IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2006
[2007] NZSC 55

	BETWEEN	ANTHONY ARBUTHNOT Appellant
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF WORK AND INCOME Respondent

Hearing: 29 May 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: P D McKenzie QC and A J McGurk for Appellant
U R Jagose and G A J Stanish for Respondent

Judgment: 19 July 2007

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS

(Given by Blanchard J)

[1] The appellant, Mr Arbuthnot, had during the late 1990s been receiving both a community wage and an accommodation supplement pursuant to the Social Security Act 1964. The Department of Work and Income formed the view that because of changes in his circumstances Mr Arbuthnot was no longer entitled to either of those benefits. On his application, a benefits review committee (BRC) reviewed the position. It determined that, contrary to the opinion formed by the Department, Mr Arbuthnot had not at the relevant time been living in a

relationship in the nature of marriage and that he was therefore entitled to continuance of the community wage. The chief executive of the Department had no statutory right of appeal against that determination.

[2] In relation to the accommodation supplement, however, where the existence of such a relationship would also have been a disqualifying factor, the BRC ruled that Mr Arbuthnot was disentitled because the supplement was available in respect of particular premises and he had moved to another address without notifying the Department. Mr Arbuthnot was dissatisfied with that decision and appealed against it to the Social Security Appeal Authority as was his right under s 12J of the Act.

[3] Before the Authority the chief executive then sought to uphold the BRC's decision on the accommodation supplement by raising again the question of Mr Arbuthnot's conjugal status. The Authority ruled that the chief executive could do so. Mr Arbuthnot appealed to the High Court against that ruling, where Goddard J agreed with him that the chief executive was precluded by the BRC's decision on his conjugal status from re-arguing that point before the Authority.[1] However, on further appeal, the Court of Appeal considered that the Authority had been right to allow the chief executive to raise the matter again.[2] As this issue has some general importance to the Department and to beneficiaries we granted leave to appeal to this Court on the following ground:

> Did the Authority err in its interpretation of s 12J in holding that it had jurisdiction to consider evidence relating to the issue of whether or not the appellant was living in a relationship in the nature of marriage if that evidence was relevant to the appellant's eligibility to the accommodation supplement?

The matter comes to this Court as a question of principle only. The Department's claim in respect of overpayment of the accommodation supplement has long since been abandoned and any debt owing by Mr Arbuthnot has been written off.

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1 *Arbuthnot v Chief Executive of the Department of Work and Income* (High Court, Wellington, CIV 2004-485-997, 16 September 2005).

2 *Chief Executive of the Department of Work and Income v Arbuthnot* (Court of Appeal, CA 256/05, 3 October 2006, William Young P, Ellen France and Arnold JJ).

The legislation

[4] Section 61EA of the Act authorises the chief executive to grant accommodation supplements to assist in meeting accommodation costs. Section 61EB contains special rules for married joint tenants including that the cash assets and income of one of them are the total of the cash assets and income of each of the marriage partners.

[5] Section 63 authorises the chief executive, for the purposes of determining an application for any benefit, or of reviewing any benefit already granted, to regard as husband and wife, in the chief executive's discretion, any man and woman who, not being legally married, have entered into a relationship in the nature of marriage and to determine a date on which they shall be regarded as having entered into such a relationship. The chief executive may then, in the exercise of discretion, terminate or reduce any benefit already granted from that date accordingly.

[6] The chief executive has a power of review of any benefit under s 81 of the Act:

> **81 Review of benefits**
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> (1) The chief executive may from time to time review any benefit in order to ascertain—
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> (a) Whether the beneficiary remains entitled to receive it; or
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> (b) Whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—
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> and for that purpose may require the beneficiary or his or her spouse or partner to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the chief executive. If the beneficiary or his or her spouse or partner fails to comply with such a requirement within such reasonable period as the chief executive specifies, the chief executive may suspend, terminate, or vary the rate of benefit from such date as the chief executive determines.
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> (2) If, after reviewing a benefit under subsection (1) of this section, the chief executive is satisfied that the beneficiary is no longer or was not entitled to

receive the benefit or is or was entitled to receive the benefit at a different rate, the chief executive may suspend, terminate, or vary the rate of the benefit from such date as the chief executive reasonably determines.

…

It was under this power of review that a Departmental official, acting as a delegate of the chief executive, decided that Mr Arbuthnot was no longer entitled to the two benefits.

[7] The beneficiary's right to have such a decision reviewed by a BRC is found in s 10A, as it stood at the relevant time:

> **10A Review of decisions**
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> (1) Any applicant or beneficiary affected by any decision made by any person in the exercise of any power, function, or discretion conferred on the person by delegation under … this Act against which the applicant or beneficiary has a right of appeal under section 12J of this Act may, within 3 months after receiving notification of the decision or (if the committee considers there is good reason for the delay) within such further period as the committee may allow on application made either before or after the expiration of that period of 3 months, apply in writing for a review of the decision to the appropriate benefits review committee established under this section.
>
> (2) The Minister shall establish at least 1 benefits review committee for every office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made.
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> (3) Every benefits review committee shall consist of—
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> (a) A person resident in or closely connected with [sic: the area of][3] the office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made appointed by the Minister to represent the interests of the community on the committee:
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> …
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> (c) Two officers of the Department appointed by the chief executive—
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> (i) From time to time; or
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> (ii) In respect of the particular review.

[3] Presumably this paragraph, which is equally obscure in the current s 10A, is meant to require appointment of a person resident in or closely connected with the area in which the office which made the decision is situated. The 1991 iteration of the Act, which still provided for "district" review committees, had spoken of a person "resident in or closely connected with the social welfare district …".

(4) The member of the benefits review committee appointed under subsection (3)(a) of this section—

(a) Shall hold office during the Minister's pleasure:

(b) May be paid out of the Department's Bank Account, from money appropriated by Parliament for the purpose, remuneration by way of fees, salary, or allowances, and travelling allowances and expenses, in accordance with the Fees and Travelling Allowances Act 1951; and that Act shall apply accordingly:

(c) Shall not be deemed to be employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 by reason only of his or her membership of the benefits review committee.

(5) All secretarial and administrative services required for the purposes of the review committee shall be supplied by the Department.

(6) At any meeting of the review committee the quorum shall be the total membership, and the decision of any 2 members of the review committee shall be the decision of the committee.

(7) No officer of the Department shall act as a member of the review committee if that officer was involved in the decision being reviewed.

(8) As soon as practicable after receiving an application for review the review committee shall review the decision and may, in accordance with this Act, confirm, vary, or revoke the decision.

(9) On reaching a decision on any review, the review committee shall give written notification of its decision to the applicant for review and shall include in the notification—

(a) The reasons for the review committee's decision; and

(b) Advice that the applicant has a right of appeal against the decision to the Social Security Appeal Authority.

[8] The Social Security Appeal Authority is constituted under s 12A. Its functions are to sit as a judicial authority for the determination of appeals in accordance with s 12J of the Act. Section 12I(2) provides:

> In hearing and determining any appeal, the Appeal Authority shall have all the powers, duties, functions, and discretions that the chief executive had in respect of the same matter.

[9] Section 12J confers on any applicant or beneficiary affected the right to appeal to the Appeal Authority against "any decision or determination" of the chief executive under various provisions of the Act and of certain other legislation

where that decision or determination "has been confirmed or varied by a benefits review committee under s 10A, or … was made by the chief executive other than pursuant to a delegation".

[10] Section 12K sets out the procedure on appeal which, in relation to the time period for appealing, differs depending upon whether the decision or determination appealed against was made personally by the chief executive or, as is much more common, was "a decision or determination of [a delegate of] the chief executive confirmed or varied by a benefits review committee".

[11] The chief executive is obliged by s 12K(4) to send to the secretary of the Appeal Authority, inter alia, a copy of the "decision or determination appealed against" and a report setting out the considerations to which regard was had in making the decision or determination.

[12] Section 12M provides for the hearing and determination of the appeal:

> **12M Hearing and determination of appeal**
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> (1) Subject to subsection (7) of section 12K of this Act, every appeal against a decision of the chief executive shall be by way of rehearing; but where any question of fact is involved in any appeal, the evidence taken before or received by the chief executive bearing on the subject shall, subject to any special order, be brought before the Authority as follows:
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> (a) As to any evidence given orally, by the production of a copy of the notes of the chief executive or of such other material as the Authority thinks expedient:
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> (b) As to any evidence taken by affidavit and as to any exhibits, by the production of the affidavits and such of the exhibits as may have been forwarded to the Authority by the chief executive, and by the production by the parties to the appeal of such exhibits as are in their custody.
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> (2) Notwithstanding anything in subsection (1) of this section, on any appeal against a decision or determination of the chief executive, the Authority may rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if the Authority has reason to believe that any note of the evidence of that witness made by the chief executive is or may be incomplete in any material particular.
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> (3) The Authority shall have full discretionary power to hear and receive evidence or further evidence on questions of fact, either by oral evidence or by affidavit.

> (4) The Authority shall also have regard to any report lodged by the chief executive under section 12K of this Act and to any matters referred to therein and to any evidence tendered thereon, whether or not such matters would be otherwise admissible in evidence.
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> (5) In the exercise of its powers under this section the Authority may receive as evidence any statement, document, information, or matter which in the opinion of the Authority may assist it to deal with the matters before it, whether or not the same would be admissible in a Court of Law.
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> (6) The Authority shall, within the scope of its jurisdiction, be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and subject to the provisions of this Act, all the provisions of the Act, except sections 2, 10, 11, and 12, shall apply accordingly.
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> (7) Subject to subsection (2) of section 12I of this Act, in the determination of any appeal the Authority may confirm, modify, or reverse the decision or determination appealed against.
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> (8) Notwithstanding the provisions of subsection (7) of this section, the Authority may refer to the chief executive for further consideration, the whole or any part of the matter to which an appeal relates, and where any matter is so referred the Authority shall advise the chief executive of its reasons for so doing and shall give such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that is so referred.

The lower courts

[13] In the High Court Goddard J considered that the Authority had power only to determine whether there had been an overpayment of the accommodation supplement because Mr Arbuthnot had failed to notify his change of address.[4] That, she said, was the extent or "true scope" of the "matter" or "decision" under appeal. The "same matter", to which s 12I(2) refers in giving the Authority all the powers, duties, functions, and discretions that the chief executive had, was the part of the chief executive's decision that was confirmed by the BRC.

[14] In contrast, the Court of Appeal emphasised the fact that the appeal to the Authority was by way of rehearing and said that it was a rehearing in respect of the original decision made by the delegate rather than of the decision of the BRC.[5] In that Court's view, an appeal by way of rehearing is addressed to the substance of the decision appealed against – the end result – and not to steps in the

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4 At para [29].
5 At paras [13] – [15].

reasoning. It was that end result which was the "decision" or "determination" which was under appeal. The conclusion of the BRC in favour of Mr Arbuthnot on his conjugal status was not in itself a decision or a determination – rather the relevant decision was that he was not entitled to the accommodation supplement: "And if ordinary appellate principles apply, the chief executive is entitled to defend that decision on grounds other than those relied on by the [BRC]."

[15] The Court of Appeal recognised that there might be "an odd result" if the Authority concluded that Mr Arbuthnot's conjugal status disentitled him to the accommodation supplement but that he nonetheless retained his entitlement to the community wage on the basis of the BRC's different and unappealable approach to that status.[6] However, the Court saw that as a consequence of the legislative scheme and in any event subject to correction by the chief executive under s 81.

Discussion

[16] In civil litigation a party which has obtained a judgment or decision in its favour is able, in the event of an appeal by the other party, to support that judgment or decision by relying upon any relevant ground, including one upon which the trial court may have found against it. If it seeks to have the judgment or decision amended, it must bring a cross-appeal – something not open to the chief executive in relation to the BRC decision in the present case – but it need not do so if it is content that the appellate court should simply confirm the judgment or decision, even though that may be on the basis of a different ground and reasoning. The distinction, not always appreciated by counsel appearing before appellate courts in New Zealand, is drawn in r 20(4) of the Supreme Court Rules 2004:[7]

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6 At paras [18] and [21].

7 See also r 52.5 of the Civil Procedure Rules 1998 (UK) and accompanying commentary in *Civil Procedure* (The White Book, 2007).

> **20 Written submissions on leave application**
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> …
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> (4) If a respondent does not wish the judgment appealed from to be varied but intends to support it on another ground (being a ground that the court appealed from did not decide or decided erroneously), the respondent must give notice of that intention in the respondent's written submissions.

[17] In this case such a course would be open to the chief executive unless precluded either by the Social Security Act or by an issue estoppel, if such an estoppel could arise from the BRC's decision concerning the community wage.

[18] We consider first the scheme of the review/appeal provisions of the Act. The Department administers many thousands of social welfare benefits. Naturally, its officials will make many decisions with which a beneficiary or someone claiming entitlement to a benefit will disagree. It would not be sensible for all of them to have to go immediately to a formal appeal process without the decision first being reviewed at a more senior level within the Department. Plainly, it would simply not be possible for the chief executive personally to undertake reviews on this scale. Furthermore, it has seemed appropriate to have some input into the review process from a person from outside the Department. The Act therefore provides for the mechanism of the BRC, which consists of two departmental officials with no involvement in the decision under review and a third person appointed by the Minister "to represent the interests of the community". But even that third person must be someone who is "resident in or closely connected with" the relevant office of the Department.

[19] It is apparent from the drafting of the provisions that the BRC is intended to act in the place of the chief executive. Its decision, either to confirm, modify or reverse the original decision, has the same standing as the decision the chief executive might have made if personally undertaking the review. It is a departmental decision. Naturally, a chief executive who does personally carry out a review cannot appeal against his or her own decision. And because a BRC is effectively acting in the chief executive's stead, the chief executive has no right to appeal the BRC's decision either. Any ability for the chief executive to revisit the

decision, in the event that the beneficiary is satisfied with it and does not appeal, is afforded only under s 81 which is discussed below.

[20] However, if the beneficiary elects to take an appeal to the Appeal Authority, s 12M provides for it to conduct a rehearing (including, if necessary, rehearing the evidence or any part of it or receiving new evidence on questions of fact[8]) which opens up for further consideration the whole of the decision made by the BRC (or by the chief executive personally). There is nothing in s 12M to prevent the chief executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.

[21] Therefore the Authority is bound to consider the chief executive's submissions and to make its decision on all grounds raised before it. It should, however, depart from a view of the BRC or the chief executive favourable to the beneficiary only if satisfied that such view was wrong and requires correction. A beneficiary, who will be of limited means, needs some certainty in relation to the level of benefit payments. That is also a consideration in relation to the chief executive's use of s 81, as we shall later make clear.

[22] It was the argument of Mr McKenzie QC that because Mr Arbuthnot was seeking to appeal to the Authority against only the BRC's ruling concerning the change of address, it was not open to the chief executive to raise any issue about conjugal status. That, counsel said, was the "same matter" in terms of s 12I(2) in respect of which the Authority was given all the powers, duties, functions, and discretions of the chief executive in order to hear and determine the appeal. The limits of the appeal had been circumscribed in that way. He supported his argument by pointing out that the appeal provisions refer to both determinations and decisions which, he said, had different meanings. He said that his client's appeal to the Authority had been limited to the determination by the BRC

[8] Section 12M(2) and (3), set out at para [12] above.

concerning the change of address. It was not against the whole of the decision of the BRC. Essentially this was the same argument that the Court of Appeal rejected, and we think it was right to do so.

[23] There is no pattern in the use of the two expressions in the relevant statutory provisions lending any support to this argument; nor, it is to be observed, could Baragwanath J find one in *Wharerimu v Chief Executive of Department of Work and Income*.[9] The words seem to have been used interchangeably, probably as a product of numerous amendments over the years to a statute enacted over 40 years ago which is starting to show its age.

[24] Section 10A enables review of a "decision" made by a delegate of the chief executive and uses the same terminology to describe the result of that review. Section 63, on the other hand, speaks of the chief executive's discretion in respect of conjugal status for the purpose of "determining" and reviewing benefit entitlements. So, when a delegate of the chief executive reaches a view on the question of a beneficiary's conjugal status, that view leads the delegate to make a determination which may be adverse to the beneficiary. Any review under s 10A results in a decision of the BRC and the beneficiary must be advised of the right to appeal against the decision. Yet s 12J confers a right of appeal against "a decision or determination" of the chief executive confirmed or varied by the BRC. And s 12M, dealing with the hearing and determination of appeals, refers inconsistently in subs (1) to an appeal against the "decision" of the chief executive, but in subs (2) to an appeal against the chief executive's "decision or determination". Finally, the result of the appeal to the Authority is a "determination"[10] which may confirm, modify, or reverse the "decision or determination" appealed against. Obviously a "determination" of an appeal against a "decision" must itself be a decision. As we have said, there is simply no pattern in the use of the words which could lead to the conclusion that normal appeal principles are being departed from in this statute.

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9 [2000] NZAR 467 (HC).

10 Section 12M(7).

[25] It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decision-maker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision-maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.[11]

[26] In this case Mr Arbuthnot's right to an appeal to the Appeal Authority was in respect of the decision of the chief executive (in reality, of his delegate), as confirmed by the BRC, that he was not entitled to the accommodation supplement. That disentitlement decision was the "same matter" in respect of which, in terms of s 12I(2), the Authority was given the powers, duties, functions, and discretions of the chief executive for the purpose of hearing and determining the appeal. Mr Arbuthnot's argument about the change of address was merely his ground or reason for saying that the BRC should not have decided that he was disentitled to the supplement. The chief executive's argument that Mr Arbuthnot had been living in a relationship in the nature of marriage was relevant to the ultimate question raised by the appeal, namely whether Mr Arbuthnot was or was not entitled to the benefit. It is beside the point that if the chief executive's argument were successful before the Authority it would follow that the BRC's decision on the community wage entitlement, not the subject of any appeal, was wrong, notwithstanding that there would then be inconsistency between the decisions on the two benefits. That oddity could be resolved, if at all, only by resort to s 81 by the chief executive. The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC in relation to the community wage, save in so far as it might

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[11] *Lake v Lake* [1955] P 336 at pp 343 – 344 (CA) per Evershed MR.

be persuaded that the BRC had in fact been right about Mr Arbuthnot's conjugal status.

[27] The other possible limitation acting on the chief executive and raised in the submissions for the appellant is that any argument questioning the conjugal status of Mr Arbuthnot might be precluded by the existence of an issue estoppel arising from the determination of that status favourable to Mr Arbuthnot in relation to the community wage. However, we are satisfied that there is no such estoppel. In the first place, an issue estoppel can arise only from a matter determined by a judicial tribunal, that is, a person or body of persons exercising judicial functions by statute or otherwise in accordance with the law. They need not have been constituted as a court.[12] A person or body of persons appointed pursuant to a statute to determine an appeal may function as a judicial tribunal and an estoppel can then arise from the determination of an issue on the appeal, as was found to have occurred in *Thrasyvoulou v Secretary of State for the Environment*.[13] That case was a decision concerning estoppel per rem judicatam, the issue being whether a change of use of certain properties had occurred at a particular time. In the leading speech, Lord Bridge observed:[14]

> In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

[28] But, as Spencer Bower, Turner and Handley point out,[15] citing a passage from the judgment of Lush J in *Pastras v Commonwealth*,[16] when the decision-

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12 Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (3 ed, 1996), para [21]:

> In determining the characteristics of a judicial tribunal one must discard the antiquated view that only a court of record can be a judicial tribunal for the purposes of this doctrine. It is immaterial whether the tribunal is a court of record, or not, or whether it is a superior court, or not, or even whether it is or is known as a court.

13 [1990] 2 AC 273.

14 At p 289.

15 At para [23].

16 (1966) 9 FLR 152.

making body is purely an administrative body, no estoppel can arise from its decision. A BRC falls into this category. It does not have sufficient independence to be classified as a judicial body. Although one of its three members is appointed by the Minister to represent the interests of the community, the majority of its membership consists of officers of the Department appointed by the chief executive. They can out-vote the Minister's appointee. Nor is this surprising since, as already noted, it effectively acts in the place of the chief executive, who would otherwise be personally charged with conducting all reviews. In contrast to the Authority, and to the Board established by s 53A of the Act to hear appeals on medical grounds, a BRC's function is that of conducting an internal review of officials' decisions, just as the chief executive might do personally.

[29] Even if the BRC had been a judicial tribunal before which the chief executive or the Department appeared as a party we would still have considered that no issue estoppel arose from its finding in relation to the community wage that Mr Arbuthnot was not in a conjugal relationship. This is because there would be obvious unfairness in holding the chief executive and his department bound in other proceedings by a finding against which he had no ability to appeal. As the Court of Appeal remarked in *Joseph Lynch Land Co Ltd v Lynch*,[17] care must be taken not to allow the doctrine of issue estoppel, designed to prevent injustice to one litigant (namely the unfairness of allowing relitigation of a matter which has been finally decided), from causing greater injustice to the other. An over-rigorous application of the issue estoppel doctrine to circumstances where there was no right of appeal, or where, as in *Lynch*, it was not reasonable to expect any such right to be exercised in practice, would indeed produce unfairness disproportionate to the object of achieving finality in litigation.

[30] The courts have therefore adopted a cautious and flexible approach to the doctrine. They have determined, for example, that a finding of fact or law against

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[17] [1995] 1 NZLR 37 at p 43.

a successful party, which has no right of appeal against the decision in its favour, will not found an estoppel because it could not have been fundamental to the decision.[18] In *Re State of Norway's Application (No 2),*[19] May LJ said in a remark which is of present relevance that whether or not an earlier decision could have been appealed is "in many cases a good test of whether it brought into being an issue estoppel". Woolf LJ regarded it as "quite unrealistic" to expect the witnesses in that case to have sought, let alone to have gained, leave to appeal.[20] A fortiori, it seems to us, where the party affected by the finding of a judicial tribunal has no right of appeal.

[31] In *Arnold v National Westminster Bank Plc*[21] the House of Lords allowed tenants to relitigate a question which had already been determined against them in proceedings relating to an earlier rent review. The House appears to have been influenced by the fact that on the first occasion the tenants had wished to appeal the point in issue but had been refused leave to do so. In the leading judgment Lord Keith quoted[22] with approval the following dictum of Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*:[23]

> All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

[32] In the present case it would be clearly unjust, were the BRC a judicial tribunal, for its unappealable decision against the chief executive to prevent him from contesting its finding in respect of Mr Arbuthnot's conjugal status during the period to which the accommodation supplement related when that matter could be determinative before the Appeal Authority.

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18 Spencer Bower, Turner and Handley, para [205].

19 [1990] 1 AC 723 at p 743.

20 At p 772. See also Balcombe LJ at p 752. These dicta were recently approved by the Court of Appeal in *Johnson v Felton* [2006] 3 NZLR 475 at para [53].

21 [1991] 2 AC 93.

22 At p 107.

23 [1967] 1 AC 853 at p 947.

Section 81

[33] For the foregoing reasons Mr Arbuthnot's appeal must fail. The Department has long since abandoned its claim against him for repayment of any overpaid benefits. However, if it had not done so, and if the Appeal Authority had heard the appeal and decided that he was in fact living in a conjugal relationship, the Department would be faced with having to administer its overall relationship with him on the basis of inconsistent decisions concerning his conjugal status. The question would then have arisen as to the ability of the chief executive to revisit Mr Arbuthnot's entitlement to the community wage by reviewing his conjugal status for that purpose under s 81. As it is possible a situation of this kind may arise in the future for other beneficiaries some observations on the use of that power by the chief executive in such circumstances may be of assistance.

[34] The scope of the power has been enlarged over the years. Until 1991 the power of review was exercisable only in the event of "any change of circumstances" of the beneficiary or of the spouse of the beneficiary. Since 1991 there has been no such limitation (albeit, curiously, until 1993 no action could be taken following the review unless there had been a relevant change in circumstances). The other significant expansion has been that earlier, in the version of the section in force from 1991 to 1993, the benefit could be reviewed only "in order to ascertain whether the beneficiary remains entitled to receive it". Now the power of review can also be exercised to ascertain whether the beneficiary:

> may not be, *or may not have been*, entitled to the benefit or the rate of benefit that is *or was* payable to the beneficiary.

The words emphasised give the chief executive the ability to look backwards and to determine whether an overpayment has been made in the past. The chief executive is no longer limited to making adjustments going forward from any change of circumstances, but may "reasonably determine" the date from which any adjustment should take effect. Consistently with the scope of the enlarged review power, an adjustment to a decision taken within the Department may be effected retrospectively where appropriate.

[35] Nonetheless, when a review of a benefit has already taken place before a BRC it would have to be an unusual case to justify a further review under s 81 where no change of circumstances has occurred and no new factual information bearing upon the eligibility for the benefit has come to the attention of the Department. Beneficiaries are persons of limited means who are likely to be dependent on the continuity of their benefit payments. They are entitled to expect that decisions once made by the Department will not be disturbed save for very good reason. To use s 81 simply as a means of re-appraising facts already known to the Department at the time of an earlier review would run counter to that expectation. The chief executive's discretion under s 81 should be exercised with this consideration in mind.

[36] In a case like the present, however, and assuming no change in the circumstances of the beneficiary, we consider that the chief executive would be entitled to use the power of review under s 81 to re-assess eligibility for continuance of a benefit in the future once an inconsistency has been created by a decision of the Appeal Authority. While this might result in suspension or termination of the benefit, when past payments have been made as a consequence of a decision of a BRC, upon which the beneficiary has been relying, it would seldom be appropriate for the chief executive to "reasonably determine" under s 81(2) to recover them as from a past date.

Result

[37] The appeal is dismissed. Presumably no question of costs arises but, if necessary, counsel may file memoranda.

Solicitors:

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