IN THE COURT OF APPEAL OF NEW ZEALAND

CA666/2007
[2008] NZCA 557

BETWEEN	AUDREY BREDMEYER Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: 30 September 2008

Court: Arnold, Ellen France and Baragwanath JJ

Counsel: J A Dean for Appellant
A J Williams and U R Jagose for Respondent

Judgment: 17 December 2008 at 11.30 am

JUDGMENT OF THE COURT

A The answer to the question in the case stated (set out at [6(a)] below) is "yes". The answer to the question (set out at [6(b)]) below is "no".

B The appeal is accordingly dismissed.

C No order for costs in this Court.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] Ms Bredmeyer, the appellant, is New Zealand born but she has lived outside of New Zealand since 1968. Ms Bredmeyer moved to Australia, her current place of residence, in 1990.

[2] After turning 65 years of age, Ms Bredmeyer applied for New Zealand superannuation. Her application was dealt with by the Chief Executive of the Ministry of Social Development in terms of an agreement between the governments of New Zealand and Australia which applies to persons who, like Ms Bredmeyer, meet the age and residence criteria for New Zealand superannuation but live in Australia: see Schedule 1 of the Social Welfare (Reciprocity with Australia) Order 2002 ("the Agreement"). Ms Bredmeyer's application for superannuation was ultimately unsuccessful.

[3] The Chief Executive in declining Ms Bredmeyer's application relied on art 9(3) of the Agreement. Article 9(3) provides that where a person is entitled to receive New Zealand superannuation under the Agreement, the rate payable is calculated using the formula in art 9(1) but the amount the applicant is entitled to receive:

> [S]hall not exceed the amount of Australian age pension that would have been payable to that person *if he or she was entitled to receive an Australian age pension* but was not entitled to receive New Zealand superannuation … .
>
> (Emphasis added.)

[4] In Ms Bredmeyer's case, her assets and those of her husband meant that she was not entitled to receive the Australian age pension as that pension is means tested. The Chief Executive said that because there was no entitlement to receive the Australian age pension, Ms Bredmeyer was not entitled to receive any New Zealand superannuation.

[5] The appellant appealed against the decision to decline her application to the Social Security Appeal Authority. The Authority dismissed the appeal concluding that the Chief Executive's decision to decline payment of New Zealand superannuation was correct: [2006] NZSSAA 57. The matter went on appeal to the High Court by way of case stated. In a decision delivered on 20 September 2007, Gendall J concluded that the Authority was correct: HC WN CIV-2007-485-105. On 13 November 2007, MacKenzie J gave leave to appeal to this Court on the questions in the case stated by the Authority.

[6] The two questions in the case stated are as follows:

(a) Does art 9(3) of the Agreement require an applicant for New Zealand superannuation living in Australia and entitled to receive New Zealand superannuation under art 6 of the Agreement, at a rate to be calculated in accordance with art 9(1) of the Agreement, to apply for an Australian age pension in order to determine the rate of New Zealand superannuation he or she can receive?

(b) If an applicant for New Zealand superannuation living in Australia and entitled to receive New Zealand superannuation under art 6 at a rate to be calculated in accordance with art 9(1) fails the means test imposed by the social security law of Australia, is he or she nevertheless entitled under art 9(3) to be paid New Zealand superannuation at the lesser of the New Zealand superannuation rate

and the maximum Australian age pension rate as if he or she had not failed the means test?

[7] The focus of the appeal is therefore on the meaning of art 9(3).

Background

[8] Before turning to the Agreement, we briefly set out the relevant background.

The relevant facts

[9] The facts are set out in the case stated as follows:

> [4] The appellant was born in New Zealand on 1 September 1937. She lived in New Zealand until May 1968 when she moved to Papua New Guinea. She moved to Australia in January 1990. She continues to live in Australia.
>
> [5] On 21 June 2005 the appellant applied for New Zealand Superannuation.
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> [6] The Chief Executive determined that the appellant met the age and residence criteria for New Zealand Superannuation. In fixing the rate of New Zealand Superannuation payable to the appellant under the Reciprocal Agreement the Chief Executive had regard to the rate of Australian Age Pension payable to the appellant.
>
> [7] Centrelink Australia (the Australian equivalent of Work and Income New Zealand) determined that the appellant was not entitled to receive an Australian Age Pension on the grounds that the assets of herself and her partner exceeded the allowable limit. Neither was the appellant entitled to a Commonwealth Seniors Health Card as the income of the appellant and her partner was above the allowable limit.
>
> [8] The Chief Executive determined that because the rate of Australian Age Pension payable to the appellant was nil the rate of New Zealand Superannuation payable to her was nil.

The Authority's findings

[10] The Authority's findings are also set out in the case stated in these terms:

> [9] Article 9(3) requires the authorities to consider how much Australian Age Pension would be payable to the appellant and to pay her New Zealand

> Superannuation at a rate no higher than that amount. As she was not entitled to receive Australian Age Pension it seems reasonable to conclude that the appellant could not receive New Zealand Superannuation.
>
> [10] The phrase in the … Agreement *"that would have been payable to that person if he or she was entitled to receive an Australian Age Pension"* ties the rate of payment of New Zealand Superannuation to the rate of payment of Australian Age Pension calculated on the basis that New Zealand Superannuation is not taken into account in calculating entitlement to Australian Age Pension.
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> [11] If the amount of New Zealand Superannuation payable was simply to be less than the maximum amount of Australian Age Pension payable then it would not have been necessary to add the words *"if he or she was entitled to receive an Australian Age Pension but was not entitled to receive New Zealand Superannuation or a Veterans Pension"*.
>
> [12] The addition of the words *"if he or she was entitled to receive an Australian Age Pension"* appears to reinforce the notion that persons in Australia who might be eligible for New Zealand Superannuation on residence grounds are not to be advantaged over persons who have spent all their working life in Australia.
>
> [13] On receiving advice that the rate of Australian Age Pension payable to the appellant was nil the Chief Executive of the Ministry was obliged to conclude that the rate of New Zealand Superannuation payable to the appellant was also nil.

The High Court decision

[11] Gendall J concluded that art 9 required an application to be made to assess the individual's eligibility for an Australian age pension. Further, Gendall J considered that the rate of superannuation payable is determined by the Chief Executive taking into account the rate of an Australian age pension that would otherwise have been nominally payable. The Judge saw this as reflecting the policy (at [35]):

> [O]f ensuring that a person living in Australia, who had previously lived in New Zealand, did not receive greater benefits than Australian residents. The fact is that an Australian living in New Zealand likewise would not obtain an advantage over New Zealand superannuitants. They may be treated far more beneficially than Australian residents by reason of the different qualifying criteria for superannuation and pension, but that is their good fortune and is solely because the New Zealand entitlement is not means tested.

[12] The Judge accordingly answered the first question in the case stated "yes" and the second question "no".

The Agreement

[13] Pursuant to the Social Welfare (Transitional Provisions) Act 1990, the Governor-General may, by Order in Council, declare that the provisions contained in a reciprocal agreement shall have force and effect. The Agreement before us is one such agreement. There are a number of others with other countries including Canada, Ireland and the United Kingdom.

[14] To put the Agreement in its context in terms of New Zealand superannuation, it is helpful to note first that the qualifications for New Zealand superannuation are age (65 years) and residence: ss 7 and 8 of the New Zealand Superannuation and Retirement Income Act 2001. To satisfy the residency requirement an applicant must have been resident and present in New Zealand for not less than ten years since the age of 20 (including an aggregate of not less than five years after turning 50), and be ordinarily resident in New Zealand when applying for superannuation.

[15] Absence from New Zealand disqualifies a person from New Zealand superannuation during that absence, except as provided in ss 22 to 29 of the 2001 Act, or in any agreement or convention adopted under s 19 of the 1990 Act: s 21 of the 2001 Act.

[16] We come back later to discuss other provisions in the Agreement but for now we set out its broad structure.

[17] The Agreement is in six parts. Part I sets out relevant definitions and defines the scope of the Agreement. In terms of New Zealand, the Agreement applies to the Acts affecting superannuation, the veteran's pension and the invalid's benefit. (Not all invalid's benefits are included: art 2(3).) For Australia, the relevant Acts are those applying or affecting, relevantly, the age pension. We add that the appellant asked us to address the impact of the Agreement on the veteran's pension but that is outside the scope of the case stated. We deal only with superannuation.

[18] The Agreement applies to any person who is or has been either an Australian or a New Zealand resident: art 3.

[19] Part II of the Agreement sets out the provisions that relate to New Zealand benefits, that is benefits that the New Zealand Government must pay. Part III contains the equivalent arrangements applicable to Australian benefits.

[20] Article 6 deems persons who would otherwise be entitled to receive a benefit under the law of New Zealand except that they are not ordinarily resident and present in New Zealand, to be ordinarily resident and present in New Zealand if they are present either in Australia or New Zealand and then meet other requirements, namely, art 6(1):

> (b) … an Australia resident, including a person who has the intention of remaining an Australian resident for at least one year or has been residing in Australia for at least 26 weeks;
>
> (c) has been a New Zealand resident at any time in his or her life for a continuous period of at least 1 year since attaining the age of 20 years; and
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> (d) in the case of New Zealand superannuation … is over the age of 65.

[21] In determining whether a person meets the residential qualifications for New Zealand superannuation, periods of Australian working age residence are deemed to be periods during which the person was both a New Zealand resident and present in New Zealand: art 8(1).

[22] As we have said, the focus of this appeal is on art 9 in Part II. Article 9 is headed "Rate of New Zealand Superannuation and Veterans' Pensions in Australia". Article 9(1) provides the formula for calculating the rate of New Zealand superannuation payable to Australian residents who meet the requirements of art 6. The formula in art 9(1) is as follows:

$$\frac{\text{number of whole months working age residence in New Zealand X maximum benefit rate}}{540}$$

[23] Article 9(1) is subject to art 9(3) which states that:

> Where a person is entitled to receive New Zealand superannuation or a veteran's pension under Article 6, the rate of New Zealand superannuation or veteran's pension shall be calculated under paragraph 1 but the amount the person is entitled to receive shall not exceed the amount of Australian age pension that would have been payable to that person if he or she was

> entitled to receive an Australian age pension but was not entitled to receive New Zealand superannuation or a veteran's pension.

[24] The equivalent provision for calculating the rate of Australian benefit payable to a person who is in Australia, is art 13(2), which provides that the rate of that benefit shall be determined by:

> (a) calculating that person's income according to the social security law of Australia but disregarding in that calculation the New Zealand benefit or benefits received by that person;
>
> (b) deducting the amount of the New Zealand benefit or benefits received by that person from the maximum rate of that Australian benefit; and
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> (c) applying to the remaining benefit obtained under subparagraph (b) the relevant rate calculation set out in the social security law of Australia, using as the person's income, the amount calculated under subparagraph (a).

[25] The Australian benefits payable to a person who is in New Zealand are calculated using a series of formulae set out in art 13(4) and (5). In each case the formula is, in essence, a multiple (determined by the period of working age residence in Australia) of the rate that would have been payable if the recipient had been in Australia and qualified under the social security law of Australia to receive the benefit.

[26] Part IV of the Agreement sets out common provisions on eligibility and Part V common provisions relating to benefit payments. Part VI contains a number of miscellaneous provisions, for example, how disputes are to be resolved.

Discussion

[27] We turn now to consider the submissions and the meaning of art 9(3).

The competing contentions

[28] The primary argument made by the appellant is that an individual in her situation is entitled to apply for New Zealand superannuation in New Zealand and obtain that superannuation. Any other approach, the appellant says, leads to an

unfair outcome. On this analysis, art 9(3) simply sets the rate of payment. In developing this submission, the appellant says that "if" is used in art 9(3) as meaning "suppose" and not as a condition of eligibility. On the appellant's approach there is no need for an applicant in her position to first apply for an Australian age pension.

[29] In support of the submission that the respondent's approach is unfair, Mr Dean submits that three principles can be drawn from the relevant documentation surrounding the Agreement. Those principles are, first, a guarantee of continued payments; second, a recognition of shared responsibility by the two governments; and, third, that affected persons will be treated in an equitable manner. Mr Dean relies in this respect on the joint communique, issued by the Prime Ministers of New Zealand and Australia on 26 February 2001 after the Agreement was signed ("the joint communique"), and the national interest analysis prepared by the New Zealand Ministry of Foreign Affairs and Trade relating to the Agreement ("the national interest analysis").

[30] The appellant also says that the Chief Executive's interpretation is a breach of s 19 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") which protects the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993.

[31] The respondent says its interpretation is consistent with the purpose of the Agreement, namely, to coordinate the relevant social security laws to provide for residence in one country to "count" as residence in the other in the calculation of superannuation/age pension payments. The objective is to then ensure equivalence so that an Australian superannuitant is not advantaged as against his or her New Zealand superannuitant neighbour and vice versa.

Analysis

[32] The meaning of art 9(3) is to be determined applying s 5(1) of the Interpretation Act 1999, that is, from its text and in light of its purpose. (Article 31(1) of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 also refers to the need to consider the purpose.) Text and purpose are therefore

"the key drivers of statutory interpretation": *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 at [22] (SC). Tipping J in delivering the judgment of the Supreme Court in that case also said at [22] that:

> Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[33] The wording of art 9(3) does provide some support for the appellant's argument. That is because, on its face, it postulates an entitlement to receive rather than eligibility as the respondent submits. However, we consider it is plain when the meaning of art 9(3) is considered in light of both its text and its purpose that the respondent is right.

[34] Consideration of the "immediate" legislative context requires an examination of the purpose of the Agreement itself. We agree with the respondent that the purpose of the Agreement is to coordinate some of the social security laws of New Zealand and Australia. The primary objective is to ensure that for New Zealand superannuation and the Australian age pension time spent in either country can be credited in the calculation of residence. Associated with that, the Agreement aims to ensure that payment of the relevant benefit is made in either country at an equivalent rate to that in the other country. The purpose is not a harmonisation of the two countries' laws. Rather, the intention is to ensure that a person is not disqualified in terms of the residency requirements by shifting from one country to the other and to then ensure that there is an equivalence in terms of the rates of payment. Hence, for example, the joint communique identified the principle on which the arrangements were based as the "free flow of movement" between the two countries.

[35] There is support for this conclusion about the purpose of the Agreement in the various deeming provisions in the Agreement we have referred to above and in the calculation of the rates provisions in arts 9 and 13. The appellant points to differences in drafting between art 9(3) and art 13 and in particular to the reference in art 13(2) to calculations determined "according to the social security law of

Australia". We consider the drafting differences reflect different ways of saying the same thing.

[36] The Preamble to the Agreement also makes the purpose clear. It records that the Agreement was entered into between the governments of New Zealand and Australia to strengthen their relations and to:

> [C]oordinate the operation of their respective social security systems and to enhance the equitable access by people covered by this Agreement to specified social security benefits provided for under the laws of both countries … .

[37] It is in this context that art 4 of the Agreement provides for "equality of treatment", which the appellant emphasises. Article 4 is in the following terms:

> Except as provided for in this Agreement, the persons to whom this Agreement applies shall be treated equally by each of the Parties in regards to rights and obligations that arise under the social security law of that Party or as a result of this Agreement.

[38] It is important that art 4 is expressly subject to other provisions in the Agreement.

[39] Moreover, the three principles identified by the appellant as emerging from the documentation associated with the Agreement (and art 4) assume a different perspective when viewed in light of the purpose we have identified. It is in the context of an agreement designed to ensure that periods of residence in either country could be credited towards residency requirements that the Prime Ministers said in the joint communique that those reliant on the benefits affected could "rest" secure in the knowledge that "continued payments of their entitlements is guaranteed regardless of which side of the Tasman they choose to live".

[40] A similar theme is apparent in the press release issued by both Prime Ministers on 26 February 2001. That document made reference to the "equity principle", under which, the press release said:

> New Zealand superannuitants in Australia will not be entitled to receive more than other Australian age pension beneficiaries, and vice versa.

[41] The purpose is also apparent in the history and development of the reciprocal arrangements between New Zealand and Australia. The relevant agreements and some of their key provisions are set out in the appendix to this judgment. It is apparent from the earliest agreement we have found, that in 1913, that the focus has long been on the coordination of the residency requirements in the two countries.

[42] That focus is reflected in some of the Parliamentary debates on earlier agreements, particularly, those in 1986 and 1988.

[43] Taking first the 1986 Agreement, the Social Security (Reciprocity with Australia) Act 1987 (repealed) was enacted to give effect to this Agreement.

[44] The purpose and effect of the Social Security (Reciprocity with Australia) Bill was explained by the Hon Ann Hercus, then Minister of Social Welfare, on the Bill's first reading ((19 February 1987) 478 NZPD 7,214):

> This is a short Bill containing only three clauses. Its purpose is to legislate for a revised reciprocal agreement between New Zealand and Australia for benefits and pensions. The revised agreement was signed in October 1986 … . It now requires empowering legislation to be passed in New Zealand.
>
> The agreement between Australia and New Zealand ensures that New Zealanders in Australia and Australians in New Zealand have access to *the social security scheme of their host country*. It is based on the general principle that residence and birth in one country be regarded as residence and birth in the other, so that New Zealanders living in Australia and Australians living in New Zealand *can be treated no differently for social security purposes than lifelong residents*. The existing agreement dates back a long way to 1949 and has not been revised. Clearly, in view of the major changes that have occurred in the social security systems of both countries since that time, a revision is long overdue.
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> (Emphasis added.)

[45] Annette King MP, delivering the report of the Social Services Committee, also addressed the effect on New Zealanders going to live in Australia in the following passage ((12 March 1987) 478 NZPD 7,754):

> New Zealanders going to Australia would be subject to a means test – an assets test – and no beneficiary in Australia is entitled to payment until the age of 65 for a male or 60 for a female.

[46] Further mention of the fact that New Zealanders moving to Australia would be means tested for superannuation was made by opposition member Maurice McTigue MP in the debate concerning the report of the select committee ((12 March 1987) 478 NZPD 7,757 – 7,758). In response a government member, Judy Keall MP, noted at 7,758 that:

> The Bill is about reciprocity, which means that when people go to Australia they will fit in with the Australian scheme and when Australians come to New Zealand they will fit in with our scheme.

[47] In the second reading debate the Minister, the Hon Ann Hercus, responded to the concerns about means testing that were again raised by Mr McTigue ((2 April 1987) 479 NZPD 8,292) by saying at 8,293:

> Most New Zealanders know that our national superannuation is one of the most generous pensions in the world. The Australian scheme is slightly different. Although there is an assets test and an income test in Australia they are applied separately – only one or the other operates. The Department of Social Welfare must provide access to information before New Zealanders decide to go to Australia, so that they are fully aware of their rights and responsibilities and know the level of payment they will receive.

[48] The 1988 Agreement was given effect to by the Social Security (Reciprocity with Australia) Act 1989 (repealed), which repealed the 1987 Act. The 1989 Act was introduced into the House in 1988 as part of the Law Reform (Miscellaneous Provisions) Bill but then in 1989 divided into the Social Security (Reciprocity with Australia) Amendment Bill, later renamed the Social Security (Reciprocity with Australia) Bill: see (23 February 1989) 496 NZPD 9,238. The reason for the negotiation of the 1988 Agreement was explained by Bill Dillon MP delivering the report of the Justice and Law Reform Committee ((28 February 1989) 496 NZPD 9,305):

> [T]he committee was supplied with information from the Department of Social Welfare that satisfied it that passing the legislation would correct an anomaly that had been running in New Zealand's favour. People from New Zealand who are entitled to a New Zealand social welfare benefit can pick up that benefit in Australia at New Zealand rates. Similarly, people from Australia can pick up the Australian equivalent in New Zealand.
>
> That exchange worked admirably until the relationship between the Australian benefit and the New Zealand benefit was no longer at parity. It has been running in New Zealand's favour to a tune of $40 million a year compared with $13 million the other way. That lack of parity encouraged

> the Australians to seek a revised reciprocal agreement, and that has now been agreed to and signed by the two Governments. The revised agreement was negotiated because of the Australian Government's concern at the increasing imbalance in the costs Australia had to meet under the terms of the existing agreement. In the revised agreement the New Zealand Government has agreed to reimburse the Australian Government for the cost of Australian age benefits, widows' pensions, and invalids' pensions granted after 1 April 1989 to former New Zealand residents who were receiving national superannuation, widows' benefits, or invalids' benefits in New Zealand before their departure to Australia.

[49] At the start of the second reading debate the Hon Dr Michael Cullen, the then Minister of Social Welfare, emphasised a "very important" point, namely, that ((1 March 1989) 496 NZPD 9,359 – 9,360):

> *The reciprocity agreement with Australia does not provide for the portability of New Zealand national superannuation.* That arrangement is a common misunderstanding amongst the public. *The agreement provides for New Zealand to reimburse Australia for the cost of providing for New Zealanders who move after the age of 60 years, and who receive an Australian pension. Therefore New Zealanders who, after the age of 60, move to Australia do not receive national superannuation but receive the Australian age pension.* That pension, based on the present exchange rate, is lower than New Zealand national superannuation. *The Australian pension is subject to a very stringent income test, which is similar to that on our own benefits, rather than to the national superannuation tax surcharge*.
>
> …
>
> As the member for Waitotara rightly says, it is subject to an assets test. *In other words, a New Zealander over the age of 60 years who moves to Australia qualifies for a pension that is substantially less, and less advantageous, than New Zealand national superannuation*.
>
> (Emphasis added.)

[50] Dr Cullen made the same point in the third reading debate ((7 March 1989) 496 NZPD 9,448):

> The Bill does not provide for the portability of New Zealand national superannuation. I repeat: New Zealanders who retire and move to Australia do not qualify for New Zealand superannuation. They qualify for an Australian pension, which is received at a later age and a lower rate, and is subject to an income and assets test.

[51] From our own research we have also found helpful a comparison of a number of aspects of the 1988, 1994 and 2002 Agreements. From that comparative exercise, three aspects can be highlighted. First, under both the 1988 and 1994 Agreements, a

New Zealand citizen living in Australia was only eligible for an Australian age pension if he or she met the eligibility requirements under the relevant Australian legislation. Therefore, if the age pension was means tested the New Zealander would only be entitled to the benefit if his or her income or assets were below the cutoff point. There is nothing to suggest there was any change in policy in this respect when the Agreement now in issue was made.

[52] Second, under both the 1988 and 1994 Agreements the benefit in issue was paid by the host country directly to the recipient beneficiary and the host (paying) country was reimbursed by the other country at a rate determined by the agreement. By contrast, under the 2002 Agreement, the superannuation payment the recipient is entitled to receive is comprised of payments from both countries. Thus, a retired New Zealander living in Australia is entitled to be paid a proportion of the Australian age pension and a proportion of New Zealand superannuation. The need for any reimbursement of benefit payments between the parties has gone because each country pays a benefit directly to the claimant. This change explains the need to introduce a cap in art 9(3) because now benefit recipients are being paid a proportion of an Australian age pension and a proportion of New Zealand superannuation. Article 9(3) applies so that where there is a nil entitlement to the Australian age pension, there is no entitlement to a portion of New Zealand superannuation.

[53] Finally, it is relevant that there has been a gradual winding back of the arrangements, for example, a reduction in the range of benefits covered with benefits like the widows benefit no longer part of the reciprocal arrangement. The national interest analysis has a useful discussion of the factors at play, some of which are also seen in the discussion on the 1988 Agreement set out at [49] above: 2001 Reports of Select Committees I 22B (Vol 1 of 2) 425. As we have noted above, the national interest analysis is prepared by the Ministry of Foreign Affairs and Trade and is laid before the House along with the relevant treaty: see McGee *Parliamentary Practice in New Zealand* (3ed 2005) at 593ff.

[54] The analysis noted the history of New Zealand's bilateral arrangements with Australia and that the Agreement meant New Zealanders enjoyed immediate access to all Australian benefits and Australians enjoyed similar privileges in New Zealand.

There is then a discussion of Australian dissatisfaction with the arrangement when, in the 1980s, migration flows from New Zealand to Australia increased "markedly": at [2]. The analysis continued:

> 2 … Adjustments in 1986 and 1994 included the introduction of stand-down periods (now two years) prior to new arrivals being eligible for benefits in the other country, and an annual reimbursement system between the Governments. New Zealand paid Australia NZ$160 million in 2001/01 to cover old age, veterans, invalid and single parent benefits received by New Zealanders in Australia.
>
> 3 Australia remained concerned at the social security burden of migrant New Zealanders and the issue became a serious irritant in the trans-Tasman relationship. In August 1999 the two Prime Ministers agreed to a thorough review of bilateral social security arrangements. Australia claimed its social security costs for migrant New Zealanders were close to A$1 billion per year while New Zealand pointed to the very strong contribution its citizens made to the Australian economy including tax payments of around A$2.5 billion per year. In October 2000 negotiations commenced with a view to devising more durable and stable arrangements for the future. As a way forward, it was acknowledged that the scope of the cost-sharing agreement should be confined to a few key benefits and that policy on access to the broader range of benefits remained a policy matter for each Government.

[55] This latter material probably does no more than highlight the point made by Gendall J at [19], ie, that the Agreement has its "genesis" in a political compact with the inevitable compromises involved in such an exercise, but it is a part of the broader context in which the purpose of the Agreement is to be construed.

[56] We need to deal here with a further submission from the appellant which is based on a comparison between the position taken by the respondent and the position applying to the payment of New Zealand superannuation to a New Zealander who travels to a country with which New Zealand does not have a reciprocal arrangement. This submission is based on s 26 of the New Zealand Superannuation and Retirement Income Act. Section 26(1) provides that:

> A person who is entitled to receive New Zealand superannuation and who leaves New Zealand to reside in a country with which New Zealand has no agreement relating to reciprocity of social security monetary benefits is entitled, while residing in that country, to be paid 50% of the gross rate of New Zealand superannuation (excluding any living alone payment), as the case may be, that he or she would be entitled to receive if he or she resided in New Zealand.

[57] By s 26(3) a person is only entitled to receive such a benefit if:

> (a) on the date of application for the payment, he or she is ordinarily resident and present in New Zealand and is on that date entitled to receive New Zealand superannuation or will be so entitled before leaving New Zealand; and
>
> (b) the applicant intends to reside for more than 26 weeks in the overseas country to which the application relates, being a country with which New Zealand has no agreement relating to reciprocity of social security monetary benefits.

[58] If a person who moves overseas is entitled to a pension in that overseas country, then s 70 of the Social Security Act 1964 will apply so that the rate of benefit that would otherwise be payable in New Zealand is reduced by the amount of the overseas benefit. (We add that the Social Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Amendment Bill currently before the House would, amongst other changes, provide that s 70(1) does not apply to New Zealand superannuation payable overseas under s 26. That would not affect cases like this one because s 26 only applies to persons residing in countries with which New Zealand has no agreement relating to social security reciprocity.)

[59] The effect of the Agreement as we have construed it may mean that a person like the appellant is worse off having moved to Australia than she may have been if she moved to a country with which New Zealand does not have a reciprocal arrangement. That is, however, the arrangement that has been reached with Australia against the background identified in the national interest analysis referred to at [53] and [54] above. It is also plain from the Parliamentary materials we have discussed that the New Zealand government has made it clear that the effect of the arrangements with Australia is as contended for by the respondent.

[60] We consider it is relevant in terms of the possible inequity in outcomes that both the New Zealand and the Australian authorities provide information about the effect of the reciprocal arrangements. It is not a situation where individuals are ill informed or misinformed of the potential effect of the means testing regime in Australia. The relevant Australian authority is Centrelink. Centrelink notes on its website that: "[t]he total amount of New Zealand and Australian pension that you receive is generally the same as what you would have received from the country you

live in if you did not receive a pension from the other country": <http://www.centrelink.gov.au/internet/internet.nsf/filestores/int014_0807/$file/int014_0807en.pdf> at 3 (last accessed 8 December 2008). Work and Income New Zealand similarly advise that in the case of New Zealanders living in Australia, "[a]s a general rule, the total amount you are paid is about equal to the Australian benefit or pension you would be paid if lived all your life in Australia": <http://www.workandincome.govt.nz/documents/australia-gate-brochure.pdf> at 7 (last accessed 8 December 2008).

The need to apply for an Australian age pension

[61] There is also a practical difficulty with the appellant's approach because art 9(3) plainly does require some assessment of the rate of Australian age pension which is payable otherwise the reference to that pension is superfluous. As the respondent submits, the Chief Executive is not in a position to undertake the requisite assessment of applying Australian law as to means testing to an individual's income and assets. This practical difficulty also supports the respondent's position. It also follows from this that the respondent is right that an applicant must first seek from the Australian authorities what amount of Australian age pension would be payable.

[62] That approach is also consistent with s 69G of the Social Security Act which imposes a duty on an applicant to take reasonable steps to obtain overseas pensions to which he or she may be entitled. As we have said in terms of s 70, the rate of New Zealand superannuation is reduced where the applicant is qualified to receive an overseas benefit, pension or periodical allowance.

The Bill of Rights

[63] We agree with the respondent that s 19 of the Bill of Rights is not engaged in this case. That is because there is no disadvantage based on a prohibited ground of discrimination. Any disadvantage is based on "residence" or "location". Neither of those are grounds of discrimination in terms of s 19 of the Bill of Rights.

Conclusion

[64] For the above reasons, we consider that art 9(3) of the Agreement required the appellant to first apply for an Australian age pension and that, having failed the means test for the Australian age pension, the appellant was not entitled to be paid New Zealand superannuation under art 9(3). We answer the questions in the case stated accordingly.

Costs

[65] The appellant seeks the costs of travel and accommodation for her and her husband in relation to the case before the Appeal Authority.

[66] The position with costs is that no costs were awarded by the Authority. The respondent did not seek costs in the High Court and none were awarded. We see no basis for revisiting costs as before the Authority given the outcome of the appeal. Further, as the respondent points out, the Authority can order the Chief Executive to pay the actual and reasonable travelling and accommodation expenses incurred by an appellant if the Authority requests an appellant to appear before it: s 12L of the Social Security Act. The costs now sought to be recovered by the appellant relate to travel and accommodation expenses but there is nothing to indicate the Authority requested the appellant to appear.

[67] The respondent made no submission as to costs in this Court and we make no order for costs.

Suppression order

[68] The appellant also asked that the order suppressing the appellant's name apparently made by the Authority be discharged. It is not clear what jurisdiction this Court would have to deal with that order but, in any event, there is no point in making any order now given that the appellant's name was not suppressed in the High Court and its judgment is available on publicly accessible databases.

Solicitors:
John Dean Law Office, Wellington for Appellant
Crown Law Office, Wellington for Respondent

APPENDIX: KEY PROVISIONS FROM EARLIER RECIPROCAL AGREEMENTS WITH AUSTRALIA

The 1913 Agreement

The 1913 Agreement was contained in the Schedule to the Old-age Pensions Reciprocity Act 1913 (repealed). Articles 2 and 3 provided:

> 2. Residence for any period in the Dominion [of New Zealand] by an applicant for a Commonwealth pension who has been resident in the Commonwealth [of Australia] for a period of twelve months immediately preceding the date of his application shall for the purpose of qualifying him for a pension be taken as equivalent to residence in the Commonwealth.
>
> 3. Residence for any period in the Commonwealth by an applicant for a Dominion pension who has been resident in the Dominion for the period of twelve months immediately preceding the date of his application shall for the purpose of qualifying him for a pension be taken as equivalent to residence in the Dominion.

The 1943 Agreement

The 1942 Agreement was contained in the Schedule to the Age-benefits and Invalids' Benefits (Reciprocity with Australia) Act 1943 (repealed). Section 3 of the Act provided that:

> 3. Where a person resident within New Zealand was, immediately prior to becoming resident in New Zealand, resident in Australia, the residence of that person in Australia shall, for the purposes of the Social Security Act, 1938, in its application to age-benefits and invalids' benefits, be treated as if it were residence in New Zealand.

Article 4 of the Agreement was to the same effect. Article 3 dealt with the position of a New Zealander in Australia:

> 3. Where a person, resident in Australia, applies to the Commonwealth [of Australia] for an old-age pension and that person is disqualified from receiving the pension in respect of the condition of residence within Australia, the Commonwealth will, in dealing with the application, treat residence within New Zealand as if it were residence within Australia.

The 1948 Agreement

The 1948 Agreement was contained in the Schedule to the Social Security (Reciprocity with Australia) Act 1948 (repealed). Section 5 of the Act provided that for the purposes of any application for a benefit, the Social Security Commission "shall treat the residence in Australia ... as if it were residence in New Zealand, and shall regard any person born in Australia as a person born in New Zealand". See also art 4 of the Agreement which provided:

> The Government of Australia will, in dealing with an application for a pension, allowance, endowment, or benefit under the Social Security Consolidation Act by a person to whom this part of this agreement applies, treat residence in New Zealand as if it had been residence in Australia and will regard a person born in New Zealand as a person born in Australia.

Article 13 provided that:

> In determining the amount of a pension, allowance, endowment, or benefit payable to a person in pursuance of this part of this agreement, the pension, allowance, endowment, or benefit shall, subject to the provisions of this part of this agreement, be granted, computed, and assessed under the provisions of the laws of Australia or of New Zealand according to the country in which that person is resident.

The 1988 Agreement

As noted at [48] above, the 1988 Agreement was contained in the Schedule to the Social Security (Reciprocity with Australia) Act 1989 (repealed). The benefits covered by the 1988 Agreement were set out in art 2(1). In relation to Australia they included, age, invalid, wives', carers', and widows' pensions as well as unemployment and sickness benefits. In terms of New Zealand, the benefits covered included national superannuation; invalids' benefits; widows' benefits; domestic purposes benefits; unemployment benefits; and sickness benefits.

Article 3 related to equality of treatment and provided that a "Party shall treat all persons affected by this Agreement equally in regard to rights and obligations that arise by virtue of this Agreement".

Part II related to residence. Article 4(1) deemed persons ordinarily resident in New Zealand who travelled directly from New Zealand to Australia to be Australian residents where such people had:

> (a) … been in Australia for a continuous period of at least 26 weeks immediately prior to lodging a claim for an Australian benefit; or
>
> (b) … a bona fide intention to remain in Australia for more than 26 weeks.

Article 4(2) deemed persons ordinarily resident in Australia who travelled to New Zealand to be ordinarily resident in New Zealand in the corresponding circumstances.

Article 5 then deemed periods of residence in one country to be periods of residence in the other for the purposes of meeting any minimum qualifying periods to claim a benefit.

Part III contained provisions relating to benefits. Article 7 addressed the entitlement to payment by New Zealand of national superannuation. It provided that:

> A person shall not be entitled by virtue of this Agreement to the payment by New Zealand of national superannuation unless that person is of an age at

which an age pension may be payable to the person under the social security laws of Australia.

Part IV of the Agreement contained reimbursement provisions. Article 13(1) provided that:

> 1. Where by virtue of this Agreement or otherwise a person receives from Australia:
>
> (a) an age pension;
>
> …
>
> and, when that person left New Zealand, had lodged a claim for and would have been entitled to receive, or was receiving,
>
> (g) national superannuation;
>
> …
>
> otherwise than by virtue of the Agreement, then New Zealand will reimburse Australia the full cost of the Australian benefit … .

The 1994 Agreement

The 1994 Agreement was contained in the Schedule to the Social Welfare (Reciprocity with Australia) Order 1994 (revoked).

The cover provided by the 1994 Agreement was set out in art 2 (as amended by the First Protocol):

> (a) in relation to Australia: the Social Security Act 1991 in so far as the Act provides for, applies to or affects the following benefits:
>
> (i) age pension;
>
> (ii) disability support pension;
>
> (iii) widow B pension;
>
> (iv) sole parent pension;
>
> (v) wife pension;
>
> (vi) partner allowance payable to the female partner of a person in receipt of an age pension or a disability support pension (referred to in this Agreement as partner allowance);
>
> (vii) parenting allowance payable to the female partner of a person in receipt of an age pension or a disability support pension (referred to in this Agreement as parenting allowance); and

(viii) additional family payment payable to persons in receipt of the above benefits; and

(b) in relation to New Zealand: the Social Security Act 1964 and the Social Welfare (Transitional Provisions) Act 1990 in so far as they provide for, apply to or affect the following benefits:

(i) New Zealand superannuation;

(ii) Veteran's pension;

(iii) invalids benefit;

(iv) widows benefit; and

(v) domestic purposes benefit for solo parents.

Article 4 provided for equality of treatment:

> Except as provided in this Agreement, all persons to whom this Agreement applies shall be treated equally by a Party in regard to rights and obligations which arise whether directly under the legislation of that Party or by virtue of this Agreement.

The eligibility requirements for New Zealand and Australian benefits were set out in arts 7 and 8 respectively. Article 7(1) provided the eligibility criteria for New Zealand superannuation:

> 1. A person who does not meet the residence criteria for New Zealand superannuation but would otherwise be eligible for that benefit under the legislation of New Zealand shall be eligible for New Zealand superannuation if that person:
>
> (a) has reached the age of eligibility under the legislation of New Zealand or under the legislation of Australia for a corresponding benefit, whichever is the later age;
>
> (b) is one of the following:
>
> (i) ordinarily resident in New Zealand;
>
> (ii) present in New Zealand and has the intention of remaining in New Zealand for at least one year; or
>
> (iii) present in New Zealand and has been present in New Zealand for at least one year
>
> at the date of grant of that benefit;
>
> (c) either:
>
> (i) was an Australian resident immediately before arriving in New Zealand; or

(ii) was, on entry into New Zealand, the holder of a valid Australian passport; and

(d) had been an Australian resident for a period of not less than 10 years, or an aggregate of 10 years, after age 16.

Article 8(1) provided the eligibility criteria for the Australian age pension:

1. A person who does not meet the residence criteria for an age pension but who *would otherwise be eligible for that benefit under the legislation of Australia* shall be eligible for an age pension if that person:

(a) has reached the age of eligibility under the legislation of Australia or under the legislation of New Zealand, for a corresponding benefit, whichever is the later age;

(b) is one of the following:

(i) an Australian resident;

(ii) in Australia and has the intention of remaining in Australia for at least one year; or

(iii) in Australia and has been in Australia for one year

at the date of grant of that benefit;

(c) either:

(i) was ordinarily resident in New Zealand immediately before arriving in Australia; or

(ii) was, on entry into Australia, a New Zealand citizen; and

(d) had been ordinarily resident in New Zealand for a period of not less than 10 years, or an aggregate of 10 years, after age 16.

(Emphasis added.)

Article 9 dealt with the calculation of rates of benefits:

Calculation of Rates of Benefits

1. Except as provided in paragraphs 2 and 3, if a benefit is payable by a Party under this Agreement, the amount of that benefit will be determined according to the legislation of that Party.

2. If a person who is receiving a benefit under this Agreement, is also in receipt of a foreign pension, that pension shall not be regarded as income, but the maximum rate of benefit otherwise payable to that person shall be reduced by the amount of the foreign pension.

3. For the purposes of paragraph 2, if a person receiving a benefit has a partner:

   (a) in relation to Australia, each partner shall be considered to receive one half of the total of any foreign pensions received by either partner; and

   (b) in relation to New Zealand, any foreign pension received by that person only shall be directly deducted first from the rate of New Zealand benefit payable to that person and then any excess shall be directly deducted from the rate of New Zealand benefit payable to that person's partner and any foreign pension received by that person's partner shall be directly deducted first from the rate of New Zealand benefit payable to that partner and then any excess shall be directly deducted from the rate of New Zealand benefit payable to that person.

4. Where members of a couple are in receipt of respectively, New Zealand and Australian benefits, each Party shall, when calculating the rate of benefit payable, disregard the amount of benefit paid by the other Party to the other member of the couple.

Part III of the Agreement contained reimbursement provisions. Article 11(1) provided that the Government of New Zealand would reimburse the Government of Australia for any benefit paid to a person who:

(a) has a period of Australian working life residence of less than 10 years;

(b) either:

   (i) had been ordinarily resident in New Zealand immediately before arriving in Australia; or

   (ii) was, on entry into Australia, the holder of a valid New Zealand passport;

(c) had been ordinarily resident in New Zealand for a period of not less than 10 years or an aggregate of 10 years;

(d) would be eligible for a corresponding benefit from New Zealand if that person had been resident in New Zealand;

(e) is an Australian resident or is in receipt of a benefit by virtue of Article 8 or Article 8A; and

(f) has became an Australian resident on or after 1 January 1983.

Article 11(2) placed a corresponding obligation on the Government of Australia to reimburse the Government of New Zealand for benefits paid. Various exceptions to the reimbursement obligation were contained in art 11(3) and (5).

Article 12 then provided a formula for determining the rate of reimbursement of benefits. The rate was calculated by dividing the number of whole months of working life experience in the reimbursing country of the person receiving the benefit by 480 in the case of an age pension (or 300 in the case of any other benefit). That figure (which was capped at a maximum of one) was then multiplied by the nominal benefit rate. The nominal benefit rate was the lower of the actual benefit paid or the rate payable under the legislation of the reimbursing country.