IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-485-11553
[2015] NZHC 2663
[2016] NZHC 1954

UNDER	Section 12Q of the Social Security Act 1964 and s 144 of the Summary Proceedings Act 1957
IN THE MATTER	of an application for leave to appeal and for permission to apply for leave out of time
BETWEEN	KATHRYN HARLEN Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: 17 August 2016

Counsel: FM Joychild QC and L Wong for applicant
SV McKechnie for respondent

Judgment: 22 August 2016

JUDGMENT OF FAIRE J

Solicitors: Davenport City Law, Auckland (G Whiteford)
Crown Law, Wellington

The applications

[1] This is an application for leave to appeal my judgment of 29 October 2015 to the Court of Appeal,[1] and an application for an extension of time to file the appeal.

[2] An application for leave to appeal was filed in the Court of Appeal on 23 December 2015, and was accepted on 7 January 2016. A jurisdictional issue was raised. On 12 April 2016, Harrison J determined that as the governing statute was the Summary Proceedings Act 1957 rather than the Criminal Procedure Act 2011, leave must be sought from the High Court.[2]

[3] On 10 May 2016, the applications for leave to appeal and leave to bring an appeal out of time were filed in this Court.

Facts

[4] Between 1994 and 1999, Mrs Harlen received the Domestic Purposes Benefit and other associated benefits, allowances and grants. Over this period, Mrs Harlen fraudulently obtained $117,598.84 as she was living in a relationship in the nature of a marriage. In 2001, Mrs Harlen was convicted on four charges of fraudulent receipt of benefits and was sentenced to 15 months' imprisonment. She unsuccessfully appealed her sentence and conviction to the Court of Appeal.[3]

[5] The procedural history of the case is summarised in my judgment:

> [8] The Ministry advised that repayments or deductions would be suspended on 27 March 2001 whilst appeals were being considered. This suspension is still in place. At a later date, on 9 June 2009, the Ministry advised that the amount of the debt had been reduced to $117,598.84 as a result of the Ministry's decision not to recover the amount of an accommodation supplement and a special benefit for the period 20 July 1999 to 30 November 1999. Counsel confirmed to me that the debt currently stands at $115,800, due to some payments that were made and have been credited.
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> [9] I return to the procedural history. The appellant applied for the recovery decision to be reviewed by the Benefits Review Committee. On 4 November 2004, it upheld the decision to recover

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1 *Harlen v Chief Executive of the Ministry of Social Development* [2015] NZHC 2663.
2 *Harlen v The Chief Executive of the Ministry of Social Development* [2016] NZCA 118.
3 *R v Harlen* 18 CRNZ 582 (CA).

> the overpayment. The appellant then appealed to the Authority, which resulted in the first decision of the Authority which was the subject of the appeal to the High Court by way of case stated, which was determined by Courtney J.
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> [10] For the second determination, by the Authority, the appellant updated her affidavit relating to her financial position. Her counsel presented an affidavit from Dr Brian Easton, an expert working in the areas of economy, statistics, public policy and history. Dr Easton's evidence, which was not challenged, referred to national surveys, reports and statistics and his review of the appellant's personal circumstances. He provided evidence of his assessment of the minimum weekly income which the appellant required to provide an adequate standard for her and her dependent daughter. He concluded that the appropriate figure was approximately $540 per week. At the time, the appellant's weekly rate of income support was $469.78.

Submissions for the applicant

[6] Counsel for the applicant submits that the application to the Court of Appeal was 20 days out of time and that the appeal to this Court is within time. Counsel says that the original application was delayed because:

(a) The applicant needed to consult with the respondent as to the respondent's position and was informed of it only six days before the deadline; and

(b) Instructions from Mrs Harlen need to be obtained on a face to face basis by visiting her in her home as her literacy is very limited.

[7] Counsel also submits that the delay was minimal and would not cause any prejudice to the respondent.

[8] Counsel for the applicant submits that:

(a) this is a test case and therefore the prospective merits of the appeal are not predictable;

(b) the appeal is a matter of both private and public importance as it affects other persons who have had a debt established against them

pursuant to the Act prior to the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014.

[9] The grounds of appeal advanced are that the Court erred in law in:

(a) Concluding that the appeal related only to the question of whether the respondent may recover the debt and did not relate to whether recovery should actually be effected;

(b) Confirming the decision that in foregoing the possibility of recovery of debt incurred by fraud on the basis that the applicant would experience hardship would erode the integrity of the Act, and would undermine future efforts to recover debts from beneficiaries in similar circumstances, and would be contrary to the widely recognised position that fraudulently incurred debts are not easily remitted;

(c) Concluding that proceeding against Mr Egan for debt recovery would not have been an efficient or economic use of the Ministry's resources;

(d) Concluding that the manner in which a similar government department exercised its debt recovery decision was not a relevant factor in the exercise of the decision to recover the debt;

(e) In its application of the International Covenant on the Economic Social and Cultural Rights to the question of the exercise of the discretion;

(f) Finding it was a legitimate factor in the exercise of the discretion to conclude that there was nothing that distinguished the applicant's circumstances from those of any other beneficiary who had defrauded the benefit system, or a beneficiary who owes debt innocently incurred;

(g) Concluding that a relevant factor in the exercise of the discretion not to recover should be whether there were rare or unusual circumstances that would cause the applicant hardship unlike the kind typically experienced by other beneficiaries in her position;

(h) Finding that there were no special individual circumstances warranting non-recovery in this situation; and

(i) Concluding it was unnecessary to consider the application for leave to file the second affidavit of Dr Easton, and that Dr Easton's evidence was only directed to issues concerning the rate of recovery.

Submissions for the respondent

[10] The respondent opposes the application for an extension of further time. In doing so, the respondent admits that it would not be prejudiced by the delay but submits that leave should not be granted in this circumstance as the proposed appeal lacks merit.

[11] The respondent submits that:

(a) The Court correctly determined the scope of the appeal as limited to whether the respondent may recover the debt rather than whether recovery should be affected or the rate of recovery;

(b) The applicant's second ground of appeal regarding the need to protect the integrity of the Social Security Act lacks merit. The respondent submits that the Court acknowledged the tension between the need to discourage fraud and the recovery of debt from persons in strained financial circumstances;

(c) The applicant's third and fourth grounds lack merit as the Court was correct in determining that the Ministry was not compelled to recover from former partners. Nor was there any error in finding that the

Inland Revenue Department's approach to debt recovery was irrelevant;

(d) The applicant's fifth ground of appeal lacks merit as the Court was correct to conclude that the right to social security requires a balance between the individual's needs and government spending;

(e) The applicant's sixth, seventh and eighth grounds lack merit as it was relevant to consider whether the applicant's circumstances were rare or unusual, and this was only one of the relevant factors considered; and

(f) The applicant's final ground lacks merit as the sufficiency of the applicant's benefit relates only to the rate at which recovery should be effected, rather than whether recovery pursuant to s 86(1) should occur.

[12] The respondent further submits that the intended grounds of appeal do not raise matters of general or public importance as the exercise of the discretion under s 86(1) is a fact specific exercise. Further, the respondent submits that the adequacy of benefits was not within the scope of the High Court appeal and relates more closely to the rate of recovery rather than whether the discretion should have been exercised to not recover the debt.

Analysis

Extension of time

[13] Section 144(2) of the Summary Proceedings Act provided:

> (2) A party desiring to appeal to the Court of Appeal under this section shall, within 21 days after the determination of the High Court, **or within such further time as that Court may allow,** give notice of his application for leave to appeal in such manner as may be directed by the rules of that Court, and the High Court may grant leave accordingly if in the opinion of that Court the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to

> the Court of Appeal for decision.
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> (Emphasis added)

[14] In this case, the delay has not caused any prejudice to the respondent. The delay, while not unavoidable, has been explained by counsel for the applicant. There is no indication that the applicant has acted otherwise than diligently. I extend the time to appeal.

Leave to appeal

[15] Pursuant to s 144 of the Summary Proceedings Act, the High Court may grant leave if "…the question of law involved in the appeal is one which, by reason of its general importance or for any other reason, ought to be submitted to the Court of Appeal for decision" .

[16] As summarised by the Court of Appeal in *Chhima v Chief Executive Ministry of Social Development*:[4]

> There is no argument as to the applicable test for leave to appeal to the Court of Appeal (*Waller v Hider* [1998] 1 NZLR 412 and *Snee v Snee* [2000] NZFLR 120). Leave may only be granted where there is a bona fide question of law, which by reason of general or public importance (or any other reason) ought to be heard by [the Court of Appeal].

[17] The Court of Appeal has also stated that s 144 was not intended to provide a "second tier of appeal:[5]

> Parliament intended such proceedings to be brought to finality with the defendant having an appeal to the High Court other than when the conditions it has specified in subss (2) and (3) are met and leave to appeal is granted. Neither the determination of what comprises a question of law, nor the question whether that point of law raises a question of general or public importance, are to be diluted.

[18] As to the applicant's first ground of appeal, I agree with the respondent that "…whether recovery should be effected and the rate of recovery are two separate matters". Counsel for Mrs Harlen submits that the Court, in effect, gave an advisory opinion and addressed a 'moot point'. In my view, this is not the case. It was clearly expressed in the decision that the Ministry had made a decision to recover the debt.

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4 *Chhima v Chief Executive Ministry of Social Development* [2007] NZAR 484 (CA).
5 *R v Slater* [1997] 1 NZLR 211 (CA) at 215.

There was no error that "a decision had not been made to recover the debt" as advanced by the applicant.

[19] The applicant has submitted that the Court erred in confirming that foregoing the possibility of recovery of the debt on the basis that the applicant would experience hardship would erode the integrity of the Act. This tension was one factor to be considered in the exercise of the discretion. Similarly, the International Covenant on Economic, Social and Cultural Rights was recognised as a relevant factor; however, again it is one relevant factor to be considered. The weight it was given in this case is not a question of law of such general or public importance to warrant a second appeal.

[20] As to the argument that proceedings against Mr Egan[6] would have been an economic and efficient use of resources, the point is not seriously arguable. There is no authority to suggest that such a proceeding would have been successful or an efficient use of resources. The decision whether to undertake such proceedings is a matter for the Ministry rather than for the Courts.

[21] The applicant has also submitted that the Court erred in finding that the difference in policy between government departments was not a relevant factor in the decision to recover the debt. In my view, this is not capable of serious argument.

[22] It is settled law that non-recovery of debt requires unusual circumstances. Whether Mrs Harlen's circumstances were rare or unusual is a fact specific exercise which involves an analysis of her particular circumstances. As to Mr Easton's affidavit, this went to the level of reparations she could or could not afford at the present time, rather than to whether the debt should be recovered. This is a matter that Mrs Harlen can still pursue with the Ministry and is quite independent of the issues raised in this appeal.

[23] It is clear that Mrs Harlen has a significant private interest in the decision; it involves a debt of over $100,000. What is not clear is whether there is a general or

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[6] Some of the documents refer to Mr Egen and some to Mr Egan. I have used Mr Egan as that is what is used in counsel for the applicant's submissions.

public interest which warrants the case being heard by the Court of Appeal. I consider there is not.

Result

[24] For the reasons given, I grant leave to appeal out of time, but dismiss the substantive application for leave to appeal.

Costs

[25] Counsel confirmed that the respondent does not seek costs. That position is appropriate. No order is made.

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JA Faire J