the Authority. At that stage she was receiving income from the rental flat of $220 a week, and her total outgoings for the property as a whole, including mortgage repayments, were $303 a week.

Statutory context

[6] The provisions of the Act dealing with accommodation supplements, ss 61E to 61EC, were inserted into the Act in 1993. The operative provision is s 61EA(1) which says that the Chief Executive may grant to an applicant an accommodation supplement "to assist in meeting the applicant's accommodation costs". Essentially, the accommodation supplement is a top up to a benefit otherwise received by the applicant to assist the applicant in meeting his or her accommodation costs. It is not available to those who have concessionary accommodation arrangements with other organs of the Crown, and is targeted in the sense that the accommodation supplement is a contribution to accommodation costs to the extent that they exceed 25% of the base rate of benefit otherwise available to the applicant.

[7] Section 61EC(1) provides for the rate of accommodation supplement to be paid at the appropriate rate specified in Schedule 18 to the Act. That schedule has detailed provisions for the calculation of the amount of accommodation supplement available to a particular applicant. We do not need to go into that detail for the purposes of the present case, but we note that the key concepts are "accommodation costs" and the "base rate" of benefit received by the applicant. The focus of this appeal is on the former.

[8] The definition of "accommodation costs" appears in s 61E. That definition, so far as it is relevant to the present case, is as follows:

> **accommodation costs**, in relation to any person for any given period, means, -
>
> …
>
> [b] In relation to premises that are owned by the person, the total amount of all payments (including essential repairs and maintenance, local authority rates, and house insurance premiums, but excluding any arrears) that-

(i) subject to s 68A, are required to be made under any mortgage security for money advanced under that security to acquire the premises, or to repay advances similarly secured; or

(ii) the chief executive is satisfied are reasonably required to be made:

…

provided that, where a person is a joint tenant or owner in common of any premises with another person or other persons living in the premises, that applicant's accommodation costs shall be the share of the total accommodation costs of the premises that the chief executive is satisfied the person is paying.

[9] In order to understand that definition, it is also necessary to refer to the definition of "premises" in s 61E. That definition is:

> **premises**, in relation to any person, means the place that he or she occupies as a home; and includes, in relation to a person who is a boarder or lodger, any room or other accommodation occupied as a home by that person.

High Court judgment

[10] The case stated by the Authority required the High Court to determine three questions. These were:

(a) Does the definition of "accommodation costs" in s 61E permit the Chief Executive (other than in the specific exceptions in s 61E and s 61EB) to apportion accommodation costs such as mortgage payments on the basis that an applicant lives in only part of the property in respect of which she has outgoings?

(b) Was the Authority correct in determining that the Chief Executive is entitled to pay accommodation costs based on a figure less than the actual amount of mortgage repayments and related costs that a beneficiary is liable to pay?

(c) Did the Authority err in finding that an applicant's accommodation costs can only relate to the part of the premises that the beneficiary lives in?

[11] John Hansen J answered the first two questions affirmatively, and the third question negatively.

[12] The Judge held that the definition of "accommodation costs" in s 61E(1) referred to the total amount of mortgage payments required to be made to acquire the premises and other essential payments, but that premises related only to the place occupied as a home. Accordingly where only half of the property owned by the appellant was occupied by her and her family as a home, the accommodation costs would be the total amount of payments which were relevant to the premises actually occupied as home.

[13] In view of that, it was necessary and permissible for the Chief Executive to apportion costs relating to the entire property as had occurred in this case. The Judge noted that the method of apportionment was somewhat arbitrary and suggested possible alternative methods of apportionment.

Leave judgment

[14] The appellant sought leave to appeal to this Court on three questions of law which were not in precisely the same terms as the questions set out in the case stated by the Authority for determination in the High Court. The questions in respect of which leave was sought were:

(a) Whether the words in the definition of accommodation costs contained in s 61E(1) of the Act "…the total amount of all payments… required to be made under any mortgage security to acquire the premises, or to repay advances similarly secured" can refer to part of a property rather than the total property.

(b) Whether the words in the definition of accommodation costs contained in s 61E(1) of the Act "…the total amount of all payments… required to be made under any mortgage security to acquire the premises, or to repay advances similarly secured" means the total amount of mortgage repayments the person is making even if part of the property is being rented.

(c) Whether in relation to a person who owns their own home the definition of premises contained in s 61E(1) of the Act means the whole of the property acquired under the mortgage.

[15] Cooper J was satisfied that these were questions of law which genuinely arose out of the substantive decision of the High Court. He was satisfied that the outcome of the appeal might affect the position of a significant number of others receiving or entitled to receive the accommodation supplement. And he was satisfied that there was a plausible argument that the decision of John Hansen J was wrong. He therefore granted leave on the three issues outlined above.

Issue on appeal

[16] The three questions of law for which leave to appeal was given overlap to a very considerable degree. We think that the reality is that there is only one question which the Court needs to determine, and the answer to that question will provide an answer to all three points on appeal. That question is: Where an applicant for an accommodation supplement owns composite premises which comprise two flats, one occupied by the applicant as a home and one rented out, are all the payments made by the applicant in relation to the composite premises accommodation costs (the appellant's position), or only the part of the payments which are referable to the flat occupied as a home (the Chief Executive's position)?

[17] The issue is of some significance for the appellant. If the appellant's position prevails, her accommodation costs are higher, leading to a corresponding increase in her accommodation supplement. This is balanced to some extent by the fact that her income for the purposes of the calculation of her DPB entitlement is also higher

under her approach; this because the gross rental received from the rental flat is all income, whereas only net rental after deduction of costs referable to the rental flat is treated as income if the Chief Executive's position prevails. This higher income potentially reduces the amount of DPB to which she is entitled. But because of the way the abatement regime applies in relation to the DPB, the positive impact on her accommodation supplement entitlement significantly outweighs any negative effect on her DPB entitlement.

Submissions for appellant

[18] On behalf of the appellant, Mr McGurk argued that the High Court Judge had failed to give proper weight to the plain meaning of the words "the total amount of all payments…required to be made under any mortgage security to acquire the premises…". He said there was no discretion to regard accommodation costs as a different or lesser amount, and no provision for apportionment.

[19] Mr McGurk said the reference to "premises" merely ensured that accommodation costs had to relate to the place where the applicant lived, but as long as the payments made by the applicant related to such premises, all such payments were accommodation costs. The fact that a part of the property owned by the appellant was also rented out as a flat was irrelevant to this.

[20] As a backup argument, Mr McGurk said that, even if accommodation costs were limited to the area of the property occupied as a home, this would still incorporate all mortgage payments because such mortgage payments had to be made in order to retain ownership of the whole property, including the part occupied as a home. The fact that another part of the property is rented out did not alter the fact that the full mortgage payments had to be made and that the mortgage was entered into in order to acquire the total premises of which the home flat formed part.

[21] Mr McGurk also argued the renting of the rental flat was not a residential tenancy under the Residential Tenancies Act 1986 because "the premises continue to be used… principally as a place of residence by the landlord": s 5(n). He said this

meant the appellant should be treated for present purposes as occupying not only the flat she and her family live in, but also the rental flat.

[22] Mr McGurk said that this would not lead to abuse because the accommodation supplement is subject to maximum limits which remove the possibility of abuse.

Submissions for Chief Executive

[23] On behalf of the Chief Executive, Mr Mathieson said the appellant's argument ignored the requirement that, in order to qualify as accommodation costs, payments had to be "in relation to premises (i.e. a place occupied by the appellant as a home)". He said it was not necessary for the Act to have a specific provision for apportionment of costs which related partly to premises occupied as a home and partly to other matters (in this case the rental flat). He drew an analogy with the decision of Fisher J in *Stowers v Director-General of Social Welfare* HCAK AP404/100/0027 September 2000, in which a distinction was drawn between mortgage payments which related to the acquisition of the beneficiary's home, and those which related to borrowings made to purchase a car and fund an overseas trip. Mr Mathieson said there would be no doubt that borrowings to purchase a separate property for the purpose of renting it out would not be brought to account as accommodation costs, and said that there should be no different outcome in the present case merely because the flat is on the same title as the home.

[24] Mr Mathieson said that it was not significant that the Act did not provide for apportionments specifically, as it did in relation to joint tenants (s 61E, definition of accommodation costs, and s61EB). He said some form of apportionment was required to ensure that accommodation costs were only the total costs incurred in relation to the premises occupied as a home, and there was no suggestion that the method adopted in this case was inappropriate. He accepted that dividing the costs on a basis relative to the square metreage of the property dedicated to the home and to the rental flat respectively (as suggested by John Hansen J) would also be a fair and equitable approach.

[25] Mr Mathieson said the argument based on the Residential Tenancies Act involved a misinterpretation of s 5(n), which dealt with a situation of shared occupancy, such as where the tenant and landlord live together as flatmates. It did not apply where a self-contained flat was occupied exclusively by a tenant.

[26] Mr Mathieson said the fact that the accommodation supplement was capped did not remove the need for concern as to possible abuse in the present situation. The calculation of accommodation costs was a key component in the calculation of the accommodation supplement and if costs which were not properly classified as accommodation costs were brought to account the outcome would be incorrect.

Discussion

[27] We agree with the High Court Judge that the reference to total payments in the definition of accommodation costs is qualified by the requirement that the costs are "in relation to premises" and, in so far as those costs are mortgage payments, that the mortgage secures a loan taken out "to acquire the premises". Thus payment for repairs, maintenance, rates and the like which relate to the rental flat are not payments "in relation to premises", and mortgage payments which relate to the amount required to fund the purchase of the rental flat are not accommodation costs either.

[28] Where the premises includes both the place that the applicant occupies as a home and a rental property, the only sensible basis on which the total costs in relation to the place occupied as a home can be assessed is by apportioning global costs on an equitable basis between the home and the rental flat. That is what occurred in this case. As long as the method of apportionment is fair, there is no basis for the Court to intervene. We reject the contention that there needs to be a specific apportionment regime in the Act itself.

[29] We agree with Mr Mathieson that s 5(n) of the Residential Tenancies Act does not apply to the appellant's situation, where she lets out a self-contained flat that is occupied exclusively by the tenant.

[30] We do not think the fact that there is a cap on the accommodation supplement allows for costs which are not properly referable to the place in which a person lives to be brought into account. While the cap would mean that any over-calculation will be capped, it does not prevent the over-calculation occurring.

[31] We conclude that the answer to the question posed in [16] above is: "only the part of the payments which are referable to the flat occupied as a home". We are satisfied that this interpretation reflects the objective of the provisions of the Act dealing with the accommodation supplement, namely to assist a beneficiary in meeting the costs of accommodation. The interpretation suggested by the appellant would also provide assistance in relation to the cost of providing accommodation to others for a profit. Of course, in calculating the appellant's income from the rental flat, the proportion of the total costs which relate to the flat would be deducted from the gross rent received, and only the net figure would be brought to account as income.

Result

[32] We agree with the interpretation of the High Court Judge and therefore dismiss the appeal. For completeness, we answer the three questions in respect of which leave to appeal was given (outlined in [14] above) as follows:

(a) Yes, they can.

(b) No, they do not.

(c) No, it does not.

[33] We make no costs order.

Solicitors:
Otene & Ellis, Auckland for Appellant
Crown Law Office, Wellington for Respondent