IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2013
[2013] NZSC 79

BETWEEN	ANDREW JOHN CAPLEN BEAVIS Applicant
AND	ELIZABETH JOY DE VERE First Respondent
	COMMISSIONER OF INLAND REVENUE Second Respondent

Court:	McGrath, William Young and Glazebrook JJ
Counsel:	L J Kearns for Applicant A M Manuel for First Respondent M Deligiannis for Second Respondent
Judgment:	19 August 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 together with reasonable disbursements to be fixed if necessary by the Registrar, to be paid by the applicant to the first respondent.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal concerning an assessment of his liability to the first respondent under the Child Support Act 1991.[1] The issue concerns whether income from an arrangement entered into by the applicant, involving the transfer of his business to a family trust with consequential reduction in his personal income should be taken into account in

1 *EJD v AJCB* [2013] NZCA 100, [2013] NZFLR 325.

assessing his liability under the Act to his former wife for child support. As well, the applicant had established a company to undertake a software development project which had significant cost implications and which further reduced his income and child support liability under the formula in the Act.

[2] In the Family Court, Judge McHardy decided that special circumstances existed to justify departure from the formula assessment, particularly because the applicant's use of the trust and his undertaking of the development project had artificially reduced the income that ought to have been available to him.[2] He upheld the first respondent's application for departure from the formula assessment and ordered the applicant to make a lump sum payment for past support for the children of the parties.

[3] The High Court, on appeal, heard fresh evidence from two accountants. In his assessment of the evidence overall, Fogarty J differed from the Family Court Judge, both as to the extent of the benefit the applicant had derived from the arrangement and the characterisation by the Family Court Judge of the purpose of the software development decision. Fogarty J found that decision to be a legitimate business choice by the applicant. He allowed the appeal and considerably reduced the child support orders made by the Family Court.[3]

[4] The first respondent then appealed successfully to the Court of Appeal, which took a similar view to that of the Family Court Judge, holding that the decision to develop the new software was not legitimate and involved shirking by the applicant of his primary responsibility to maintain his children. The Court of Appeal also disagreed with Fogarty J's assessment of the amount of additional income that had effectively been received by the applicant through the trust.

[5] The application for leave to appeal to this Court raises many grounds, most of which are directed at the Court of Appeal's assessment of the evidence and its findings of fact. None of these grounds, however, raise issues of principle that

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2 *EJD v AJCB* FC Auckland FAM-2004-004-002183, 14 April 2010.
3 *B v X* [2011] 2 NZLR 405 (HC).

qualify for a further appeal under s 13 of the Supreme Court Act 2003. There are, however, two grounds raising legal issues that call for further comment.

[6] In the Family Court, the applicant accepted that there was jurisdiction to make retrospective departure orders. In the High Court, that issue was fully addressed by Fogarty J, who decided that retrospective departure orders could be made, but that care should be taken to ensure that the consequences of such orders were just, equitable and appropriate. The issue of jurisdiction was not argued in the Court of Appeal, which ultimately made a retrospective order without addressing its power to do so.

[7] When giving the first respondent leave to appeal against the High Court judgment, the Court of Appeal had observed that jurisdiction to make retrospective orders could not be determined on the appeal unless the applicant cross-appealed on the point. The Commissioner of Inland Revenue, who had been successful on the retrospectivity point in the High Court, was unable to appeal.[4] Despite this clear indication, the applicant did not seek to argue the point by way of cross-appeal. Because of this, while the retrospective application point is one of some importance, we consider it would be unfair to the first respondent to permit the applicant to raise it at this stage of the proceedings.

[8] The other legal ground is said to be the scope of s 105(2)(c) of the Child Support Act, which permits parents receiving or liable for child support to apply for departure orders to adjust the amount on specified grounds. The test under s 105 potentially raises intermingled questions of law and fact which might in appropriate circumstances raise a point requiring consideration by this Court. The issues in the present case, however, have at each stage largely been treated as involving disputes of fact. The current challenge to the decisions of the courts below is also effectively factual and confined to the particular circumstances of the case. Legal questions concerning the scope of s 105(2) thus do not squarely arise.

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4 *Darby v Bolton* [2011] NZCA 474, [2011] NZFLR 1065 at n 8.

[9] For these reasons, we conclude that it is not necessary in the interests of justice, in terms of s 13 of the Supreme Court Act, to grant the application for leave to appeal and it is dismissed.

Solicitors:
Law Works, Auckland for Applicant
Wynyard Wood, Auckland for First Respondent
Crown Law Office, Wellington for Second Respondents